Neutral Citation Number: [2009] IEHC 242

THE HIGH COURT

JUDICIAL REVIEW

2008 646 JR

BETWEEN

THE HEALTH SERVICE EXECUTIVE

APPLICANT

AND

HIS HONOUR JUDGE MICHAEL WHITE

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS,

JONATHAN COSTEN, ELEANOR JOEL AND

THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice John Edwards delivered on the 22nd day of May, 2009

Introduction.
On Monday the 9th of June 2008 the applicant successfully obtained an Order of the High Court (from Peart J) granting it leave to apply for diverse relief by way of judicial review, including certain Declarations and an Order of *Certiorari* in relation to an Order made by his Honour Judge Michael White on the 27th May 2008 arising out of an application brought by the third named notice party seeking, *inter alia*, the disclosure of certain documents from the applicant who is a non-party to certain criminal proceedings brought on behalf of the people of Ireland at the suit of the first named notice party against the second and third named notice parties, respectively.

Chronological background to the present proceedings.
[Before commencing this chronology it is important to state that, for the avoidance of confusion, the parties concerned with this case will be referred to in this judgment (save where otherwise referred to internally within documents quoted) either by means of how they are described in the title to the present judicial review proceedings, or by their actual names. For example, a reference to "the first named notice party" means the first named notice party in the present proceedings, i.e. the DPP, and not the first named notice party in the related criminal proceedings, i.e. the Minister for Health.]

The second and third named notice parties are a man and a woman respectively and, although not legally married, were at all material times living together informally as though they were man and wife. The late Evelyn Joel was the mother of the third named notice party. She was diagnosed as suffering from primary progressive multiple sclerosis in October 2000. In and about the month of November 2004 the late Evelyn Joel had to leave the premises in which she was then residing with her late husband's brother. She then went to stay with second and third named notice parties and their children, and was accommodated in an upstairs bedroom of the house in Enniscorthy, Co Wexford which they were renting from the local authority. She resided there for 13 months approximately until her admission to Wexford General Hospital on 1 January 2006. It is alleged that at the time of her admission to hospital she was in an extremely malnourished condition and was suffering from neglect. Evelyn Joel died on the 7th of January 2006.

Shortly after the death of the late Evelyn Joel two separate enquiries were commenced. One was a criminal investigation by An Garda Siochána into the circumstances surrounding her death. The other was an independent review of the health and personal social services provided by the HSE to the late Mrs. Joel in the two years prior to her death, commissioned on behalf of the applicant on the 13th of January 2006 at the instigation of a Mr Pat Healy, Assistant National Director of PCCC (the acronym stands for Primary Community and Continuing Care).

The Independent Review
The "independent review" commissioned by the applicant was in effect an internal review to be conducted by a review body consisting of personnel that were independent of the case though not wholly independent of the HSE. The review body as established consisted of a three-member committee (hereinafter referred to as the committee) chaired by a Dr. Joe Duggan, Consultant Geriatrician. The committee was requested:

- to review the scope, range and level of services provided by the HSE to Mrs. Evelyn Joel during the period January 2004 to January 2006 having regard to her medical condition and circumstances.
- to review the delivery and co-ordination of these services.
- to review existing protocols and procedures in the delivery of these services.
- having regard to the above to make recommendations as appropriate and to submit their report to the HSE.

- to complete their report as soon as possible.

According to an affidavit of Pauline Bryan sworn on behalf of the HSE, on the 16th of May 2008, in the Circuit Criminal Court proceedings at the centre of this judicial review, the review was commissioned by the applicant due to the unusual and tragic features that presented in the case of Mrs. Joel's death. Its terms of reference were carefully drawn to ensure that the review would not seek to apportion blame. It was not the function of the committee to engage in fact-finding save to the limited extent that it was necessary for it to do so in order to fulfill its brief of reviewing the delivery and co-ordination of services by the HSE to the late Mrs. Joel. The review was not set up for the purpose of establishing, neither was it intended to establish, the facts in relation to Mrs. Joel's death. Rather, it was concerned with, and was limited solely to enquiring into, the delivery and co-ordination of services to the late Mrs. Joel by the HSE.

The committee duly set about its work and some weeks or months later (the precise timeline is unclear), having conducted a series of interviews with personnel concerned with the case, and an extensive review of documents, prepared a draft preliminary report. According to Ms Bryan, the committee intended at this point to send relevant extracts from this preliminary draft report to interested parties and invite commentary from them as to whether there were any factual inaccuracies in the document, and/or concerning the manner in which the committee had interpreted and dealt with any documentation or information provided to it. The committee further intended to review its draft preliminary report in the light of any comments received and then to finalize it by making such revisions to their draft findings, or to the recommendations based upon their draft findings, as were considered appropriate having regard to the comments received.

However, before extracts of the draft preliminary report could be circulated to the relevant interested parties, the committee, the applicant and the applicant's Solicitor each received a communication from the Superintendent of An Garda Siochána in charge of the criminal investigation in relation to the late Mrs. Joel's death requesting that the work of the review committee should be suspended pending the outcome of the criminal investigation then being conducted by An Garda Siochána, for fear that it might prejudice the ongoing criminal investigation. This request was immediately acted upon by all concerned, the committee duly suspended its work and nothing was done to further progress the draft preliminary report.

It is unclear as to exactly when the Superintendent made his request, or as to what prompted it. It may possibly have been connected, either temporally or causally, with the publication of an article in the Irish Times on Monday the 24th of July 2006, under the byline of Fiona Gartland, and entitled "HSE inquiry into death of woman completed". As I will be referring to it again, it would seem convenient at this point to recite the contents of the archived record of it (exhibited before me) as preserved on the "ireland.com" website:

> "Mon, Jul 24, 2006
>
> An investigation into the treatment provided by the Health Service Executive to a woman suffering from multiple sclerosis who died in a severely malnourished condition has been completed, writes Fiona Gartland.
>
> Evelyn Joel (58), from Enniscorthy, died six days after she was admitted to Wexford general hospital on January 1st this year.
>
> Her daughter, Eleanor, who had been caring for her, said that her mother had refused to eat after her partner died in mid-December. She called the doctor on New Year's Day and an ambulance brought her mother to hospital.
>
> The HSE set up the three-person independent investigation committee within a week of Mrs Joel's death.
>
> It is chaired by Dr Joe Duggan, consultant geriatrician at the Mater Hospital in Dublin. The other two members are Tom O'Dwyer, former programme manager and deputy chief executive of the Southern Health Board, and Marie Faughey, Kildare/West Wicklow Local Health Office child care manager and director of public health nursing in the eastern region.
>
> The committee was asked to review the scope, range and level of services provided by HSE to Mrs Joel between January 2004 and January 2006 for her medical condition and circumstances. It was to review the delivery and co-ordination of these services to her and to review existing protocols and procedures in service delivery.
>
> It was also asked to make any recommendations necessary.
>
> In a statement yesterday, the HSE said that the committee had completed its investigation after a very extensive review and was in the process of preparing its report. "This will be completed as soon as possible in keeping with the investigation committee's terms of reference," the statement said. "The HSE ... has provided the committee with access to all files, records and expertise as required."
>
> A separate Garda investigation into the circumstances of the death of Mrs Joel was completed in March and an extensive file on the case was sent to the Director of Public Prosecutions.
>
> Four weeks after the death, gardaí arrested two people for questioning, both of them known to Mrs Joel.
>
> They were released without charge after being questioned at Enniscorthy Garda station on January 30th. The replies they furnished to gardaí form part of the file sent to the DPP. It remains unclear if any criminal charges would be pursued in the case.
>
> Commenting in the aftermath of the news of Mrs Joel's death, Minister for Health Mary Harney said that it was a case of 'appalling neglect`."

Quite apart from possibly prompting the Superintendent into making the aforementioned request (and nothing turns on whether or not it did so) the contents of this article assumed a significant importance later in the chronology when its

existence was discovered by the solicitor for the third named notice party. I will be returning to this.

The Criminal Proceedings
Before doing so, however, it should be recorded that on the 10th of January 2007 the second and third named notice parties, respectively, were each charged (as fist and second named accused respectively) with the unlawful killing of Evelyn Joel, contrary to common law. The second and third named notice parties were also charged with reckless endangerment, contrary to section 13 of the Non-Fatal Offences Against The Person Act, 1997. A Book of Evidence was served in March 2007. On the 28th of March 2007 the two accused were returned for trial to the Circuit Court for the South-Eastern Circuit and County of Wexford and all four charges were included on Bill No WX 13/07, the proceedings bearing record no 364/2007.

For reasons that are not clear to the Court the case had still not come on for trial a year later. However, the trial was finally due to commence on the 21st of May 2008.

On or about the 26th of March 2008 a Ms Julie Breen, solicitor, of Garahy Breen & Co, who represents the third named notice party (the second named accused in the criminal proceedings), was searching on the internet for archived media reports concerning the case and discovered the Fiona Gartland piece. It appears that Ms Breen was unaware of the existence of the independent review prior to that point.

Ms Breen immediately sought disclosure of the material that was before the committee, and of the report, both from the first named notice party and also from the applicant. She made these requests by means of separate letters, both dated the 1st of April 2008, addressed on the one hand to Mr Kevin O'Doherty, State Solicitor for Wexford, representing the first named notice party, and on the other hand to Messrs Comyn Kelleher Tobin, the firm of solicitors representing the applicant. She has exhibited her correspondence in an affidavit sworn on the 2nd of May 2008.

The letter to the solicitors for the applicant asserted "The above particulars and information are sought in pursuance of the Freedom of Information Act 1997 and Freedom of Information (Amendment) Act 2003". The applicant was asked to provide the material sought within 14 days and was specifically appraised of the fact that it was required in connection with the defence of a criminal case at a trial due to start on the 21st of May 2008.

The letter to the State Solicitor enclosed a copy of the letter to the solicitors for the applicant and sought disclosure of the material in question within ten days on the basis that " ….it is likely that certain information which may be relevant to the preparation of our client's defence are available within the said documents"

The first named notice party as prosecutor in the criminal case was not actually in possession of the material sought by Ms Breen on behalf of her client, but readily appreciated the potential materiality of it to the defence. In the circumstances the State Solicitor mentioned the matter before the Circuit Court on the 15th of April 2008 and the Circuit Judge (the respondent herein) directed that the State should endeavour to assist the defence in obtaining the material in question. The Circuit Judge further granted the parties liberty to mention the matter again on the 28th of April 2008. Accordingly on the same day, the 15th of April 2008, the State Solicitor wrote to Messrs Comyn Kelleher Tobin solicitors for the applicant, to see if the committee's report could be procured from the applicant with a view to then making it available to the third named notice party by way of "disclosure".

By a letter of the 17th of April 2008, Messrs Comyn Kelleher Tobin replied as follows:

> "Dear Sir,
>
> We acknowledge receipt of your letter of 15 April 2008.
>
> We have carefully considered the content of the letter.
>
> For the sake of clarification we wish to confirm that the HSE set up an independently constituted investigation committee with terms of reference which specifically related to the involvement and response of the HSE and associated bodies in the care and attention received by Evelyn Joel in advance of her death.
>
> That investigation committee was set up to report to the HSE with recommendations which would seek to eliminate the possibility of such an adverse event occurring again. It was not something which was set up with a view to ascribing blame to any parties.
>
> Also of significance is the fact that the report was not completed. As no doubt you will be aware of first draft of the report was submitted to the HSE from the investigation team, and it was the intention of the investigation team to consult with those persons who were adversely affected by certain conclusions and recommendations in the report. That process of deliberation was stopped when a request was received from the Chief State Solicitor's office to desist from further investigation as it might prejudice a criminal investigation which at that stage had commenced.
>
> We do not believe that it is appropriate to release the report where persons who might be adversely impacted by its findings have not had the opportunity to comment on same to the investigation team.
>
> We believe that there is underlying documentation which was available at the date of death of the late Evelyn Joel which might be of assistance to both parties and certainly the HSE will facilitate a process whereby such information will be made available. We do not believe that it is necessary to obtain a Disclosure Order in relation to those documents but it would be important to note that they will be released subject to the implicit obligation of confidentiality which attaches to all Discovery documentation.
>
> We confirm that we have spoken to Julie Breen, solicitor and we have made her aware of the position. We would ask that you liaise with her. If an agreement can be reached in relation to the documentation which would be available we will certainly facilitate same well in advance of any court hearing on the 28th of April.
>
> In the event that there is a difficulty in that regard you might please revert to us as we may need to be

represented on that date.

Yours sincerely”

The State Solicitor subsequently attempted to obtain clarification from the solicitors for the applicant as to precisely what material the applicant was offering to make available.

In the meantime, an indictment was filed on the 25th of April 2008. On that indictment the manslaughter charge was particularised in the case of each of the accused in terms that the accused “on the 7th day of January 2006, in the County Wexford, unlawfully killed Evelyn Joel by neglect causing the said Evelyn Joel to succumb to pneumonia and sepsis.” Further, the reckless endangerment charge was particularised in the case of each of the accused in terms that the accused “between the 1st day of December 2005 and the 1st day of January 2006, in the County Wexford, intentionally or recklessly engaged in conduct, namely the failure to ensure that Evelyn Joel received nourishment, which created a substantial risk of death or serious harm to the said Evelyn Joel.”

The matter was mentioned again before the Circuit Court on the morning of the 28th of April 2008. The State Solicitor informed the Court that he had ascertained just before the Court sat that the only documentation that the applicant would make available on a voluntary basis was such documentation as may have been available to the investigation team before the investigation began. They would not voluntarily disclose any material generated in the course of the investigation including memoranda of interviews with / statements taken from interested parties, and the draft preliminary report. Ms Breen then sought on behalf of her client, and was granted, leave to bring a motion before the Circuit Court sitting at Naas, Co Kildare on the 8th of May 2008 seeking diverse Orders against various parties aimed at securing disclosure of the desired material. As the applicant has argued strenuously that what was sought as against it and other non-parties to the criminal litigation was in reality “discovery” I believe that it is necessary for the purposes of this judgment to recite the Notice of Motion in its entirety. The Notice of Motion is entitled in the same way as the criminal proceedings but in addition named “The Minister for Health, The Health Service Executive, Ireland and the Attorney General” as “Notice Parties”. It is then in the following terms:

“TAKE NOTICE that pursuant to leave of his honourable Court granted on 28 April 2008, an application will be made by Counsel on behalf of the Second-Named Accused to the said court sitting at Naas, Co Kildare, on the 8th day of May next 10:30 a.m. for the following reliefs:

1. An Order directing the Prosecutor to take all reasonable steps to obtain, and subsequently make disclosure to the Second-Named Accused of the following documentary material:-

(a) All material made available to an investigation committee set up by the Minister for Health in or about the month of January 2006 to review the scope range and level of services provided by the Health Service Executive to the late Evelyn Joel in the two years prior to her death on 6 January 2006 (including but not limited to material made available to the committee *in the course of* their investigation);

(b) All material that came into existence in the course of that investigation (including but not limited to statements made by any person or body to the committee *and* reports or opinions commissioned by the committee from any third party/expert);

(c) Any report's findings or recommendations whether draft interim or otherwise presented to the Minister and/or the Health Service Executive by the said committee

(d) The contents of a communication received by M/s Comyn Kelleher Tobin (Solicitors for the HSE) from the Chief State Solicitor's office requesting them to "desist from further investigation as it might prejudice a criminal investigation" and referred to in a letter from M/s Comyn Kelleher Tobin to the Prosecutor's solicitor dated the 17th day of April 2008; and

(e) All *other* documentary material within the possession power or procurement of the Minister for Health and/or the Health Service Executive in relation to matters at issue in these proceedings (including the provision of care and other services whether medical nursing or otherwise to the late Evelyn Joel for the period of two years prior to her said death.).

2. An Order directing the Minister for Health to make available to the Prosecutor and/or to disclose to the Second-Named Accused the following documentary material:

(a) All material made available to an investigation committee set up by the said Minister for Health in or about the month of January 2006 to review the scope range and level of services provided by the Health Service Executive to the late Evelyn Joel in the two years prior to her death on 6 January 2006 (including but not limited to material made available to the committee *in the course of* their investigation);

(b) All material that came into existence in the course of that investigation (including but not limited to statements made by any person or body to the committee *and* reports or opinions commissioned by the committee from any third party/expert);

(c) Any report's findings or recommendations whether draft interim or otherwise presented to the Minister and/or the Health Service Executive by the said committee

(d) The contents of a communication received by M/s Comyn Kelleher Tobin (Solicitors for the HSE) from the Chief State Solicitor's office requesting them to "desist from further investigation as it might prejudice a criminal investigation" and referred to in a letter from M/s Comyn Kelleher Tobin to the Prosecutor's solicitor dated the 17th day of April 2008; and

(e) All *other* documentary material within the possession power or procurement of the Minister for

Health and/or the Health Service Executive in relation to matters at issue in these proceedings (including the provision of care and other services whether medical nursing or otherwise to the late Evelyn Joel for the period of two years prior to her said death.).

3. An Order directing the Health Service Executive to make available to the Prosecutor and/or to disclose to the Second-Named Accused the following documentary material:

(a) All material made available to an investigation committee set up by the said Minister for Health in or about the month of January 2006 to review the scope range and level of services provided by the Health Service Executive to the late Evelyn Joel in the two years prior to her death on 6 January 2006 (including but not limited to material made available to the committee *in the course of* their investigation);

(b) All material that came into existence in the course of that investigation (including but not limited to statements made by any person or body to the committee *and* reports or opinions commissioned by the committee from any third party/expert);

(c) Any report's findings or recommendations whether draft interim or otherwise presented to the Minister and/or the Health Service Executive by the said committee

(d) The contents of a communication received by M/s Comyn Kelleher Tobin (Solicitors for the HSE) from the Chief State Solicitor's office requesting them to "desist from further investigation as it might prejudice a criminal investigation" and referred to in a letter from M/s Comyn Kelleher Tobin to the Prosecutor's solicitor dated the 17th day of April 2008; and

(e) All *other* documentary material within the possession power or procurement of the Minister for Health and/or the Health Service Executive in relation to matters at issue in these proceedings (including the provision of care and other services whether medical nursing or otherwise to the late Evelyn Joel for the period of two years prior to her said death.).

4. An order directing that any information referred to above that is not at present recorded in a durable or retrievable form (whether in writing or otherwise) should be so recorded.

5. An Order staying the trial of the Second-Named Accused until a reasonable time after the said documentary material is disclosed to the said Accused

6. Further and other relief.

7. An Order providing for the costs of this application.

WHICH SAID APPLICATION will be grounded upon the affidavit of Ms Julie Breen, Solicitor, sworn on the 1st day of May 2008, the provisions of the Constitution and in particular Article 38 thereof, the provisions of the European Convention on Human Rights, and in particular Articles 6 and 13 thereof, the nature of the case and the reasons to be offered.

[dated, signed etc]"

At paragraph 6 of her affidavit of 1 May 2008 grounding the said motion Ms Breen deposes:

"I am advised by counsel and believe that the material sought in the Notice of Motion is very likely to be relevant to the matters at issue in these proceedings; that it would clearly have a bearing on the offences with which my client is charged and/or on the surrounding circumstances of the case; and that it might reasonably be considered capable of assisting my client's case and/or of undermining the case being made by the prosecutor herein. I am further advised that it is essential that this material would be available in advance of the trial itself so that it can be fully considered before the trial commences."

At paragraph 7 of her said affidavit Ms Breen deposes (*inter alia*):

"Having regard to the terms of reference of the committee; the likelihood that various persons who cared for and spoke to the deceased (or my client) over the years made statements to that committee; the possibility that experts (whether those carrying out the investigation or others) may have formed opinions or come to conclusions in relation to persons who had a duty of care (statutory or otherwise) towards the deceased; and to the charges laid against my client I say and believe and am advised that in the absence of the documentation in question there would be a real risk that my client would not receive a fair trial. Obviously, in circumstances where there is no obligation on an accused person to disclose any element of her defence beforehand (and where to do so could put her at a disadvantage) the foregoing should be regarded as simply a brief outline of some of the more obvious reasons as to why the absence of the material sought creates the risk in question."

At paragraph 8 of her said Affidavit Ms Breen further states:

"For the avoidance of doubt I confirm that my client will not use or disclose any information recorded in the material in question save in connection with and in the course of the above proceedings (and any appeal therefrom). She and her advisers will also take all reasonable steps (that are compatible with her legitimate defence) to preserve the anonymity of any of the persons named in the disclosed material."

No replying affidavit had been received from any party or notice party to the proceedings by the return date, viz the 8th of May 2008. On that date, when the motion was called in the Circuit Court sitting at Naas, before the respondent who was the presiding judge, counsel on behalf of the DPP, counsel on behalf of the two accused respectively, and counsel on behalf of the HSE, all announced their respective appearances. However, and somewhat unexpectedly, there was no appearance on behalf of either the Minister for Health or on behalf of Ireland and the Attorney General. Although, upon enquiry from the respondent, the Court was informed that it was believed that those parties had been duly served with

the motion, it was suspected by all concerned that the non-appearances could be due to some mix-up, possibly an expectation on the part of those notice parties that the Wexford State Solicitor could represent their respective interests and a failure to appreciate that he could not in fact do so due to the possibility of a conflict or conflicts of interest arising between the DPP as prosecutor and the Minister for Health, Ireland and the Attorney General in their position as notice parties. In any event the Court was informed that quite apart from this difficulty the motion was not in fact ready to proceed, and that those present were proposing that, subject to the Court's agreement, the matter should be adjourned to the 20th of May 2008 (the last day of the Whit vacation and the day before the trial was due to commence).

The respondent acceded to the adjournment application. Moreover, it appears that it was the understanding of all concerned that the State Solicitor would, during the adjournment, contact the appropriate representatives of Minister for Health, Ireland and the Attorney General to appraise them of what had happened and to ascertain their respective clients' attitudes to, and intentions with respect to possible separate representation at the hearing of, the motion.

On the 14th of May 2008 Ms Breen swore and filed a supplemental affidavit in support of the motion. At paragraph 3 of her said supplemental affidavit she adds:

> "I am now aware that my client was interviewed by the review committee set up by the Minister of Health/HSE and referred to in my earlier affidavit. This interview took place in Enniscorthy on 22 March 2006. At some point Ms Joel was sent a transcript of her interview by the committee. She left that transcript into my office. However, at that point a different solicitor was dealing with the case and, unfortunately, I only became aware of the existence of the transcript after I had sworn the earlier affidavit referred to above."

The transcript was duly exhibited, and at paragraph 5 of her supplemental affidavit Ms Breen states:

> "It is evident from the transcript that the committee interviewed other laypersons apart from my client. It may well be that some of those persons are those whose statements to the Gardaí appear on the Book of Evidence and whom the prosecution intend to call. It may also be that the committee interviewed persons who did *not* make statements to the Gardaí but who may have information that would be material to the defence of my client but of whose existence my client is not aware."

At paragraph 6 she states:

> "It is also evident from the said transcript that the investigation committee was very well acquainted with the national/local protocols and procedures surrounding the provision of care to the late Evelyn Joel. They appear, from questions they asked, to have knowledge of the different roles and functions of the various healthcare providers such as doctors, nurses, occupational therapists and pharmacists. They also appear, again from those questions, to have had a knowledge of what the late Evelyn Joel would have required by way of care having regard to the fact that she was suffering from advanced progressive multiple sclerosis. In addition, they were concerned to ascertain from my client what information was conveyed to her by the various healthcare providers about her mother's needs and requirements."

At paragraph 7 she states:

> "In addition, the committee sought and obtained from my client permission to obtain the phone records of the late Evelyn Joel "from June to December 2005" so that they could establish what contact the local public health nurses had had with her and what contact she had had with those nurses during that period."

At paragraph 8 she concluded:

> "In the circumstances, I say and believe and am advised that it is absolutely crucial to my client's defence that the transcripts of interview and other material gathered by and during the investigation be made available to my client together with the draft interim report of the committee itself."

On the 16th of May 2008 an affidavit in response to the motion was filed on behalf of the applicant. This affidavit was sworn by Pauline Bryan on the same day, i.e. the 16th of May 2008.

The first part of Ms Bryans said Affidavit sets out the circumstances in which the independent review was set up and the manner in which the committee proceeded up until the point at which they were asked to suspend their activities by An Garda Siochána. Then at paragraph 6 she states:

> "I say that as is plain from the terms of reference the purpose of setting up the committee was to ensure that the protocols and procedures operated by the HSE were effective in coping and dealing with unusual cases of the type presented by Mrs Joel's illness. I say that such a review is an appropriate, proper and measured response for an organisation such as the HSE so as to ensure that current best practice is adhered to and that any improvements in the delivery and coordination of health services as may be identified by the circumstances arising in a tragic case such as this can be implemented. As can be seen from the document given to the second-named accused and her solicitor," ... (the transcript) ... "this purpose in the setting up of the review committee was explained to each witness, and each knew the basis upon which they were being interviewed."

At paragraph 7 she states (*inter alia*):

> "Insofar as the draft Preliminary Report or any extracts therefrom have not been sent to any relevant party for consideration" …. "those individuals who may well wish to respond may well be prejudiced, and the circulation of the draft preliminary report or the publication of extracts therefrom during the hearing of these proceedings has the potential to be prejudicial to those individuals."

At paragraph 8 she states:

> "I have not seen the "Book of Evidence" and I have been informed by the HSE's solicitors and believe that the same has not been disclosed to them by the second-named accused or by the prosecutor. As such, I do not know the exact nature of any issues arising in the prosecution, or the nature, extent and strength of the evidence disclosed."

At paragraph 9 she deposes (*inter alia*):

> "In relation to the relief sought against the HSE in the Notice of Motion herein, I say that HSE is willing to furnish and has in fact furnished all documents within its power, possession or procurement relating to the care of the late Mrs Joel for the two-year period prior to her death. Paragraph 3 (b) of the Notice of Motion which seeks this relief relates these documents to the "matter or issue" in the criminal proceedings. Not having seen the "Book of Evidence", I do not know what these are, but the HSE has disclosed all documents in its possession for the relevant period. In this regard, I beg to refer to a schedule listing this documentation ..." (schedule exhibited). "Further I say that I have been advised by the solicitors for the HSE and believe the document the subject matter of the relief claimed by the second-named accused at paragraph 3 (d) of the Notice of Motion, that is the communication received by the HSE's solicitors from the Chief State Solicitor's office does not exist. This communication was verbal, ..."

Finally, at paragraph 10 she concludes:

> "I further say that I have been advised by the solicitors and counsel for the HSE that the balance of the documents sought by the second-named accused in the Notice of Motion are ones that as a matter of law the second-named accused is not entitled to obtain, and are not documents that the HSE is obliged to disclose."

The motion duly proceeded on the 20th of May 2008 before the respondent. At the outset the Court learned that the prosecution wished to substitute a new indictment for the indictment originally filed on the 25th of April 2008, and would at the appropriate time be seeking leave to do so. (On the following day, the 21st of May 2008, the prosecution made a formal application to be allowed to make the proposed substitution, and on the 22nd of May 2008 this was acceded to.) In the new indictment the manslaughter charges were now particularised in terms that the accused "on the 7th day of January 2006, in the County of Wexford, unlawfully killed Evelyn Joel by neglect causing said Evelyn Joel to die of pneumonia, complicating sepsis syndrome due to infected pressure sores due to immobilisation due to multiple sclerosis." Further, the reckless endangerment charges were now particularised in terms that the accused "on a date unknown between the 1st day of December 2005 and the 1st day of January 2006, in the County of Wexford, intentionally or recklessly engaged in conduct, namely the failure to ensure that Evelyn Joel received nourishment; to attend to her sanitary requirements; to attend to her lack of mobility; and/or to obtain for her timely medical attention, which created a substantial risk of death or serious harm to the said Evelyn Joel."

In the course of the hearing the Court was informed that, contrary to what had been stated previously (and in good faith) , it had transpired upon further enquiry that the Minister for Health, Ireland and the Attorney General had not in fact been separately served. (What appears to have happened is that the Notice of Motion may have been served on some legal agency representing "the State," but it was not served separately and individually on the notice parties concerned.) At any rate, although these notice parties were unaware of the motion on the 8th of May their attitude and intentions had since been ascertained. The Minister for Health was prepared to make available to the first named notice party, on a voluntary basis, such documents as were actually in his possession, and accordingly did not wish to be represented or heard at the hearing of the motion. (The documentation in question consisted of e-mails and correspondence concerning the establishment of the HSE inquiry, its terms of reference, its membership, and of a general nature. It did not include the material mainly being sought by Ms Joel's legal team, namely material generated in the course of the investigation including memoranda of interviews with / statements taken from interested parties, and the draft preliminary report.) The Court was further informed that Ireland and the Attorney General did not wish to make any observations and they would not be separately represented.

There was lengthy legal argument on the motion at the end of which the respondent gave an initial ruling. As this ruling forms the background to, and puts in context, the making of his later Order on the 27th of May 2008 which the applicant seeks to quash in this judicial review, it is, I believe, necessary to quote it in extenso. The Court transcript for the 20th of May 2008, which has been exhibited before me, records it thus:

> "The issue which the Court is dealing with today is based on a notice of motion issued by and on behalf of Mr Costen and Ms Joel, seeking disclosure from, first of all, the Director of Public Prosecutions, primarily; secondly, the Minister for Health; and thirdly the Health Service Executive. And the requests are broadly similar, and the issues, which the Court has to deal with in terms of disclosure, are set out in the notice of motion.
>
> Now, the Court should note that there has been significant assistance, to date, in the provision of voluntary disclosure. The Health Service Executive, which is a notice party to the motion, has agreed to discover all documentation in the possession of the Health Service Executive, up to the date of death of Ms Joel, on the 6th of January 2006. The Department of Health, were served and who were joined as a notice party, have agreed to voluntary disclosure of all documentation in their possession, which consists of a number of e-mails and correspondence in respect of the setting up of a committee of inquiry.
>
> Now, what is in issue now is twofold; material generated by the committee of inquiry, which was set up; and secondly, a draft report, prepared by this committee. Now, there is some issue in relation to the status of that report, in that there is some conflict of evidence as to how far on that report is. Clearly, the Court finds that it is in draft form, and in so far as the Court can take it, there has been a specific request by the gardaí investigating the matter, that the report should not be published, pending the conclusion of the criminal proceedings.
>
> One of the important elements of the Court has to decide on issues of disclosure is the relevance of it. In fact, in Archbold, the extract from the European Commission case is on all fours with the law in Ireland, and I quote from paragraph 16 - 83 of Archbold 2008. It is headed, 'The prosecution's duty of disclosure'. 'In *Jesper v. Belgium* ante, the Commission held that the equality of arms principle imposes on prosecuting and investigating authorities an

obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself, or in obtaining a reduction of sentence. This principle extends to material which might undermine the credibility of a prosecution witness.' And that is on all fours with the fair procedures requirement on the Director, in this jurisdiction.

Now, it is clear from the case of *D. H. v. Groarke and DPP*, reported at [2002] 3 Irish reports, page 524, that it is appropriate for a trial judge to deal with the issue of material in dispute, the relevance of it, and the Court can make a decision that the appropriate relevance has not been established by the person seeking disclosure. And that is relevant, and I quote from an extract in the *D. H. v. Groarke* case, at page 525 of the judgment, dealing specifically with the facts in the particular case. It states, "Since the applicant had not satisfied them that there was any ground for supposing that the notes or memoranda made by the two main social workers, or other employees of the first notice party who had dealings with the complainant, contained any material which would be of any assistance to the applicant in the conduct of his defence, it followed that the public interest, in ensuring that a health board treated as confidential, sensitive material of this nature, had to be upheld."

Now, there is no dispute, also, about the terms of reference of the Health Service Executive's inquiry ……"

The respondent then goes on to set out the terms of reference, and continues:

"Now, it seems to me that the actual findings of the report and the contents of the report, in relation to the trial of the accused person, is not relevant and that the report does not require -- the draft report does not require to be disclosed to the defence.

Now, the other area where the HSE do not want to go beyond is material generated by the committee. And having considered this carefully, the Court is of the view that that material could very well provide material assistance to the defence. The defence are not obliged to disclose to the trial court the nature of their defence. The presumption of innocence applies. But Mr O'Kelly, on behalf of Mr Costen, has raised one issue, which, in fact, is covered in the responsibility of disclosure that I opened from Archbold. And that is, that a witness may have given a statement of evidence to the inquiry who is a witness for the Director, in the Book of Evidence. And that witness could well have given evidence, which is inconsistent as between the two statements.

And without having to advance any ground, whatsoever, it would be clear to me that it would be of significant assistance to the defence if they had, in their possession, transcripts of interviews with witnesses. The inquiry, itself, is clearly on all fours with the issues, in respect of the parameters of the charges. In other words, how Mrs Joel was cared for in a relevant period. It is quite clear, from the submissions made to this Court, that Ms Joel was under, what I would call, the loose care of the defendants from a period towards the end of 2004, but had been seen by the health services, in the general term, for a substantial period prior to that.

And Mr Dillon" ... (Senior Counsel for the prosecution)... "has quite properly pointed out that it is of no relevance whether, in fact, other parties neglected their duty, because the prosecution have, at all times, the responsibility to prove the particular acts against the accused people which they say amounted to the offences of which they are charged. But to deal with the definition of manslaughter, clearly there are issues which would be of significant assistance to the defence in dealing with issues of gross negligence, and which the jury could have a bearing on, and material, which has been generated in the course of the investigation, by the committee. And I have no doubt that there could well be material in that, or documents in that, which could be of assistance to the defence within the general definitions of disclosure."

..... .

The learned judge later continued:

"Now, clearly this Court is at some disadvantage in that it doesn't know the extent of the material generated in the course of the inquiry, apart from the draft report itself. And, as I said, in the course of exchanges between the various parties to this process, that there may well be other individual issues in relation to some specific matters or documents.

Now, clearly, the material, which I regard as being of assistance to the defence, in other words, material generated by the inquiry, apart from the draft report, is not in the specific possession of the Director of Public Prosecutions, and not directly in their procurement, except by request. I don't think that this Court can extend the law to say that the Director has power to direct another State or public agency to provide documentation.

Now, what is the law? I mean, clearly, it has been strongly argued in the motion before the Court that, first of all, in the original seminal judgment of Mr Justice Geoghegan in *DPP v. Derek Sweeney*, delivered on the 9th of October 2001, (now reported at [2001] 4 I.R 102) it is quite clear that disclosure was not discovery. And the discovery envisaged in the Superior Court Rules, and prior to that in common law, and in equity, is not the procedure with which disclosure can be exercised. And it certainly was thought that that would put an end to the argument. But there have been a number of judgments since that period of time.

There is one issue, which the Court would like to deal with in terms the mechanisms of disclosure. Now, the Circuit Criminal Court, in the past, has dealt with sensitive issues in relation to third parties by the issue of a subpoena *duces tecum* directing a witness, from a third party, to appear in the course of the trial, and to deal with issues that arise. Normally this can be dealt with by agreement or by teasing out the issue.

Ms Justice Macken, in her judgment (in the High Court) in *JF v. [Judge Michael Reilly and the Director of Public Prosecutions, and the Midland Health Board, (Notice Party)*], delivered on the 10th of June 2005, dealt with this matter. She did not say that a court had no power to issue a subpoena *duces tecum* to a third-party to come to court. I think it is important that the Court set out exactly what she did say, at page 22. She stated, 'The second possibility mentioned by Keane, C.J., as providing possible access to information, or to files was that the issue of a

subpoena *duces tecum* was possible for the purposes of ensuring that a witness and a file or document would be available "at the trial itself". The extract is not to be taken as a statement of law that, by the mere issuing of a subpoena *duces tecum* at any time in the course of criminal proceedings, a person issuing the same is, ipso facto, entitled to have sight of the documents in question or is entitled to have their content read out in court, so as to prepare for the defence of the case at an eventual trial. Such a witness can of course be compelled to attend at the trial itself, as the above extract makes clear. A subpoena *duces tecum* is a process of the Court, not of the parties. Its usual purpose is to compel the production of specific documents that are relevant to pending judicial proceedings. It is a long established principle that a subpoena *duces tecum* is not however a disclosure device, and cannot be said to be capable of being used as a substitute for discovery. In the present case, it is, in reality, being sought to be used as such.'

And I stress that this court still has power to issue a subpoena *duces tecum* to the secretary of the inquiry, and direct the production of certain documents. How they are used, subsequently, in the course of the trial, is clearly a matter for argument.

Now, what is the state of the law? Now, before I open [the Supreme Court's judgments in] the case of *[JF v. Judge Michael Reilly and the Director of Public Prosecutions, and the Midland Health Board, (Notice Party)]* [2008] 1 ILRM 105 [and [2008] 1 I.R. 753], and the passage on which both Ms Boyle and Mr O'Kelly rely on to say that the Court has power to order the Health Board directly to provide documentation, I want to deal with another case which clearly places the role and responsibilities of a trial judge in perspective. That was a judgment of Mr Justice Fennelly, in *[P.G. v. The Director of Public Prosecutions,]* delivered on the 29th day of March 2006 (and now reported at [2007] 3 I.R.39). And this related..... to the notes of a psychologist who lived abroad, dealing with a complainant who made a complaint of sexual abuse against his uncle, 20 years after the alleged event, and first disclosed to a psychologist, or a person of the particular type of qualification in the United Kingdom.

Mr Justice Fennelly, in the course of his judgment, said (at p.55), '…it will be a matter for the trial judge to deal with it.' …. 'The trial judge must be and is in law, bound to arrange the progress of the trial so as to render justice and to guarantee fair procedure to all parties, especially the accused. I agree with the submission of the respondent that matters of disclosure are within the province of the trial judge. They are not matters for judicial review except to the extent that an accused person can show that, having taken all reasonable steps to obtain disclosure, necessary material has been withheld from him to such an extent as to give rise to a real risk of an unfair trial.'

Now, in the decision *[in JF v. Judge Michael Reilly and the Director of Public Prosecutions, and the Midland Health Board, (Notice Party)],* reported at [2008] 1 ILRM, page 105 and following pages, (it is also now reported at [2008] 1.IR 753), Mr Justice Geoghegan, who delivered the seminal judgment in *Sweeney*, returned to the issue of disclosure. And at the third last paragraph, he stated, 'I also agree with those statements but subject to the proviso, that, as I mentioned at the beginning of this judgment, there may still be undecided issues as to a right in certain circumstances in a criminal case to procurement of documentation from a third party which is at least a state or state funded body but I think that it would be an issue that would have to be decided in a suitable case by the court which would ultimately be trying the defendant and on notice to the Director of Public Prosecutions, the body in question and the Attorney General.'

Clearly, there are indications from the Supreme Court that there reposes in the trial judge in the trial, following fair procedures, [power??] to deal with these issues, and in certain cases to deal with issues which are not directly in the power of procurement of the DPP, and may be, or are, in the possession of a third-party, which is either a State party, or which is funded by a State agency.

Now, in my view, it is much preferable for a court, in that particular instance, to ask the authority concerned whether, in fact, it can comply with voluntary disclosure. The fact that the Court has now prohibited the disclosure of the draft report may be of assistance to the Health Service Executive in its deliberations in that regard. I cannot see any undue prejudice, at the moment, to the Health Board, if a list of the documentation, which was generated in the course of the inquiry, and the transcripts of evidence of witnesses were supplied, that there would be any prejudice to the Health Service Executive or to the draft report.

The issue in respect of any other matters which may arise in the course of the trial, as to whether the committee -- and I don't know this, generated the opinion of experts, is obviously a specific issue which the Court may well have to deal with again. But my first port of call is, first of all, to request the Health Service Executive to provide to the Court a list of documentation generated by the committee of inquiry, and secondly, to voluntarily disclose to the defendants, the statements of evidence taken from witnesses in the course of the inquiry, the transcripts of those and the Court is assuming that a number of witnesses were interviewed, based on the transcript provided by the defence of Mrs Joel. The Court reserves its position as to whether it moves by way of subpoena *duces tecum* in relation to the specific issue, or whether it deals within the powers reposed to it, which the Court feels that it has."

In the light of his ruling the respondent then adjourned the further hearing of the motion for a week (to the 27th of May 2008) so as to enable Counsel for the applicant to take his client's instructions on whether, in the light of the Court's ruling that it would not order disclosure of the draft preliminary report, they would, as requested, (i) provide to the Court a list of documentation generated by the committee of inquiry, and (ii) voluntarily disclose to the defendants the material that the court had suggested should be voluntarily disclosed. Then, in response to a query from Counsel for the applicant arising out of his ruling, the respondent confirmed that, notwithstanding his said ruling, and any position adopted by the applicant with regard to the requests made, the applicant would not be precluded from making, at an appropriate time, any further arguments that it might wish to make based on privilege or on confidentiality.

The respondent reserved to the following day, i.e. the 21st of May 2008, a decision on whether or not it would be appropriate at that stage to empanel a jury, as it was now clear that the trial could not commence until the 28th of May 2008 at the earliest.

When the case was called on the 21st of May 2008 the respondent decided that a jury should not be empanelled at that stage, and the substantive matter was adjourned for mention on a future date for the purpose of fixing of a new trial date once all of the outstanding preliminary issues had been dealt with. He then proceeded to deal with the application to

substitute a new indictment and, as has been indicated, he allowed the prosecution to make the requested substitution. He also dealt with a number of defence applications to have the indictment quashed in whole or in part on the grounds of duplicity, of inadequate particulars or in-exactitude of pleading, and of the allegedly inappropriate joinder of manslaughter counts and endangerment counts on the one indictment, and he reserved judgment on these applications to the 27th of May 2008.

On the 27th of May 2008 the respondent, having first given a ruling rejecting all of the defence applications to have the indictment quashed, resumed hearing the "disclosure" motion.

Counsel for the applicant commenced by emphasising that his client had no wish to be, and was not being, deliberately obstructive. However, he stated, there was an important matter of principle at stake as far as the HSE was concerned and his client was of the view that the Court's approach, as indicated on the previous occasion, would have "major ramifications for the way it conducts areas of its business into the future." He stated that, in the circumstances, the applicant was asking that a case should be stated to the Supreme Court pursuant to s.16 of the Courts of Justice Act, 1947. In response to this the following exchange occurred, as recorded in the transcript of the 27th of May 2008 exhibited before me:

> "Judge: Before we get on to that Mr Comyn, I don't want to make an order unnecessarily, but in terms of voluntary disclosure, is there any way that the HSE can assist the Court?
>
> Mr Comyn: No, my instructions are not to make voluntary disclosure of the documents. Those are my instructions.
>
> Judge: Are you prepared to advance any reason as to why that should be?
>
> Mr Comyn: Based upon the submissions I made to your lordship last week, that as a matter of law …. I am not obliged to do that and that there is no process that is available."

(The applicant's counsel had submitted in the course of the legal argument on the 20th of May 2008 that "disclosure" was a different thing to "discovery", that the duty of disclosure rested solely upon the first named notice party, that the applicant was under no duty to disclose anything, that what the third named notice party was in fact seeking was third party discovery under the guise of disclosure and that there is no provision in Irish criminal law for discovery, either on an *inter partes* basis or on a third party basis.)

Pressed by the respondent as to whether the particular concerns of the HSE were in relation to any particular document, and if so, "can the matter be furthered in any way by co-operation?" Counsel for the applicant replied: "I don't think so".

Counsel for the applicant then reiterated that his application was for a case stated, or, in the event that the court was not disposed to state a case, to be allowed to make further legal arguments based upon privilege and confidentiality before any final order was made by the Court in respect of the adjourned motion.

When asked if the HSE was prepared to at least provide the list that the judge had sought, Counsel for the applicant replied : "No, because, in my submission, the furnishing of the list will, in effect, be the preliminary complying with a discovery order because it will have the same effect as swearing an affidavit and setting out a list in various schedules and making your claim to privilege"

Counsel for both accused opposed the application for a case stated.

The Court then ruled. Once again, I believe that it is necessary to quote extensively from the transcript record as it records the stated reasons for the respondents Order and, having done so, I will conclude this chronological history by then reciting the Court's Order as perfected, as it is that Order that is being challenged in this judicial review.

Having summarised the background to the matter, and the history of the motion proceedings up to that point, the respondent continued:

> "It was clear from my judgment of 20th May that I relied primarily on the case of *JF [v.] Judge Michael [Reilly] and the Director of Public Prosecutions and the Midland Health Board,* [now reported at [2008] 1 ILRM 105 and at [2008] 1 I.R. 753] and delivered on 26th of July 2007 when he stated at page 13 [page 111 of the ILRM report and page 760 of the IR report]:
>
> > 'I also agree with those statements but subject to the proviso, that, as I mentioned at the beginning of this judgment, there may still be undecided issues as to a right in certain circumstances in a criminal case to procurement of documentation from a third party which is at least a state or state funded body but I think that it would be an issue that would have to be decided in a suitable case by the Court which would ultimately be trying the defendant and on notice to the Director of Public Prosecutions, the body in question and the Attorney General.'
>
> All of those have been complied with in so much as I am the trial Judge designated to conduct the trial, the Director is on notice, the Health Service Executive has been on notice and the Attorney General has been on notice of the motion by the defendants in relation to the documentation sought and my ultimate responsibility is to ensure that Ms Joel and Mr Costen get a fair trial and I am, I should say, strongly of the view that the documentation in the hands of the committee may be of significant assistance to Ms Joel and Mr Costen in the defence of what one could only describe as offences of the most serious kind where, on conviction, there are very serious consequences for the accused persons and I appreciate the co-operation of the Health Service Executive in relation to the disclosure of matters up to the date of death of Ms Joel but, as I said, it is my first priority to ensure that Ms Joel and Mr Costen are afforded the right to a fair trial and as part of that I am of the view that the documentation generated by the committee could well be of assistance to them.
>
> The Court accepts that the Director has no direct way of getting that other than through the assistance of the Court. It is not immediately in his power of procurement and the Court accepts readily that there are other issues of privilege, confidentiality and other specific issues which may arise in respect of these issues and the Court will make

clear, and makes clear again, that it is somewhat hampered in that it doesn't have a list of the documentation, doesn't know what documentation was generated or whether any particular issues arise in relation to particular documents but that is not to say that the Health Service Executive aren't totally [entitled to??] defend their rights which is the position that they have done. They are totally within their rights to indicate that they don't wish to make voluntary disclosure.

As [to stating a ??] case, whether I state a case or not, and clearly there are weighty issues, but the purpose of [a] case stated is to assist the Court in coming to a decision in respect of the matters in hand and I don't have a difficulty in coming to a decision in this matter. I am certainly of the view that if the documentation were in the hands of the Director of Public Prosecutions it would have to be made amenable to the defence, subject to the issues of privilege and confidentiality which the Court has already outlined and it is a fairly unique case in that the enquiry which the Health Service Executive set up is, in fact, on all fours, specifically [as it ??] relates to the issues of which Mrs Joel and Mr Costen are on trial, the carer[s] of Mrs Joel in the final period of her life and I am of the view that this is a case which Mr Justice Geoghegan envisaged and that I have power, as the trial Judge, to direct the Health Service Executive to disclose the relevant documentation.

It is appropriate to make the order that preserves the right of the Health Service Executive to deal with confidentiality and privilege. I have considered the application of the Health Service Executive and if I felt it would assist I will certainly do that. I think the huge difficulty is one that I have experience of myself in first of all framing an appropriate case but framing it in such a way that the Supreme Court would assist me in a determination, in the absence of or knowledge of the documentation that does exist and when there are -- matters, there is no doubt about that, I am of the view that the law as it has now been developed in respect of precedent allows the trial Judge clearly to make the order and I don't think that I need any assistance in relation to that and secondly I am also strongly influenced by the submissions of Mr Dillon on behalf of the Director that the Supreme Court would be completely at sea in dealing with the issue in a vacuum and therefore the assistance of the case stated and the decision of the Supreme Court may ultimately not be of great benefit to the Court and I therefore have taken the view that I should make a decision on the motion.

I will make an order directing the Health Service Executive to make available in the first instance to the Director of Public Prosecutions for the purposes of disclosing to the accused persons the following documentary material; (a) all material made available to the investigation committee set up by the Health Service Executive in or about the month of January 2006 to review the scope, range and level of services provided by the Health Service Executive to the late Evelyn Joel in the two years prior to her death on 6th January 2006 including but not limited to material made available to the committee in the course of their investigation; (b) all material that came into existence in the course of the investigation, including but not limited to the statements existence in the course of that investigation including but not limited to made by any made by any person or body to the committee and -- opinions commissioned by the committee from any third party.

The orders are subject to the right of the Health Service Executive or individual members of the committee to request the Court formally [to rule??] on any issue of privilege confidentiality or any other specific matter in respect of any of the documentation directed to be disclosed. The Court refuses an application to disclose the draft report to the committee."

A formal Order reflecting the respondent's ruling, and ancillary directions given by him, was perfected on the 28th of May 2008 by the Wexford Co Registrar and is in the following terms:

"Order of His Honour Judge Michael White made at Wexford on 27 -- 05 -- 08

This matter coming before the Court this day by way of Notice of Motion and having heard submissions made on behalf of all the parties the Court doth make the following orders:

1. An order directing the Health Service Executive to make available to the Director of Public Prosecutions, for onward transmission to the defendants' solicitors the following:

a. all material made available to an investigation committee set up by the Health Service Executive in or about the month of January 2006 to review the scope range and level of services provided by the Health Service Executive to the late Evelyn Joel in the two years prior to her death on 6th January 2006 (including but not limited to material made available to the committee in the course of their investigation).

b. All material that came into existence in the course of that investigation (including but not limited to statements made by any person or body to the committee and reports or opinions commissioned by the committee from any third party.)

Subject to the right of the Health Service Executive or individual members of the committee to request the Court for a ruling on any issue of privilege, confidentiality, or other specific matter, in respect of any of the documentation to be disclosed

2. The Court directs that the draft report of the committee shall not be disclosed.

3. The documentation to be furnished by the Health Service Executive to the Director of Public Prosecutions by the 10th of June 2008

4. the Health Service Executive to retain possession of any material in respect of which a Court ruling is sought, as to privilege, confidentiality, or other specific matter, until further order of the Court.

5. Grant a stay on the order to 30th May 2008.

6. The material to be exclusively used by the defendants for the purpose of the criminal prosecution, and not be furnished to a third-party except for the purpose of preparing their defence.

7. Liberty to any party to apply."

The present proceedings.
On the 9th of June 2008 the applicant successfully applied to the High Court for leave to apply for various orders by way of judicial review was a view *inter alia* to quashing the respondents said Order of the 27th of May 2008. By Order of Mr Justice Peart the applicant was granted leave to apply for the reliefs set forth at paragraph D of its Statement of Grounds on the grounds set forth at paragraph E of the said Statement of Grounds.

In paragraph D the applicant sought (*inter alia*):

(i) A Declaration …….. that the Order of His Honour Judge Michael White made at Wexford on the 27th day of May 2008 (and perfected on the 28th of May 2008) was made without jurisdiction;

(ii) A Declaration ……that the said Order is bad for want of jurisdiction;

(iii) An order of *Certiorari* …… quashing the said Order

In paragraph E the applicant pleaded that the said Order was made without jurisdiction; that the respondent departed from and failed to follow established precedent; that the respondent acted unreasonably and/or irrationally and/or erred in law in making the said Order.

Statements of Opposition were filed on behalf of the first, second, third and fourth named notice parties respectively. It is not necessary for the purposes of this judgement to review each of these statements of opposition in any depth. They each seek to traverse the suggestion that the respondent acted in excess of jurisdiction, or without jurisdiction, or contrary to established precedent, or unreasonably, or irrationally or that he erred in law. Further, the third named notice party specifically pleads that it was within the power of the respondent to make such an Order and that he was obliged to do so to ensure that the accused persons received a trial "in due course of law" as provided for by Article 38 of the Constitution, and further so as to ensure that the accused persons were held equal before the law as required by Article 40 of the Constitution. It is pleaded that these rights to a fair trial and to equality before the law, respectively, are independent of and may not be made subject to formal procedures or rules of court in order to give effect. In essence the case is made that the respondent had an inherent jurisdiction to make the Order in question.

The parties respective legal submissions

1. Submissions on behalf of the applicant.

Summary of the Case
The submissions of the applicant may be summarised as follows:

- The applicant is not a party to the criminal proceedings.
- The duty of disclosure does not extend beyond the prosecution to non-parties.
- A defendant, as a party in criminal proceedings, has no legally enforceable right or statutory entitlement to disclosure from a non-party to the proceedings.
- The obligation to disclose applies to relevant material within the possession, power or procurement of the prosecution. The material sought is not and never has been within the possession, power or procurement of the prosecution.
- It is submitted that what effectively was sought, and what effectively has been ordered by the respondent, is non-party discovery in criminal proceedings. Discovery is not available in criminal proceedings.
- The Order made by the respondent is contrary to established legal principles and settled case law and is therefore made without jurisdiction
- Questions of privilege and/or confidentiality do not arise on this application. If, however, the reliefs sought are not granted, the applicant reserves the right to argue issues of privilege and/or confidentiality. It is submitted that the appropriate forum for such issues to be argued is before the trial judge, as anticipated in the Order of the respondent.

The Right To A fair Trial
The applicant says it is a stranger to the criminal proceedings and expresses no opinion as to whether the material sought is necessary so as to ensure a fair trial.

However, without prejudice to this fact, the applicant recognises the right of all citizens to a fair trial under Article 38.1 of The Constitution of Ireland and the right of an accused to a fair trial under Article 6 of the European Convention on Human Rights. It is submitted that nothing in the applicant's submissions offends these rights.

The Law
The applicant submits that the net legal issue to be decided by this honourable Court is whether it is possible to compel the disclosure of documents in the hands of a non-party in the context of criminal proceedings.

It is an established legal principle that the duty of disclosure in criminal proceedings rests on the prosecution. It does not extend to third parties. In *Ward v Special Criminal Court* [1999] 1 I.R. 60 it was held that the prosecution must disclose

any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things.

The question therefore arises as to whether there exists a mechanism or procedure at law whereby an order, akin to discovery in civil law proceedings, may be made against a non-party in criminal proceedings. The applicant respectfully submits that discovery is not available in criminal proceedings. Seeking to utilise such a process to obtain material from non-parties to a criminal proceedings is inappropriate and not recognised in law. The applicant says that this was unequivocally held to be the case in three recent Supreme Court cases namely: *The People (Director of Public Prosecution) v Sweeney* [2001] 4 IR 102; *D.H. v His Honour Judge Groarke and The Director of Public Prosecutions; the North Eastern Health Board and S.H. (Notice Parties)* [2002] 3 IR 522 *and J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)* [2008] 1 I.R. 753. The applicant then helpfully proceeds to review these cases in some detail. However, as they are of crucial importance and relevance to the issues that I have to decide I intend, where necessary, to quote even more liberally from them than the applicant has done.

It was submitted that in *The People (Director of Public Prosecution) v Sweeney* [2001] 4 IR 102 it was held that discovery was not available in criminal proceedings. In this case the accused had been charged with rape and obtained an order of the High Court for non-party discovery of documents against the Rape Crisis Centre. Considering the relevant legislation and statutory provisions the Supreme Court took as a starting point Order 31, rule 12 of the Rules of the Supreme Court (Ireland), 1905 (as fully set out in Wylie's Judicature Acts) which provided that any party might apply to the court for an order directing any other party "to an cause or matter" to make discovery. The word "cause" had been defined in the Supreme Court of Judicature Act (Ireland), 1877 as including "any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown." But that definition was not to apply if there was "anything in the subject or context repugnant thereto." Geoghegan J. went on to observe that:

> "In the 100 years that followed that Act, there was never discovery of documents ordered in criminal proceedings and I think that is clearly because, having regard to the history of the jurisdiction in discovery of documents and the context in which such orders were made, it would have been clear that the rules in relation to discovery would not have been intended to include criminal proceedings."

Geoghegan J. referred to both the Courts of Justice Act, 1924 and the Courts of Justice Act, 1926 wherein the definition of the Central Criminal Court was set out and noted that any "ambiguity" was resolved by Section 4 of the 1926 Act:

"The Central Criminal Court shall have and may exercise every jurisdiction in criminal matters for the time being vested in the High Court, and every person lawfully brought before the Central Criminal Court for trial in exercise of any such jurisdiction may be indicted before and tried and sentenced by that Court wherever it may be sitting in like manner in all respects as if the crime with which such person is charged had been committed in the county or county borough in which the said Court is sitting."

The learned judge then noted that up to 1961 discovery of documents in the Central Criminal Court was unknown. Noting the Courts new statutory meaning under the Courts (Establishment and Constitution) Act, 1961 Geoghegan J. concluded that:

> "…there is nothing in the character of the criminal jurisdiction vested in the present High Court which could lead to any view that the Rules of Court relating to discovery were suddenly to apply to it when they had never applied to its predecessors."

Geoghegan J. pointed out that the constitutional obligation on the court to ensure fair procedures does not involve the process of discovery and noted the rights that an accused does have in an indictable case under the Criminal Procedure Act, 1967, and the right to see relevant documentation in the hands of the prosecution.

Geoghegan J. also observed that in civil proceedings discovery is not normally made until after the close of pleadings and that this is especially so in relation to discovery against a non-party who cannot be expected to know the issues raised by the pleading. "But none of this", observes Geoghegan J. "can be done in criminal proceedings. Only the prosecution must show its hand. Subject to some modern statutory exceptions in relation to alibi evidence, the defence is entitled to spring surprises and, above all, is perfectly entitled, pending the trial, to give no indication as to what issues might be raised. In that state of affairs, discovery of the documents under the Rules of Court is wholly inappropriate and it is another reason why those rules can never have been intended to apply to criminal proceedings."

Geoghegan J. referred to the only case in this jurisdiction that had been cited to him which dealt with the issue of non-party discovery in criminal proceedings or, indeed the availability of discovery orders at all in criminal cases. In *The People (Director of Public Prosecutions) v Flynn* [1996] 1 ILRM 317, non-party discovery was sought in a Circuit Court criminal prosecution on the basis that under the Rules of the Circuit Court, 1950, if a particular situation is not provided for, the Rules of the Superior Courts apply. Judge Moriarty (as he then was) having "assumed" (as Geoghegan J. put it) that he had jurisdiction to make such an order, refused the application for the following reasons as set out in the head-note to that judgment:

> "1. While O.31 r. 29 of the Rules of the Superior Courts 1986 leaves open the possibility of ordering discovery in criminal cases, there was no authority which could support the making of such an order.
>
> 2. The principle that each party should be entitled to know from the other in advance any information that would enhance his own case or destroy his adversary's case was less applicable in criminal proceedings where the entire burden of proof rested on the prosecution.
>
> 3. Discovery was intended to be mutual between the parties and it could not be mutual in a criminal case because it would not be ordered against the accused. It followed that a non-party should not be subject to a greater obligation that could be imposed on the accused.

4. There had been excessive delay in bringing the application…

5. The complainant in a criminal case is bound to supply the DPP with any information relevant to the case, whether favourable to the prosecution or the accused. The judge is obliged to ensure that fair procedures are observed at the trial. If the prosecution cannot obtain evidence disclosure of which is necessary for the purposes of the defence, the accused may be entitled to a direction on the relevant counts."

Geoghegan J. referred to the above reasoning as being "impeccable" save and except that Judge Moriarty did not advert to the contextual limitation on the definitions contained in the Rules of the Superior Courts, 1986. In *Conlon v Kelly* [2001] ILRM 198 the Supreme Court held that the word "cause" in the Rules does not include "criminal proceedings".

Geoghegan J., in stating that the constitutional obligation on the court to ensure fair procedures does not involve the process of discovery, noted the rights that an accused does have in an indictable case under the Criminal Procedure Act, 1967, and the right to see relevant documentation in the hands of the prosecution.

The applicant also points out for the sake of completeness that Geoghegan J. also referred to another Circuit Court case, i.e., *The People (Director of Public Prosecutions) v. S.K.* (unreported, Circuit Court, Judge Dunne, 14th December, 1999) in which Judge Dunne had granted orders of discovery against third parties but he noted that her jurisdiction to do so did not appear to have been challenged and the only issue was one of privilege.

In *D.H., (Applicant) v His Honour Judge Groarke and the Director of Public Prosecutions, (Respondents); and the North Eastern Health Board and S.H. (Notice Parties)* [2002] 3 I.R. 522 the Supreme Court, sitting as a five judge court, was asked to depart from its earlier decision in *The People (Director of Public Prosecutions) v. Sweeney* on the grounds that it was erroneous in law. The applicant in the *D.H.* case faced charges of indecent assault. The complainant had reported the assaults to a social worker in the Health Board and the defence sought to require the second named respondent and the first named notice-party to discover all documents relating to the allegations in their possession, power or procurement. The first named respondent who was the trial judge refused the application for discovery. The essential reason for the decision of the first respondent, as recorded in the transcript of the hearing, was that the applicant was not entitled in advance of the trial to obtain the material sought from the first notice party. First, he said that it had not been suggested that there was any reason to believe that the documents in question disclosed the existence of allegations by the complainant of sexual assaults upon her by persons other than the applicant, which might, if they existed, be used for the purpose of advancing a defence that the complaints were fabricated. Secondly, he considered that he was bound to have regard to the public interest in ensuring that confidential communications in cases of this nature to a health board remained confidential, unless their disclosure was required by the public interest in the administration of justice. Since the applicant had not satisfied him that there was any ground for supposing that the notes or memoranda made by the two named social workers or other employees of the first notice party who had dealings with the complainant contained any material which would be of any assistance to the applicant in the conduct of his defence, it followed that the public interest in ensuring that a health board treated as confidential, sensitive material of this nature, had to be upheld.

The applicant then sought and was successful in obtaining from the High Court leave to apply by way of judicial review for (*inter alia*) an order of *certiorari* quashing the ruling of the first named respondent refusing discovery. However, the applicant was unsuccessful at the substantive hearing of his judicial review application and, in an ex- tempore judgment, the learned High Court judge dismissed his claim. The applicant then appealed to the Supreme Court.

Between the filing of the notice of appeal and the appeal coming on for hearing the Supreme Court delivered its judgment in *The People (Director of Public Prosecutions) v. Sweeney*. In the written submissions lodged on behalf of the appellant (the applicant *DH*) it was made clear that the Supreme Court would be asked to depart from its earlier decision in *Sweeney* on the grounds that it was erroneous in law. Keane C.J. expressed the view that there were features of the case which made it proper to consider the issue raised as to whether the court should depart from its earlier decision He observed:

"This is of its nature an issue which is bound to come before the courts again and it is clearly in the public interest that the law in the matter should be clear beyond doubt. If the questions raised on this appeal as to the correctness of the decision in The People (Director of Public Prosecutions) v. *Sweeney* [2001] 4 I.R. 102 were left unresolved, it might give rise to the entirely erroneous belief that the decision was of doubtful authority, simply because it had been challenged in this case. I will, accordingly, proceed to consider first the question as to whether the court should depart from its decision in *The People (Director of Public Prosecutions) v. Sweeney* ."

Then, following a detailed consideration of the circumstances giving rise to, and the judgment of Geoghegan J in, *Sweeney*, Keane C.J. considered the arguments on foot of which the Court was being asked to depart from its earlier decision. He observed:

" ….even where the earlier decision was that of a court of three, I am satisfied that it should not be over ruled - again to cite the language of Henchy J.:-'merely because a later Court inclines to a different conclusion'.

In the present case, it is not suggested that any relevant statutory provision or authority was overlooked so that the judgment could have been regarded as having been given *per incuriam* . It certainly cannot be said, given the relatively short time which has elapsed since it was decided, that the circumstances in which an application for discovery of this nature comes before the court have altered to such an extent as to require reconsideration of the correctness or otherwise of the decision.

Counsel for the applicant has urged that the necessity of observing fair procedures in criminal trials, mandated by the Constitution, should have led to a different construction of the Rules of the Superior Courts, 1986, so as to permit the making of discovery orders against bodies such as health boards in cases such as the present. In his judgment, however, in *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102, Geoghegan J. adverts to the modern developments in case law under which the prosecution are bound to furnish the accused with any documents relevant to the prosecution, even though they do not assist the prosecution case and will not

be used by them at the trial, but draws a distinction between this and the inappropriate use of the civil machinery of discovery, such as was utilised in that case and in the present case.

It is also suggested that the court in that case did not have regard to the decision of Costello J., which was upheld by the Supreme Court in *Nolan v. Irish Land Commission* [1981] I.R. 23 ……."

In rejecting the arguments advanced Keane C.J went on to say:

"I am, accordingly, satisfied that the applicant in the present case has fallen well short of the high threshold which must be reached before the court departs from one of its previous decisions. No doubt, it would be possible to take a different view from that arrived at by the court in that case, but it most certainly cannot be said that the decision was"clearly wrong" or that there are "compelling reasons" for treating it as one of those exceptional cases in which the court will depart from the generally applicable principle of *stare decisis* .

I am, in any event, satisfied that the decision in *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102 was correct in point of law. The function of discovery in civil proceedings, whether it be *inter partes* or third party discovery, is to enable both parties to advance their own case or damage their opponent's case. The court in such cases is normally in a position to ascertain from a consideration of the pleadings what the issues are between the parties and, accordingly, what documents will be relevant to those issues and, specifically, whether, if discovered and inspected, they will enable a party to advance his own case or damage that being made by his opponent. In a trial on indictment, such as the present, the issue which the court has to determine is not defined until the accused has been arraigned and has pleaded to the counts laid against him. Even then, he is not required to do more than plead guilty or not guilty. There are some rare statutory exceptions to that, such as the requirement to notify the prosecution in advance of a proposed alibi. But in every other respect, while the prosecution must disclose comprehensively and in detail the case they propose to make against the accused, he is under no such obligation. Discovery, accordingly, in a trial on indictment would be a wholly one-sided process, which was certainly not what was envisaged by the procedure for *inter partes* and third party discovery provided under the Rules of Court. It is clear, accordingly, that, in the case of the Rules of Court dealing with discovery, to treat the word"cause" as extending to criminal proceedings would be clearly repugnant to the context in which it was being used.

The fact that discovery in the form provided for in the rules for civil litigation is not available in criminal proceedings does not have as a necessary consequence an erosion of the fair procedures to which defendants are entitled. Thus, in the present case, it was open to the solicitor for the applicant to ensure at the deposition stage that any relevant records or notes in the possession of the social workers were produced and, to at least a limited extent, that was done. Moreover, the social workers can be required by the applicant to attend the trial and produce any relevant documents by the issue of a *subpoena duces decum* .

I am, accordingly, satisfied that the decision in *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102 was correct in point of law and it follows that the first respondent had, in any event, no jurisdiction to make the order which was sought. That is sufficient to dispose of the present appeal, but I should add that I am also satisfied that, in the then state of the law, the learned High Court Judge was perfectly correct in holding that the first respondent was acting entirely within his jurisdiction - assuming he had such a jurisdiction - when he declined to make the order sought. Indeed, it is clear from the transcript that he carefully balanced the undoubted public interest in ensuring that such communications to bodies such as health boards remained confidential against the public interest in the administration of justice with its consequent necessity of ensuring that an accused person is not unfairly hindered in the conduct of his defence. He was clearly entitled to form the view that it had not been established that the documents would be of any particular significance in the conduct of the applicant's defence, other than the possibility that they might afford material for testing the credibility of the complainant. Even assuming a discovery jurisdiction existed, that would not, of itself, justify the making of the third party order sought in the present case."

In their written submissions Counsel for the applicant comment that it is interesting to note that in the *D.H.* case the appellant's counsel urged upon the Supreme Court "that the necessity of observing fair procedures in criminal trials, mandated by the Constitution, should have led to a different construction of the Rules of the Superior Courts, 1986, so as to permit the making of discovery orders against bodies such as health boards in cases such as the one before the court. Keane C. J., in rejecting that argument relied on the dicta of Geoghegan J. and distinguished the duties of disclosure placed on the prosecution from the *'inappropriate use of the civil machinery of discovery'* as was sought to be utilised in those cases."

In the High Court in *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)* (unreported, High Court, Macken J. 10th June 2005 and [2005] IEHC 198) Macken J. rejected the arguments of the Applicant that an accused should be entitled to oblige the prosecution to secure documents from third parties for onward transmission to the defendant.. The Applicant, who was charged with sexual offences, sought to obtain Midland Health Board reports which at that time were not in the possession of the Director of Public Prosecutions. The reports were considered by the Health Board to be both privileged and confidential. Macken J., in the High Court held:

"No matter how the suggested procedure is described, and regardless of what it might be called, the proposition put forward on behalf of the applicant is one by which discovery of the type available in civil proceedings should be available in criminal matters. In fairness to Mr Hartnett, when pressed to explain the manner in which a procedure of the type contended for would operate, he clearly described a procedure so closely similar to discovery as to be indistinguishable from it, including, for example, the listing of all documents in the hands of a third party; the description of them in sufficient detail to permit a defendant to identify those which might be relevant or of interest; the invoking, if appropriate, of a claim to confidentiality; and the determination by a judge, in the event of a dispute between the parties, as to the disclosure of any particular document, of its fate.

Given that the law relating to this very matter has been the subject of several cases of as recent a vintage as

> 2000 and 2002, cases in which the issues have been argued in very significant detail, and in particular the case of *D.H. v His Honour Judge Groarke,* supra, a unanimous decision of a court of five judges, I do not find any reason for considering that the suggested procedure would fall outside the ambit of those judgements."

Specifically referring to the fact that the documents sought from the Health Board had not been furnished to the DPP when the matter came before the District Court, and that the prosecution did not have any automatic legal entitlement to any documents on the Health Board's file, and that accordingly these documents were not within the procurement or control of the prosecution, Macken J. held:

"While it was suggested that a complainant is obliged to make available to the prosecution all documents which are relevant, and I accept this to be the case, I am not satisfied that the complainant is obliged to pursue a statutory body or is entitled at law to secure from it documents of the type found on the file of the Notice Party in these proceedings and no authority to the contrary was opened to me."

In upholding the decision of Macken J., the Supreme Court (whose judgments are reported at [2008] 1 I.R. 753) examined whether a subpoena *duces tecum* might be appropriately used to obtain disclosure of the material sought from the Health Board and concluded that it was not a valid means of securing third party disclosure. In delivering judgment Geoghegan J. unequivocally reaffirmed the continued application of the principles in *Sweeney* and *D.H.* cases, respectively, and said (at p.755):

> "In the background to this appeal is a most important legal issue which has never been fully considered by the courts of this jurisdiction. That is the question of the right (if any) of an accused to production or at least sight of documents in the possession of third parties where such access is, with reason, considered by the accused's legal advisers to be necessary to ensure a fair trial. There are different aspects to this problem. There is the question of whether there can ever be such legal access without the permission of the relevant third party. There is the question of whether a distinction might be made between State or State funded third parties and other third parties and then particularly in the context of statements made by a complainant in a sex crime case in the possession of a health board, as to whether there would be a countervailing duty of confidentiality. Misconceived attempts have been made to get around these difficulties. One of them has been the attempted invoking of the Rules of the Superior Courts 1986 relating to the discovery of documents. In two decisions of this court, *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102 and *D.H. v. Judge Groarke* [2002] 3 I.R. 522 (the latter being a decision of a five judge court), it has been held that the rules relating to discovery of documents and in particular the rules relating to third party discovery in the Rules of the Superior Courts do not apply to criminal trials. For the reasons explained by Keane C.J. in the latter judgment, the original regime of discovery of documents between parties and the later regime of third party discovery contained in the Rules of the Superior Courts were not intended to apply to criminal trials and are not appropriate having regard to the underlying purpose of those rules. It was made clear, however, by this court that its decisions in those cases were not in any way diminishing the obligations of the prosecution as to disclosure which is a quite different concept. That obligation of the prosecution has been traditionally viewed by the Director of Public Prosecutions as logically confined to documents within his possession or lawful procurement. It may be arguable as to whether this is too narrow a view of the obligations of the Director of Public Prosecutions. Certainly, the guidelines of the Attorney General of England and Wales relating to disclosure seem to suggest a rather wider obligation in that jurisdiction. This whole problem has been coped with in different ways in the jurisdictions of England and Wales, Canada, New South Wales, the United States of America and no doubt elsewhere also. There are areas still to be explored but as in the case of invoking the discovery procedures under the Rules of the Superior Courts, I am quite satisfied, as was the trial judge, Macken J., in this case that availing of the deposition procedure is no solution. That is the only issue which arises in this appeal and it is the only issue which I intend to address."

The applicants submitted that the Order made the Respondent falls squarely within the ambit of the procedures described in these judgments (*Sweeney; D.H. & J.F. respectively*) and that, accordingly, the precedent of the Supreme Court should not be departed from. They contend that these cases neither are clear authority for the fact that the law does not recognise and does not allow for discovery in criminal proceedings and that no duties of discovery or disclosure can be placed on a non-party to criminal proceedings nor was it ever intended thus. In the instant case, as in the case of J.F., the documents sought have not been furnished to the DPP and the prosecution has no automatic legal entitlement to them. Accordingly, they are not and could never be within the power, possession, procurement or control of the prosecution.

They point out that the fact that there is no provision in criminal proceedings for discovery or disclosure as against a non-party to those proceedings was acknowledged in *The Director of Public Prosecutions v J.B.* (unreported, Supreme Court, 29th of November 2006 and [2006] IESC 66). In his judgment in that case Hardiman J. noted the absence of "any provision, in criminal cases, for discovery or something closely analogous to it. Nor is there in this jurisdiction a firm protocol for disclosure." However it is to be observed that he was critical of this fact and referred to it as a "considerable anomaly".

The applicants, while acknowledging that Hardiman J's remarks were made in criticism of an anomalous situation, rely nonetheless on them in support of their position that there is no procedure for discovery or anything akin to it in Irish criminal law.

Moreover, they also point out that the absence of any such procedure is also commented upon in *Discovery and Disclosure* by Abrahamson, Dwyer and Fitzpatrick (Thompson Round Hall, Dublin, 2007). The authors, like Hardiman J., are critical of the fact that no statutory procedure exists; but as to the fact that it does not exist they are certain. They state (at page 247):

> "There is no statutory mechanism whereby a defendant in criminal proceedings can seek disclosure from a non-party to the proceedings."

The applicants also draw the Court's attention to Chapter 9 of the Guidelines for Prosecutors, published by the Office of

the Director of Public Prosecutions (2006) wherein the following guidance is given under the heading - "Material in the possession of third parties":

> "9.14 Following the decision of the Supreme Court in the case of *The People (Director of Public Prosecutions) v Sweeney* (2001 4 IR 102), to the effect that the civil procedure known as 'third party discovery' has no application in criminal proceedings, defendants cannot utilise this procedure to ensure production of material in the hands of third parties.
>
> 9.15 This does not, however, have as a necessary consequence an erosion of the fair procedures to which the defendant is entitled. The following observations are relevant:
>
> • the Criminal Justice Act, 1999 provides for the possibility of taking evidence by way of sworn deposition in the District Court at any stage after the return for trial and it is open to the accused to ensure that any relevant records or notes in the possession of a witness are produced;
>
> • alternatively it is open to the accused to require witnesses to attend at the trial and produce any relevant documents by the issue of a subpoena *duces tecum*."

The applicants are careful to concede that these guidelines were promulgated prior to the decision in *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)* and they acknowledge that the guidance proffered at the mentioned last bullet point cannot now be taken as correct in law. However, they contend that save with respect to that particular point the DPP's guidance is correct and they rely on it. Moreover, they contend that the position taken by counsel for the DPP on the hearing of the Motion before the Respondent was in line with the DPP's guidelines.

The applicants submit that the issue as to the possible availability of discovery in criminal cases has been considered by the Supreme Court and the Supreme Court has rejected the notion that it is available in a series of decisions that are clear and beyond challenge. It is their case that the non-availability of non-party discovery and non-party disclosure in criminal proceedings does not offend the right to a fair trial.

The applicants advance a further argument based upon the jurisprudence of the European Court of Human Rights and the principle of *égalité des armes*. The concept of *égalité des armes* exists between parties to proceedings. It does not extend to non-parties to criminal proceedings. The principle is one that has developed to ensure that no party to proceedings is at a disadvantage vis-à-vis his or her opponent. It is an important concept that has attracted much judicial recognition and comment in Strasbourg. In *O'Callaghan v Judge Mahon* [2006] 2 I.R. 265, Hardiman J, noting this development, commented as follows:

> "A major issue in civil and criminal procedural law is the extent to which either side must make disclosure to the other. This has led to the development of an impressive body of jurisprudence both in the United Kingdom and in Strasbourg. The latter has significantly influenced the former and will no doubt influence our jurisprudence too, in particular through the concept of "*égalité des armes*", which might be regarded as the opposite of that state of imbalance and disadvantage descried by Ó Dálaigh C.J. as clocha ceangailte agus madraí scaoilte." [emphasis added]

The applicants say that although considerable jurisprudence does exist in relation to this principle - for example see *Jespers v Belgium* [1981] 27 DR 61, ECHR; and *Rowe & Davis v The United Kingdom* [2000] 30 EHRR 1 - these cases have been concerned with materials and documentation that is within the possession of the prosecution and/or the investigating authorities. They contend that these cases were not concerned with material in the possession of non-parties. It was therefore submitted that the absence of non-party disclosure in a criminal trial does not offend the principle of *égalité des armes;* nor does it absolve the prosecutor from compliance with his important obligation to disclose all material relevant to an accused.

In *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)* Geoghegan J., in agreeing with certain dicta of Macken J., the trial judge, commented *obiter*:

> "… there may still be undecided issues as to a right in certain circumstances in a criminal case to procurement of documentation from a third party which is at least a state or state funded body but I think that it would be an issue that would have to be decided in a suitable case by the court which would ultimately be trying the defendant and on notice to the Director of Public Prosecutions, the body in question and the Attorney General."

Anticipating, in the light of this dictum, that it would be argued on behalf of their opponents that the respondent had a residual inherent jurisdiction to make the order that he made against them as *a state or state funded body,* the applicants have sought to stress that Geoghegan J's remarks were obiter dicta and do not in any way form part of the *ratio decidendi* of the case. Accordingly, they submit, they cannot erode or alter what they contend are the established legal principles. However, without prejudice to that stance they have proceeded make the following substantive arguments against the existence of a residual jurisdiction that could be invoked against them.

They point out that the applicant is a "body corporate" established under Section 6 of The Health Act, 2004. It is a state funded body. In a general sense, and leaving aside the present case, it is acknowledged that there may be circumstances where the HSE may have an interest and even an active interest in the subject matter of criminal proceedings. For example, the HSE and its officers may be actively involved in the treatment and care of the accused or the complainant or both. However, it would not seem appropriate to elevate such involvement to a level whereby the distinct role of the HSE and the distinct role of the prosecution would in some way be linked or conflated, even where their roles may be shown to be coincidental or even consentient. They suggest that it would indeed be dangerous to attempt to conflate in any way the distinctions between the statutory functions of the HSE and the statutory functions of the DPP. From time to time the HSE might well choose to furnish certain material to the prosecution on a voluntary basis, as has occurred in the past, and such discretion should be respected. It is open to any body, state funded or otherwise to exercise such discretion. But, it was submitted, the interests of justice would not be served in elevating Geoghegan J.'s obiter dictum to

a finding that, when called upon to do so by a party to criminal proceedings, all third party state and state funded bodies are under an obligation to make disclosure of materials and documents in their possession in a manner approximating to, or analogous to, the making of non-party discovery in civil proceedings. Nor, it was submitted, is this what he intended. Such a position would be fraught with danger and could lead to a great anomaly in the law and injustices to individual accused. Certain state bodies are under a statutory obligation to furnish information to appropriate authorities and this is provided for in relevant legislation. If there is a need to expand the scope or extent of existing obligations in that regard then it is a matter for the legislature to deal with this by enacting further legislation. It is not for the Courts to do so, and any attempt by the Courts to do so by the declaration of a novel "inherent" jurisdiction, alternatively, a residual common law jurisdiction would be inappropriate in the absence of a clear constitutional mandate or clear historical evidence that such a jurisdiction had previously been exercised at common law. It would amount to legislation by the Courts and be contrary to the principle which requires the separation of legislative, executive and judicial powers.

Finally, the applicants contend that although issues of privilege and confidentiality do not arise on this application, they will arise for consideration by the trial judge in due course in the event that his Order is upheld in these proceedings. They say that Geoghegan J, anticipating precisely this situation, made highly pertinent observations in his judgment in the *Sweeney* case to which this Court should now have regard. He said:

> "A general consideration of the issue of privilege would certainly support the view that the machinery of discovery as operated in civil proceedings could not be applied to a criminal prosecution. The wide range of documents and communications created in contemplation of criminal proceedings and which justice would require the prosecution to make available to the defence would almost certainly be privileged from production in civil proceedings."

2. Submissions on behalf of the first named notice party.

Summary of the Case
The DPP's case can be summarised as follows:

- Just because the Supreme Court has held that the civil process of discovery is unavailable in the criminal process it does not follow that the trial judge in a criminal case has no power to make an order to compel a public body to make potentially relevant documentation available in such a trial.

- The respondent has not purported to make an order of discovery; that word does not appear in his order and he has not directed the swearing of an affidavit on behalf of the applicant.

- The DPP submits that the respondent has exercised his inherent power to ensure a fair trial as mandated by the Constitution by ordering that one public body (the HSE) make certain documentation available to the public body that is vested with the power to prosecute (the DPP).

- In *Director of Public Prosecutions v. Judge Browne* (unreported, High Court, McMahon J, 9 December 2008, McMahon J observed that the obligation of disclosure "only extends to relevant evidence which is in the prosecutor's possession". Consistent with this, the D.P.P. interprets the impugned order as requiring the material in question to be furnished to him so that he can then, in the performance of his usual duty of disclosure, consider it and determine how much, if any, of that material ought to be disclosed to the defence. The DPP contends that the reference in the order to "onward transmission to the Defence solicitors" makes it clear that this is what the respondent envisaged.

- The Superior Courts, whilst holding that discovery under the Rules of the Superior Courts is unavailable in the criminal process, appear to have left it open to a trial judge to ensure a fair trial by, in appropriate circumstances, ordering a public body to make documents available to the prosecution so as to ensure that material contained therein, which is of potential relevance to the defence, is disclosed to the defendant. The DPP submits that the public interest and the constitutional imperative of trial in due course of law furnish ample grounds for the existence of such a power.

- The impugned order was made within jurisdiction and, in particular, was a common sense decision having regard to the scope of disclosure in criminal proceedings, as described in the following passages of the judgment of the Court of Criminal Appeal in *Director of Public Prosecutions v. McCarthy, Dundon, McCarthy, Stanners and Costello* (unreported, Court of Criminal Appeal, 25 July 2007 and [2007] IECCA 64) where Kearns J, under the heading "Relevant Legal Principles" held as follows:

> > "There is no doubt under the modern jurisprudence of our courts that the prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution and that if there is such material in the possession of the prosecution they are under a constitutional duty to make that available to the defence. These principles were clearly stated in *Director of Public Prosecutions v. Special Criminal Court and Paul Ward* [1999] 1 I.R. 60, where the obligations of the prosecution in relation to disclosure were described in the following terms at p. 71:-
> >
> > > 'The prosecution must disclose any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things.'
> >
> > As was pointed out by Carney J. in the High Court hearing in that case, there could be no question of the Gardaí or counsel for the prosecution deciding that any material might be withheld from disclosure to the court or the defence. It was in his view a matter for the court to determine, where a dispute arose, which documents should be disclosed or not disclosed to the defence. In dismissing the appeal brought from the ruling of Carney J., the Supreme Court held that the trial court has full discretion to decide how a trial is conducted and, in particular, how a controversy about disclosure should be resolved.

The Court is satisfied, however, that the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis. Nor is a conviction to be regarded as unsafe per se simply because there has been a partial failure by the prosecution to meet the obligations of disclosure. It is a question of degree in every case, having regard to the nature and importance of the material in question. Thus in *People (DPP) v Eamon Kelly* [1987] I.R. 596 the failure of the prosecution to disclose a serious previous conviction of a prosecution witness was sufficient to render a conviction unsafe. In formulating principles to be derived from various English decisions such *R. v. Collister and Warhurst* [1995] 39 Cr. App. R. 100; *R. v. Parks* [1961] 1 W.L.R. 1484 and *R. v. Paraskeva* [1982] 76 Cr. App. R. 162, Finlay C.J. stated at p. 599:-

> '....the court of appeal may, upon being satisfied as to the fact of such conviction and being also satisfied that it was material to the credibility of the witness, allow an appeal and direct a new trial.' (emphasis added).

The court also held, however, that the prosecution did not have a duty to make exhaustive or widespread enquiries about every prosecution witness so as to ascertain if convictions had been recorded against him, a reservation which also suggests that there must be some reasonable limitations to the duty imposed on the prosecution in this regard. It also suggests that not every failure by the prosecution to make complete disclosure will automatically result in a trial which is unfair or lead to a verdict which can only be seen as unsafe.

The Court is of the view that a failure of disclosure must be shown to have been important, as distinct from technical or trivial, if a conviction is to be regarded as unsafe. To put it another way, this Court must engage with the facts of this case to see if the omission disadvantaged the defence in such a way as to render the trial unfair or the jury verdict unsafe in the particular circumstances of the individual case. That is a two part consideration: was there a failure in the first instance, and, secondly, if so, did it materially affect the outcome of the case in the particular circumstances? That any obligation or failure to meet same must be assessed by reference to the facts of the particular case is apparent from a line of recent authorities on the judicial review side which deal with the obligations to seek out evidence, to preserve it and to make it available to the defence. These authorities may obviously be seen as having a shadow application to obligations of disclosure in criminal trials. The cases extend through *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127, *Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305, *Scully v. Director of Public Prosecutions* [2005] 2 I.L.R.M. 203 to *McFarlane v. Director of Public Prosecutions* [2006] I.E.S.C. 11. In the latter case, in stressing the need for an applicant to establish a risk of an unfair trial, Hardiman J. stressed:

> 'In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent. Failure to do this was the basis of the failure of the applicant in *Scully* [2005] 1 I.R. 242.'

These cases stress that commonsense parameters must govern the scope of the duty to seek out and preserve evidence and the consequences of any supposed failure to do so in a particular case. As Hardiman J noted in *Dunne v. Director of Public Prosecutions,* 'no remote, theoretical or fanciful' possibility should lead to a prosecution being prohibited. Repeating this in *Scully v. Director of Public Prosecutions* [2005] 2 I.L.R.M. at 216 he added:

> 'One is concerned, first and last, with whether there is a real risk of an unfair trial. Obviously this will depend on the individual circumstances of each case.'"

- The Director believes, and recognises, that the material the respondent directed to be transmitted to the DPP is, in the absence of any clear demonstration by the applicant, potentially relevant to the trial of the charges against the second and third named notice parties on at least two grounds:
  - o If anyone spoken to by the investigation also made a statement included in the book of evidence, the defence would be able to see if that witness has maintained a consistent position, thus going to his/her credibility.
  - o Should the said defendants seek to defend the charge on the basis that the neglect of the deceased was wholly or partially caused or contributed to by other persons.

Relevant Authorities

The submissions on behalf of the Director of Public Prosecutions contain a detailed review of relevant authorities including *People (D.P.P.) v Flynn* [1996] 1 ILRM 317; *Conlon v Kelly* [2001] 2 ILRM 198; *The People (Director of Public Prosecution) v Sweeney* [2001] 4 IR 102; *D.H. v His Honour Judge Groarke and The Director of Public Prosecutions; the North Eastern Health Board and S.H.(Notice Parties)* [2002] 3 IR 522; *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)* [2008] 1 I.R. 753; *Whelan v Kirby* [2005] 2 I.R. 30; *McGonnell v Attorney General* (unreported, High Court, McKechnie J, 16th of September, 2004 and [2004] IEHC 312) and *Traynor v Judge Delahunt, the Director of Public Prosecutions and the Garda Síochána Complaints Board* [2009] 1 ILRM 113.

As some of these authorities have been cited and extensively quoted by the applicant and/or in judgments relied on by the applicant, it is not necessary to further refer to them in great detail. Accordingly, as the decision of His Honour Judge Moriarty (as he then was) in *People (D.P.P.) v Flynn* was extensively reviewed and referred to by Geoghegan J in *The People (Director of Public Prosecution) v Sweeney* [2001] 4 IR 102 it is not necessary to further quote from it here. The same applies to *Conlon v Kelly*. In the *Sweeney* case Geoghegan J quoted extensively from the judgment of Fennelly J in *Conlon v Kelly* a case in which the Supreme Court held that the rules of civil procedure do not apply in criminal procedures and cannot simply be applied by analogy in order to repair a perceived gap in the latter.

The applicant relied heavily on *People (Director of Public Prosecution) v Sweeney* [2001] 4 IR 102 and I have already quoted extensively from it. The first named notice party makes the following points about it. First, the order under examination in *Sweeney* was an order for discovery, not an order made by a trial judge in the exercise of any inherent

power to ensure fair procedures. Secondly, the Rape Crisis Centre, unlike the HSE, is not a public body. It is therefore contended that *Sweeney* supports the proposition that the civil mechanism of discovery cannot be used in a criminal case.

I have already extensively reviewed the decision in *D.H. v His Honour Judge Groarke and The Director of Public Prosecutions; the North Eastern Health Board and S.H.(Notice Parties)* [2002] 3 IR 522.

With respect to *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)* [2008] 1 I.R. 753, to which I have also made extensive reference previously, the first named respondent relies with particularity on the passage therefrom, wherein Geoghegan J states:

> "… there may still be undecided issues as to a right in certain circumstances in a criminal case to procurement of documentation from a third party which is at least a state or state funded body but I think that it would be an issue that would have to be decided in a suitable case by the court which would ultimately be trying the defendant and on notice to the Director of Public Prosecutions, the body in question and the Attorney General."

The DPP submits that this passage makes it clear that Geoghegan J did not regard *Sweeney* as having disposed of the issue that arises in the present case. If it were otherwise his suggestion that there were "undecided issues" outstanding would make no sense.

In the case of *Whelan v Kirby* [2005] 2 I.R. 30 the accused, in the context of a summary prosecution for drink driving, sought material not in the possession of the DPP (the second named respondent) but rather which was in the hands of the Medical Bureau of Road Safety and also an order for inspection of the relevant intoximeter. In that case the refusal of the first named respondent (the District Judge) to entertain an application for inspection in circumstances where the prosecution had consented to such an inspection was successfully impugned. In the course of his judgment Geoghegan J stated:

> "A court of summary jurisdiction is a creature of statute and at common law can only make orders permitted by statute. But that common law principle is subject in this jurisdiction to the overriding requirement of fair procedures under the Constitution. Counsel for the second respondent seemed to suggest that even in relation to "Gary Doyle" applications the court cannot and does not make an order as such. It simply gives some kind of informal directions. I would respectfully disagree with that. There is jurisdiction in the District Court to make any order that would be necessary for the fulfilment of the constitutional obligation of a fair trial and fair procedures."

As regards orders to inspect intoximeters, he observed that they

> "…could only be made against the second respondent but if as a consequence of non-cooperation by the Medical Bureau or for any other reason the District Court order could not be complied with, it would be open to the District Court to refuse to proceed with the trial".

Reliance was also placed on the following statement from the judgment of McKechnie J in the High Court in *McGonnell v Attorney General* (unreported, High Court, McKechnie J, 16th of September, 2004 and [2004] IEHC 312), a case involving an unsuccessful challenge to the constitutionality of the intoxilyser regime. In his judgment McKechnie J said (at p. 92):

> "… it is in my view an important assurance for an accused person to know of his right to have access to a judicial authority for the purposes of seeking inspection facilities in respect of any given machine. When so deciding, the court in question must of course comply with constitutional justice and fair procedures on any such application so made, as it must on the hearing of the section 49 charge itself. In both instances it may vindicate such rights of the defendant in the most appropriate manner available. These observations equally apply to any application in respect of documentation."

The first named notice party also relied upon *Traynor v Judge Delahunt, the Director of Public Prosecutions and the Garda Síochána Complaints Board* [2009] 1 ILRM 113 [2009] 1 ILRM 113. In that case the central issue was whether the applicant, who faced prosecution on indictment for assault and violent disorder arising out of a fracas on the 31st of March 2003 at Ballyogan Crescent, Dublin involving a number of people, was entitled to disclosure of certain documents and reports sent by the Garda Síochána Complaints Board ("GCB") to the Director of Public Prosecutions and which she claimed might assist her in defending herself at her trial. The material in question was generated in the course of the investigation by the GCB of a complaint made by the applicant against a particular Garda who had attended at the scene of the fracas in the course of his duty and who had then became involved in an altercation with the applicant's daughter. When the applicant tried to intervene she alleged that she was assaulted by the Garda in question. The applicant's daughter was arrested. Subsequently, the applicant made a complaint to the Garda Complaints Board about the conduct of the Garda and this gave rise to the investigation in question.

At the call over of cases in the Circuit Court the applicant sought disclosure, both from the Director of Public Prosecutions and from the Garda Complaints Board, of all material generated from the Complaints Board's investigation of the matter. Both parties resisted all disclosure except the statement of complaint made by the applicant herself to the Board and the findings of the Board itself, both of which were sent to the applicant. On the Director of Public Prosecutions assurance that he was not going to rely on any of the said documentation, the Circuit Court judge refused to make an order of disclosure against either party. The applicant then sought and obtained leave to apply for relief by way of judicial review for the purpose, *inter alia*, of quashing the Circuit Court Judge's order and seeking other orders the effect of which would be to oblige the GCB and the Director of Public Prosecutions to disclose the relevant documents to the applicant.

In granting the reliefs sought, McMahon J noted:

> "The prosecution has an obligation to disclose all material evidence within its possession, power or procurement even where it does not propose to rely on it at the trial. Carney J. in *Director of Public Prosecutions v. Special*

Criminal Court [1999] 1 I.R. 60, (hereinafter "*Ward*") clearly states this to be the position at p. 71:-

> "… the prosecution must disclose any document which could be of assistance to the defence in establishing a defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things."

In addressing the specific issue in the case before him McMahon J went on to say:

> "It does not seem to me to be an adequate excuse for the Director of Public Prosecution's reluctance to disclose such material as was sent to it by the Garda Complaints Board to say that it does not propose to rely on it in its prosecution of the defendant. Reliance is not the test for excusing disclosure. The matter is, in my view, the very kind of matter that would impede the prosecution's case, advance the defendant's case or lead to a new line of inquiry of assistance to the defendant, as set out in *Ward*. The prosecution has made no attempt to argue that it is not relevant or material in this sense. Perhaps, on seeing the material, the defendant will wish to rely on the evidence therein to cross examine Garda Gillen and to attack his credibility. Why should she be deprived of this opportunity?
>
> The main substantive argument advanced by the Director of Public Prosecutions is that it must observe the confidential nature of the material sent to it by the Garda Complaints Board. In circumstances such as the present we may legitimately ask: why? Why should the Director of Public Prosecutions show greater respect to the confidential nature of the documents generated by the Garda Complaints Board than to the defendant's constitutional right to a fair trial? If, which is arguable, some kind of confidentiality attaches to such material when it is in the possession of the Garda Complaints Board, does it remain so classified once it is sent on to the Director of Public Prosecutions? Does some kind of waiver operate in those circumstances? If the Director of Public Prosecutions decided initially as a result of being sent the material to prosecute Garda Gillen would it be obliged to release it to Garda Gillen to enable him to defend himself? Would the Director of Public Prosecution's sensitivity in such a case trump the garda's right to a fair trial? Surely not. Why should, the complainant here, Mrs. Traynor be placed in a worse position? Her liberty and her good name are equally at stake.
>
> Even at its lowest the material in question might disclose the weakness of the defendant's case, or that there are no other relevant witnesses in a position to give evidence. This in itself might save the defendant expense and effort in fruitless investigations of her own.
>
> In *Ward*, O'Flaherty J. stated at p. 82 that the prosecution is generally "…under a duty to make that person available as a witness for the defence and, in general, to make available any statements that he may have given" even if it is not proposed to call the author of the statement involved.
>
> The duty on the prosecution to disclose extends to preparatory notes and previous inconsistent statements made by witnesses. Any other rule would breach the equality of arms principle. Similarly, the duty extends to transcripts of previous trials (see Hardiman J., *B.J. v. Director of Public Prosecutions* [2003] 4 I.R. 525). In *The People (Director of Public Prosecutions) v. G.K.* (Unreported, Court of Criminal Appeal, 6th June, 2002), the defendant sought from the prosecution a transcript of the previous trial which application was refused. The Court of Criminal Appeal quashed the conviction. In the course of her judgment Denham J., in rejecting the argument based on inconvenience as being "not relevant" stated at pp. 13 to 14:-
>
> > "In a criminal prosecution, when a retrial is ordered, for whatever reason, and a successful prosecution is dependant upon the credibility of one or more of the witnesses for the prosecution, whose evidence is not supported by either forensic or circumstantial evidence, fair procedures require that the accused is furnished with a transcript of the testimony given at the first trial, irrespective of whether or not any inconsistencies in the evidence of witnesses for the prosecution can be demonstrated at the time that the application to be provided with such a transcript is made. Otherwise, the accused is precluded from confronting witnesses for the prosecution with inconsistencies in their evidence which only become manifest during the retrial. This is all the more so when the outcome of the prosecution is to a large extent dependant on whether or not the evidence of an alleged victim is accepted by the jury, or by the court, as the case may be. To withhold a transcript of the evidence given at the first trial from an accused person in such a case is tantamount to denying him/her the opportunity of exposing an unreliable witness for what he/she is, in that, in the absence of a capacity to compare evidence given at successive trials by the same witness (evidence which is hotly contested) the accused is, in effect, limited in his/her capacity to defend himself/herself, which offends all principles of justice, as they are recognised in this jurisdiction."

In my view there is no reason why the principle stated by Denham J. should not also apply in the present case. In Abrahamson, Dwyer and Fitzpatrick, *Discovery and Disclosure* (Thompson Round Hall, Dublin, 2007) the learned authors, having quoted Denham J., say at p.238:-

> "It is submitted that this principle is not limited to previous trials in which the accused participated but extends to proceedings where witnesses have given previous accounts of events which form part of the proceedings in being."

McMahon J concluded by opining that:

> "In this case, where the documents and reports in question relate to the very same incident, where the main parties involved in the prosecution are the same as those involved in the Board's investigation and the Director of Public Prosecution's previous consideration, it is inconceivable that they would not fall within the principle enunciated in *Ward*, and for this reason; the onus on the accused/applicant to show relevance and that there is a real risk of a fair trial, is easily discharged."

The constitutional obligations of the trial judge

The Director has sought to argue further, and by analogy with the approach adopted by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. J.T.* (1988) 3 Frewen 141, that the courts are obliged to interpret and develop common law rules of procedure in such a manner as to vindicate rights recognised and conferred by the Constitution of Ireland.

In *The People (Director of Public Prosecutions) v. J.T*. (1988) the Court of Criminal Appeal held that the rule preventing

one spouse from being a competent witness against the other could not prevail against the right of an individual to be protected against attack by another family member. In his judgment in that case Walsh J said:

> "The Constitution places upon the courts the obligation to enforce the protection given to the family and family life by the Constitution itself. That must necessarily include an obligation to enforce these protective provisions even against members of the family who are guilty or alleged to be guilty of injuries to members of the family.
>
> It would be difficult to consider or to imagine any matter which would be more subversive of family life than sexual offences committed against his child by a spouse of the nature alleged in the present case particularly when the child in question is less than fully normal. It is obviously the duty of one spouse to protect the child or children against the other in cases of such abuse, and it would completely frustrate the obligation placed upon the State to protect the family if the very person upon whom the obligation is said to rest should be prevented or inhibited from testifying in a prosecution against the offending spouse. This is particularly so in the circumstances where a spouse whose testimony it is sought to introduce is a vital witness. Insofar as the justification sought for the existence of the rule is the prevention of family dissension, it can quite clearly have no validity in a situation where the application of the rule is so far from preventing dissension, is assisting in concealing in effect, and thus permitting to go unpunished, a serious offence committed upon members of the family by other members of the family, particularly sexual offences by a father upon his own daughter. In view of the sense of obligation placed upon this Court to assist insofar as it can in the protection of the family the Court must take the view that the maintenance of the common law rule relied on in this case would be a failure to comply with the obligations imposed by the Constitution. This is all the more so in cases of assault upon the children of the family by the parents. Such a case should not be more hampered in its proof by the existence or the enforcement of the rule than in the case of an assault by the husband upon the wife."

The European Convention on Human Rights
It was further submitted on behalf of the Director that having regard to the terms of s.1 and s. 2 of the European Convention on Human Rights Act, 2003 the common law should be interpreted so as to avoid a result whereby a criminal prosecution arising out of a fatality could not proceed in the absence of a statutory (as distinct from a common law) mechanism whereby material that might be relevant and necessary to the case could be obtained from a public body so as to be made available to the prosecutor and the defence. In support of this submission the Court was referred to dicta in *X and Y v. Netherlands* (1986) 8 EHRR 235; and *DPP (at the suit of Walsh) v. Cash* (unreported, High Court, Charleton J, 28 March 2007 and [2007] IEHC 108).

3. Submissions on behalf of the second named notice party.

Summary of the Case
The submissions of the second named notice party may be summarised as follows:

- The accused in the criminal proceedings, in seeking the Orders which the applicant now seeks to impugn, have at all times acted appropriately and reasonably. They have identified in correspondence shortcomings in the disclosure made to them, have given the State sufficient time to deal with the grievance, have raised the issue fully before the trial judge at a pre-trial hearing and have obtained an Order of the Court.

- The respondent's Order was made reasonably and rationally and within jurisdiction and according to law and precedent.

- Having regard to comments by Hardiman J in his judgment in *J.F. v the Director of Public Prosecutions,* [2005] 2 I.R. 174 emphasising the role of disclosure in the preparation for cross-examination, a protocol was required to deal with situations such as the situation that has arisen in the instant case. It was submitted that Geoghegan J. has provided such a protocol in his judgment in *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)*.

- The accused parties have a substantive right to disclosure in order to make their trial a fair one and that the absence of a statutory procedure for bringing that right into effect should not be a bar to their receiving a fair trial.

- If a situation exists whereby an accused in criminal proceedings has less right to disclosure of material relevant to his defence than a civil litigant has then that is a substantial anomaly. The Courts would not be providing for disclosure of material to civil litigants from third parties unless that was something that was necessary for a fair trial in a civil action. If it is necessary for a fair trial in a civil action then there is all the more reason to think that it is necessary for a fair trial in a criminal context.

- The respondent was correct in deciding that the accused should have disclosure so that witnesses could be challenged on any inconsistencies between statements given to the Health Service Executive and those given to the Gardaí in the course of their investigation. Further, he was correct in expressing his belief that the accused could not receive a fair trial in the absence of such disclosure.

- The Applicant is an emanation of the State and consequent thereon is a party to the prosecution of the accused.

Relevant Authorities
The second named notice party has cited numerous authorities in support of his submissions. He has argued that the general duty on the prosecution to make disclosure is derived from the constitutional right to a fair trial and Article 6 of the European Convention on Human Rights. He cites McCarthy J's judgment in *The People (DPP) –v- Tuite* (1983) 2 Frewen 175 in support of the general imperative that a prosecution should be conducted fairly, and he then cites the following passage from the judgment of Hardiman J in *J.F. v the Director of Public Prosecutions*, [2005] 2 I.R. 174 emphasising the role of disclosure in the preparation for cross-examination:

> "Oral contradiction in a public forum is the culmination of the work of the cross-examiner but it is by no means the whole of it. All effective cross-examinations…are the result of intensive preparation. It is of the essence of the right to cross-examine that the cross-examiner, the advocate selected by the person impugned, should have access to the materials for cross-examination. Study and assessment of these materials is a vital part of the process of cross-examination. It is also a vital factor in the formulation of the advice an advocate gives to his client."

The Court's attention was also drawn to the dictum of *Glidewell J in R. v Ward* [1993] 1 WLR 619 at 642, recognizing the potential for injustice in a failure to make disclosure. He said:

> "Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence."

It was submitted that it would be a breach of the accused parties' right to a fair trial in due course of law as required by Article 38.1 and Article 40.4.1 of the Constitution of Ireland not to have made the documents at issue available to them for use during the trial. They point out that the respondent considered that such disclosure was necessary in order to ensure the co-accused obtained a fair trial in due course of law.

The availability of discovery in criminal proceedings.
The second named notice party also comprehensively reviews the important decisions in *The People (Director of Public Prosecution) v Sweeney* [2001] 4 IR 102; *D.H. v His Honour Judge Groarke and The Director of Public Prosecutions; the North Eastern Health Board and S.H. (Notice Parties)* [2002] 3 IR 522 and *J.F. v Judge Michael Reilly* and the *Director of Public Prosecutions and the Midland Health Board (Notice Party)* [2008] 1 I.R. 753. Having done so, he concludes: "It is clear from the foregoing that an application for discovery, the issuing of a *subpoena duces tecum* or the use of the deposition procedure would have been inappropriate in this case."

The breadth of the duty of disclosure
The second named notice party has drawn the Court's attention to Geoghegan J's remarks in the *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)* that:

> "[t]hat obligation of the prosecution has been traditionally viewed by the Director of Public Prosecutions as logically confined to documents within his possession or lawful procurement. It may be arguable as to whether this is too narrow a view of the Director of Public Prosecution's obligations. Certainly the guidelines of the Attorney General of England and Wales relating to disclosure seem to suggest a rather wider obligation in that jurisdiction."

The second named Notice Party has referred extensively to those portions of the "Attorney General's [of England and Wales] Guidelines on Disclosure, April 2005" that appear under the subheadings "Materials held by Government departments and other Crown bodies" and "Material held by other agencies". Under the latter subheading the following guidance is given in paras 51 and 52 respectively:

> "51. There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example, a local authority, a social services department, a hospital, a doctor, a school, a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases, if the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused prosecutors should take what steps they regard as appropriate in the particular case to obtain it.
>
> 52. If the investigator, disclosure officer or prosecutor seeks access to the material or information but the third party declines or refuses to allow access to it, the matter should not be left. If despite any reasons offered by the third party it is still believed that it is reasonable to seek production of the material or information, and the requirements of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or as appropriate section 97 of the Magistrates Courts Act 1980 are satisfied, then the prosecutor or investigator should apply for a witness summons causing a representative of the third party to produce the material to the Court."

The second named notice party points out that although the English Court of Appeal held in *R v Brown* (1995) 1 Cr App R 191 that such guidelines do "not have force of law" and have no statutory basis, they are followed in practice. It was contended that these guidelines improve consistency in the decision making of prosecutors and set minimum standards of fairness.

He has further submitted that the constitutional rights of the accused to fair procedures and to be tried in due course of law, together with the public interest in the successful prosecution of crime, mandate that the issue of non-party disclosure should be regulated in the clearest fashion. He says that in the absence of either a statutory framework or non-statutory guidelines in this jurisdiction the Supreme Court has expressed its view. This is an allusion to the passages from the judgment of Geoghegan J in *J.F.* previously quoted where he agreed with Macken J in the High Court that:

> "the relevant documents were not within the procurement or control of the Director of Public Prosecutions and that she was not satisfied that a complainant was obliged to pursue a statutory body or was entitled at law to secure from it documents of the type found on the file of the notice party."

But subject to the proviso that:
> "…there may still be undecided issues as to a right in certain circumstances in a criminal case to procurement of documentation from a third party which is at least a state or state funded body but I think that it would be an issue that would have to be decided in a suitable case by the court which would ultimately be trying the defendant and on notice to the Director of Public Prosecutions, the body in question and the Attorney General."

Reliance is also placed on the fact that in the course of making his said Order, the respondent expressed his view that disclosure was necessary in order for the second and third named notice parties to receive a fair trial. It was submitted

that as he was the judge who "would ultimately be trying the defendant" he had jurisdiction to make a disclosure order against the applicant, because the applicant is within the category of "state or state funded" bodies identified by Geoghegan J. The Director of Public Prosecutions, the Attorney General and the Applicant were on notice of the said application. The second named notice party contends that the Supreme Court had envisaged that such an order might be made and the application, when made, complied with the criteria set out by that court. Accordingly, the respondent adhered to and followed established precedent in the making of the said Order.

Challenging the credibility of a witness and the right to a fair trial
Under this heading the second named notice party submits that defence Counsel should have disclosure so that witnesses could be challenged on any inconsistencies between statements given to the Health Service Executive and those given to the Gardaí in the course of their investigation. It is again pointed out that Judge White accepted this point and expressed his belief that the accused could not receive a fair trial in the absence of such disclosure. In further support of this proposition reliance is placed on the judgments of Denham J in *The People (Director of Public Prosecutions) v. G.K.* (unreported, Court of Criminal Appeal, 6th June, 2002) and of McMahon J in *Traynor v Judge Delahunt, the Director of Public Prosecutions and the Garda Siobhan Complaints Board* [2009] 1 ILRM 113, which I have already reviewed..

Disclosure in Criminal Proceedings
The second named notice party has extensively reviewed the authorities on this topic for the assistance of the court. Citing many of the cases previously referred to, and in particular i.e., The Director of Public Prosecutions v J.B. (unreported, Supreme Court, 29th of November 2006 and [2006] IESC 66); and *P.G. v. The Director of Public Prosecutions,* [2007] 3 I.R.39, the Court's attention has been drawn to the following comments of Hardiman J in the *P.G.* case:

> "…since the topic of disclosure has arisen in a specific way I wish to state that I am not to be taken as agreeing with the director's submission that disclosure is always or primarily a matter for the trial judge. As the law stands, the elaborate procedures which have been provided for discovery in civil cases do not apply to criminal cases. Furthermore, and despite the cogent recommendations of the Working Group on the Jurisdiction of the Courts which reported in May, 2003, no provision has been made for the sort of preliminary hearing before the trial judge on arraignment which might address these problems. Indeed, at present there is no certainty that the judge presiding over the arraignment will be the eventual trial judge. Moreover, the Courts have had recent experience of disturbing cases (including one case where a conviction leading to a sentence of life imprisonment was subsequently held to be a miscarriage of justice) of grave shortcomings in disclosure. These included non disclosure of the fact that a Prosecution witness had previously made a dubious allegation of rape against another party. (*DPP v. Nora Wall*, CCA, 16.12.05)
>
> For these reasons I wish to make it clear that, in my view, at least unless and until a satisfactory provision for disclosure or discovery in criminal cases comes into being, an applicant is, in a suitable case, entitled to raise the question of disclosure on judicial review."

He has further referred the Court to *Florence Healy v. Director of Public Prosecutions* (heard in conjunction with *Vincent Dodd v. Director of Public Prosecutions*) (unreported, High Court, McGovern J, 13th of March 2007 and [2007] IEHC 87) and *Traynor v Judge Delahunt, the Director of Public Prosecutions and the Garda Siobhan Complaints Board* [2009] 1 ILRM 113 as examples where judicial review has been sought as suggested by Hardiman J.

4. Submissions on behalf of the third named notice party.

Summary of the Case
The submissions of the third named notice party may be summarised as follows:

- If the material the subject matter of the respondent's order were at this moment "in the hands" of the prosecutor, he would be under a duty to disclose it to the second and third notice parties.

- .The English Attorney General's interpretation of the Crown's duty of disclosure, as set out in her current guidelines, is consistent with the first (and fourth) notice parties' constitutional obligations towards an accused and with their obligations under Article 6 of the Convention as interpreted by the ECHR. Those guidelines appear to draw a distinction between "third party" state agencies and agencies that are more "at the heart" of government, described as "government departments or other Crown bodies." Easier "access" appears to be expected from the latter. The applicant in this case is such a body. It was submitted that a request from either the fourth notice party, the attorney general, or his constitutionally authorised "delegate," the prosecutor, to the applicant might reasonably be expected to result in a disclosure of the material in question.

- .If that submission is incorrect then it is acknowledged that in implementing their exactly similar duty of disclosure English prosecutors and investigators have a formal statutory power to seek orders from the court when the material which they believe may be covered by their duty of disclosure is not being made available to them by "third party" state agencies such as doctors and social services departments. It is accepted that there is no similar statutory framework in place, in this jurisdiction, that would enable them (or indeed an accused) to obtain from the court of trial a summons to produce material evidence as is provided for under the English Act of 1965.

- Order 31 rule 29 of the RSC provides (in respect of civil proceedings):

> "Any person not a party to the cause or matter before the Court who appears to the Court to be likely to have or to have had in his possession custody or power any documents which are relevant to an issue arising or likely to arise out of the cause or matter or is or is likely to be in a position to give evidence relevant to any such issue may by leave of the Court upon the application of any party to the said cause or matter be directed by order of the Court to answer such interrogatories or to make discovery of such documents or to permit inspection of such documents. The provisions of this Order shall apply mutatis mutandis as if the said order of the Court had been directed to a party to the said cause or matter provided always that the party seeking such order shall indemnify such person in

respect of all costs thereby reasonably incurred by such person and such costs borne by the said party shall be deemed to be costs of that party for the purposes of Order 99."

It is inconceivable that a similar procedure is not available to an accused person facing a serious charge. Adopting the reasoning of Girvan J in PJO'N & MO'N it is submitted that, absent a statutory mechanism, the respondent, having come to the view, as he was entitled to, that the material referred to in his order was "potentially relevant", had a "separate and inherent power" to order third parties to make "potentially relevant documents available to the defence for inspection."

• If the respondent is found not to have had the jurisdiction to make the order then it is submitted that the State is in breach of its obligations under the Constitution and the Convention alike. The right to a fair trial and to equality before the law is independent of and may not be made subject to formal procedures or rules of court in order to give it effect. If it is to be made subject to rules of court or other statutory schemes in order to be effective then the trial of the third notice party should not proceed until such time as the necessary statutory scheme is put in place.

• The order the subject matter of these proceedings was made within jurisdiction and is available in law to a party in criminal proceedings as against a party with the status, in law, of the applicant in this case.

The Law

The third named notice party has submitted that if information, documentation or other material exists which might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused or in providing a lead on evidence that goes to either of these things, then an accused person is entitled to sight of such material whether or not it is in the hands of the prosecution. This, he submits, is the position at common law. The requirement also exists to ensure that an accused person receives a trial "in due course of law" as provided for by Article 38, and is held equal before the law as provided for by Article 40, of the Constitution. It also exists in order to ensure that an accused person receives a "fair trial" within the meaning of Article 6 of the European Convention on Human Rights.

Position in England and Wales

In its 2008 edition Archbold's *Criminal Pleading, Evidence and Practice* includes the following in its summary of the prosecution's duty of disclosure (para 16-83)

> "In *Jespers v Belgium*, ante the Commission held that the "equality of arms" principle imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence. This principle extends to material which might undermine the credibility of a prosecution witness (ibid, para 58). Non disclosure of evidence relevant to credibility may also raise an issue under Article 6(3) (d): *Edwards v UK* 15 EHRR 417, Op. Comm., para 50). ..."

It has been submitted on behalf of the third named notice party that in our neighbouring jurisdiction the prosecuting authorities are of the view that material held by government departments or other Crown bodies (or agencies) is not just subject to disclosure but also comes within the remit of the prosecution's own duty of disclosure.

The hitherto informal system of disclosure in England and Wales was largely replaced by a statutory scheme after a number of persons succeeded in having convictions overturned on the basis of the failure by certain members of the English police and prosecution to comply with their obligations as to disclosure under common law. The Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003, ["the CPIA 1996"] sets out in Part 1 the procedure applicable to disclosure. The CPIA 1996 also (in s.23) imposes a duty on the English Secretary of State to prepare codes of practice in relation to disclosure.

In addition, English attorneys general have from time to time - for the guidance of prosecutors - issued guidelines in relation to the duty of disclosure. This practice appears to have existed since 1992, just before the introduction of the statutory scheme. The current AG's Guidelines (April 2005) state in the foreword that disclosure is "one of the most important issues in the criminal justice system" and that the "application of proper and fair disclosure is a vital component of a fair criminal justice system". They go on to state that the "golden rule" is that "fairness requires full disclosure should be made of all material held by the prosecution that weakens its case or strengthens that of the defence." See also the "General Principles."

The guidelines go on to make it quite clear that material in the hands of government or state agencies is encompassed by the prosecution's duty of disclosure. They also provide that it is the prosecution's responsibility to seek out and obtain such material from such government or state agencies

Under the heading "Involvement of other agencies" the guidelines deal first with material held by "government departments or other Crown bodies." They state that in England and Wales such entities should have identified personnel at established "enquiry points" to deal with issues concerning the disclosure of information in criminal proceedings and that while "investigators, disclosure officers and prosecutors" cannot be regarded as being "in constructive possession" of material held by these departments, they should consider what other steps might be taken to obtain the material or inform the defence. (See paragraphs 47 to 50 inclusive.)

Then secondly, in relation to material or information held by "other agencies" (a local authority, a "social services department," a hospital, a doctor, a school, and a provider of forensic services are the examples given) they provide that prosecutors should take appropriate steps to obtain it. The guidelines suggest that if the "third party" declines or refuses to allow access to this material that "the matter should not be left." They also suggest that an application should be made under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965. The guidelines also acknowledge that public interest reasons which might justify withholding disclosure may be placed before the court in the usual way. (See paragraphs 51 to 54 inclusive.)

Finally, the Court's attention is drawn to the foreword to the guidelines which points out that:

"The House of Lords in *R v H & C* [2004] 2 WLR 335, at 331, made it clear that so long as the current disclosure system was operated with scrupulous attention, in accordance with the law and with proper regard to the interests of the defendant, it was entirely compatible with Article 6 of the European Convention on Human Rights."

Position in Northern Ireland
An analysis of the powers of the Northern Ireland crown court under the corresponding sections of the Judicature (NI) Act 1978 (those sections also substituted by the CPIA 1996) is to be found in the judgment of Girvan J in *R v PJO'N & MO'N* [2001] NICC 5. Girvan J held that "taking the legislation as a whole and having regard to the provisions of the Convention" the court had power, by a witness summons, to require a third party to attend court, either at the trial or at a specified time and place before trial, to produce documents and things likely to be admissible evidence. In this context material which was "likely to assist the defence in defending the proceedings" would constitute "relevant evidence." In an *obiter dictum* under the heading *Has the court any Residual Powers on Third party Disclosure.* Girvan J considered what the position would have been had he come to "a different and narrower view on the meaning and effect of section 51A [of the NI Act 1978]." He says that the question would then have arisen whether the court had a *"separate and inherent power"* to "make third parties produce potentially relevant documents available to the defence for inspection." He expressed the view that "the dictates of fairness and the [European] Convention [on Human Rights] might call for the development of a separate jurisdiction by the court outside the framework of section 51A to enable the defendant to gain access to potentially relevant third party documentation."

The Irish Position
The Courts attention was drawn to Article 30.4 of the Constitution; to s.25 of the Courts (Supplemental Provisions) Act, 1961 (as amended) and to the following cases to which extensive reference has already been made, viz *The People (Director of Public Prosecution) v Sweeney* [2001] 4 IR 102; *D.H. v His Honour Judge Groarke and The Director of Public Prosecutions; the North Eastern Health Board and S.H. (Notice Parties)* [2002] 3 IR 522; the High Court judgment of Macken J in *JF v. Judge Michael Reilly and the Director of Public Prosecutions, and the Midland Health Board, (Notice Party)*], (unreported, High Court, Macken J. 10th June 2005 and [2005] IEHC 198) and the Supreme Court judgments in the same matter now reported at [2008] 1.IR 753; The *Director of Public Prosecutions v J.B.* (unreported, Supreme Court, 29th of November 2006 and [2006] IESC 66); *P.G. v The Director of Public Prosecutions* [2007] 3 I.R. 39 and *Traynor v Judge Delahunt, the Director of Public Prosecutions and the Garda Siobhan Complaints Board* [2009] 1 ILRM 113

Jurisprudence under the ECHR
The Court was referred to the provisions of s.2, s.3 and s. 4 respectively of the European Convention On Human Rights Act, 2003 and to the cases of *Jespers v Belgium* [1981] 27 DR 61, ECHR; and *Rowe & Davis v The United Kingdom* [2000] 30 EHRR 1, both of which I have previously referred to .

5. Submissions on behalf of the fourth named notice party.

Summary of the Case
The submissions of the fourth named notice party may be summarised as follows:

• In *P.G. v The Director of Public Prosecutions* [2007] 3 I.R. 39 it was held that disclosure is essentially a matter for the trial judge subject to the possibility that judicial review may be available to a person who can show that, despite all reasonable efforts on his or her part, necessary material is being withheld to such an extent as to give rise to a real risk of an unfair trial.

• Having regard to the well established principles as to the ingredients of a fair trial, and the duty of the trial judge to ensure in so far as is practicable the fairness of a trial, it is within the jurisdiction of a trial judge to make an order of the kind made by the Respondent herein.

• It is not suggested that an order of the kind made by the Respondent herein would necessarily be required in every such case, as circumstances may well vary. However, a trial judge has an inherent jurisdiction to make such an order, in an appropriate case.

• The Respondent, having heard submissions from the interested parties in relation to the issue of disclosure, was in a position to make an informed assessment of the need for disclosure in order to obviate the risk of unfairness to the accused persons.

• In the instant case the material which the Respondent has ordered to be disclosed to the prosecution would appear, by any reasonable standard, to be closely related to the subject-matter of the criminal charges and appears to be in the possession of a public body.

• Furthermore, as reflected in the order made by the Respondent in this case, application may be made by the affected parties for the witholding of certain material on a ground of privilege.

As there does not appear to be any Irish authority directly bearing on the point which arises for resolution in the present case, it is respectfully submitted that this Honourable Court should proceed on the basis of certain established principles which, by logical extension, would appear to favour the approach adopted by the Respondent herein.

The basic rules governing disclosure are closely connected with the role of the prosecutor as it is envisaged by our constitutional scheme and, indeed, in many other common-law countries. The prosecutor is often described as a "minister of justice" meaning that while he may take all appropriate steps and tender all appropriate evidence and submissions in order to secure a conviction in a criminal trial, he may not set out to secure a conviction at any cost. The prosecutor is obliged to take all necessary steps to ensure that justice is done. The Supreme Court of Canada said in *R v Boucher* [1955] S.C.R. 326 (at p. 333):

"It cannot be overemphasised that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay

> before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it should be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings."

Statements to similar effect are to be found in the judgments of the Irish Supreme Court in *DPP v Special Criminal Court* [1999] 1 I.R. 60.

The particular duty resting upon the prosecution to make disclosure to the defence is well established. The essence of the duty has been expressed in the following terms by the Supreme Court in *McKevitt v DPP* (ex tempore, Supreme Court, March 18, 2003):

> "[T]he prosecution are under a duty to disclose to the defence any material which may be relevant to the case which could either help the defence or damage the prosecution, and if there is such material which is in their possession they are under a duty to make that available to the defence."

As the English Court of Appeal (Criminal Division) pointed out in *R v Ward* (1993) 96 Cr. App. R. 1 at 22 non-disclosure can be a potent source of injustice because, even with the benefit of hindsight, it will often be difficult to say how a particular item of material, had it been disclosed, might have influenced the course (and possibly therefore the outcome) of the case. Therefore, as the Court of Criminal Appeal in this jurisdiction has held in *The People (DPP) v McKevitt* [2005] I.E.C.C.A. 139 (December 9, 2005):

> "A person charged with a criminal offence has a right to be furnished, firstly, with details of the prosecution evidence that is to be used at the trial, and secondly, with evidence in the prosecutor's possession which the prosecution does not intend to use if that evidence could be considered relevant or could assist the defence."

The prosecution's duty of disclosure therefore extends to any document or other material which would assist the defence case, damage the prosecution case or which provided a lead to evidence which went towards doing either of those things. It was submitted, which submission I readily accept, that the following statement by Lord Taylor C.J. in *R v Keane* [1994] 1 W.L.R. 746 also reflects the law in Ireland:

> "[Material evidence is that] which can be seen on a sensible appraisal by the prosecution: (a) to be relevant or possibly relevant to an issue in the case; (b) to raise or possibly raise a new issue whose relevance is not apparent from the evidence the prosecution proposes to use; (c) to hold out a real, as opposed to a fanciful, prospect of providing a lead on evidence which goes to (a) or (b)."

In the instant case the respondent having heard extensive argument on the matter concluded that the documentation in the possession of the Applicant might be of "significant assistance" to the accused persons, the second- and third-named Notice Parties herein. He proceeded to say:

> '[I]t is my first priority to ensure that Ms Joel and Mr Costen are afforded the right to a fair trial…'

In the circumstances it cannot be said that the learned Respondent erred in law or acted unreasonably in directing that the material in question be furnished to the first-named Notice Party.

The issue of third party disclosure has arisen in previous cases. It is now well established that discovery is not available in criminal proceedings - *People (Director of public Prosecutions) v Sweeney* [2001] 4 I.R. 102 and *D.H. v Groarke* [2002] 3 I.R. 522. It is also reflected in the more recent decision of the Supreme Court in *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party)* [2008] 1 I.R. 753 which also held the an order of *subpoena duces tecum* was not an appropriate mechanism for obtaining disclosure of material which is unavailable by other means.

The fourth named notice party again quotes extensively from the judgment of Geoghegan J in *J.F.* He then submits that it is clear from the remarks by Geoghegan J that, notwithstanding the absence of third-party discovery in criminal proceedings, the Supreme Court envisaged at least the possibility that a third party, and particularly perhaps if that party was a public body, might be required as a matter of justice to furnish the DPP with material with a view to its disclosure to an accused person in furtherance of that person's right to a fair criminal trial.

It is a significant point in relation to possible obligations of confidence assumed by the applicant, or third party rights to privacy that the Respondent's order was that the material in question be furnished to Director of Public Prosecutions, as opposed to being given directly the accused persons or their representatives. Further, the order is made subject to the Applicant or individual members of the aforementioned investigating committee being entitled to request the Circuit Court for a ruling of privilege, confidentiality or related matter connected with the said documentation. It is also part of the order that the material is to be used exclusively by the accused persons for the purpose of the criminal prosecution and not to be disclosed to any third party except for the purpose of preparing their defence. It may also be assumed that the Director of Public Prosecutions will have due regard to issues of materiality and privilege when deciding on the disclosure of the material in question to the defence.

It is accepted by the fourth-named Notice Party that the Applicant has acted conscientiously and in good faith in adopting its present stance towards the disclosure issue which is at the heart of the present dispute. However, it is submitted that existing legal principles support the legality and reasonableness of the decision taken by the Respondent. In particular, there is the well established principle that in the hierarchy of rights and interests engaged by the criminal justice process, the right of an accused person to a fair trial takes priority. Secondly, they submit that it is established beyond doubt that every trial judge has a right and a duty to take whatever steps are necessary to secure a fair trial for the accused person. As regards this second point the only comment the Court would make is that it ought perhaps to be recast so as to read "every trial judge has a right and a duty to take whatever steps he may within jurisdiction as are

necessary etc etc"

In a recent case before the Supreme Court, namely *People (Director of Public Prosecutions) v Gilligan* [2006] 1 I.R. 107 Denham J stated (at p.137):

> "While applying these principles to protect the rights of an accused the court will also have regard to the right of the people that offences be prosecuted. This may require the court to balance competing rights. On a hierarchy of constitutional rights, the accused's right to a fair trial is superior to the community's right to have the matter prosecuted: *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476. In balancing competing positions the test is whether there is a real or serious risk of an unfair trial for the accused: *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465. The right of the people is also part of the equation. This incorporates the right to have an accused prosecuted; the right to have a fair trial system in the community; and to guard against unfair trials which may lead to miscarriages of justice. The position of victims (and their families) should not be excluded from this equation either."

It was further submitted on behalf of the Attorney General Equally that it is well established within our jurisprudence that a trial judge is under a constitutional duty to take all appropriate steps to ensure that an accused person receives a fair trial. There are many judicial statements to this effect, including the following statement by the Supreme Court, per Fennelly J., in *Blanchfield v Hartnett* [2002] 3 I.R. 207 at 221:

> "The overwhelming responsibility reposed by the law and the Constitution on the trial judge is to ensure the fairness of the trial. An exceptionally important aspect of this function is to adjudicate on the evidence which should be placed before the jury. It is, in my view, inherent in that function that the trial judge be clothed with the power to judge the validity of legal procedures taken in order to extract, collect or gather evidence."

It was further submitted that it is also well established by virtue of both the Constitution and the common law that an accused person is entitled to an adequate opportunity to prepare and present his or her defence. This is reflected in a well-known statement by Lord O'Brien C.J. in *R (Martin) v Mahony* [1910] 2 I.R. 695 at 708:

> "[I] in all matters of procedure the essentials of justice must be observed. It is one of the essential requirements of justice that a charge should be duly formulated: that an accused person should have due notice of it, and that he should be given an adequate opportunity of defending himself. Such matters are more mere formalities; they are essential requirements of justice."

The essential submission being made by the fourth-named Notice Party in the context of the present case is that, in light of the principles set out above it is within the jurisdiction of a trial judge to make an order of the kind made by the Respondent herein.

Decision
Every judge trying a criminal case is obliged in accordance with the declaration that he or she made on assuming office to uphold the Constitution and the law. Article 38.1 of the Constitution specifies that no person shall be tried on any criminal charge save in due course of law. Moreover, an accused by virtue of his personal rights under Article 40.3 of the Constitution has a right to fair procedures, and to expect that the laws of the State will facilitate the defence and the vindication of his good name in the case of it being unjustly attacked.

Trial in due course of law
In The *State (Healy) v. Donoghue* [1976] I.R.325 Gannon J, in the High Court, referred to the "due course of law requirement" and called it:

> "…a phrase of very wide import which includes in its scope not merely matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function."

Giving judgment in the same case, on the appeal to the Supreme Court, O'Higgins C.J. said (at p.348):

> "…..the concept of justice, which is specifically referred to in the preamble in relation to the freedom and dignity of the individual, appears again in the provisions of Article 34 which deal with the Courts. It is justice which is to be administered in the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual. No court under the Constitution has jurisdiction to act contrary to justice."

He continued (at p.349):

> "Article 38 deals specifically with a criminal trial and provides that no person should be tried on any criminal charge save in due course of law. This Article must be considered in conjunction with Article 34; with Article 40, s. 3, sub-s. 1, under which "the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen" and with sub-s. 2 of the same section under which "the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." Being so considered, it is clear that the words "due course of law" in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights. What then does justice require in relation to the trial of a person on a criminal charge? A person charged must be accorded certain rights. In referring to these in his judgment, Mr. Justice Gannon said:—
>
> > 'Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to

have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence.'

It seems to me that this puts very clearly what one would expect to be the features of any trial which is regarded as fair. However, criminal charges vary in seriousness. There are thousands of trivial charges prosecuted in the District Courts throughout the State every day. In respect of all these there must be fairness and fair procedures, but there may be other cases in which more is required and where justice may be a more exacting task-master. The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial."

He subsequently added:

> "The general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed. The right to speak and to give evidence, and the right to be represented by a lawyer of one's choice were recognised gradually. To-day many people would be horrified to learn how far it was necessary to travel in order to create a balance between the accuser and the accused."

The following year, in the case of *In re Article 26 and the Criminal Law (Jurisdiction) Bill,* 1975 [1977] I.R. 129, O'Higgins C.J. in delivering the Court's opinion said that Article 38.1 required:

> "..fair and just treatment for the person so charged, having due regard to the rights of the State to prosecute for the offence charged and to ensure that the person so charged will stand his trial. The phrase 'due course of law' requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society"

Accordingly, although it is clear that by virtue of Article 38.1, every individual who is accused of a crime has the right to a fair trial, the ramifications of Article 38.1 do not begin and end there. By virtue of Article 38.1 it is also the right of the people of Ireland, on whose behalf and in whose name all prosecutions on indictment are brought by the relevant prosecuting authorities (hereinafter referred to for convenience as "the State"), to have those accused of crimes tried fairly and in due course of law, for it is only by doing so that they can maintain an effective criminal process in the common interest and for the good of the community as a whole. In that regard Keane J stated in *Kelly v O'Neill* [2000] 1 I.R. 354 (at p.375) that:

> "As has been frequently pointed out, the right to a fair trial in due course of law guaranteed under the Constitution is not simply a right vested in those who happen to be accused of particular crimes: it is in the interest of the community as a whole that the right should be protected and vindicated by the State and its organs."

Previous statements to similar effect are to be found in *The People (Director of Public Prosecutions) v O'Shea* [1982] I.R.384 and in *The People (Director of Public Prosecutions) v Quilligan (No 2)* [1989] IR 46. In the O'Shea case, which concerned a challenge to the jurisdiction of the Supreme Court under Article 34.4.30, of the Constitution to entertain an appeal from a verdict of not guilty duly recorded by a jury at the trial of an accused on indictment in the High Court (Central Criminal Court). In the course of his judgment O'Higgins C.J. said (at p.405):

> "It should be remembered that the Constitution is concerned with justice and, in the context of this case, with criminal trials being fairly conducted in due course of law. While these considerations provide safeguards for the person accused, they also guarantee to the State which accuses him, and which has a duty to detect and suppress crime, that he will be tried fairly and properly on the evidence adduced against him and in accordance with law. If, as a result of an error made by the trial judge, the jury is not permitted to consider the evidence or the charge brought against an accused or to pronounce on his guilt or innocence, can it be said that justice has been accorded to the State and to society? In my view, it cannot and, if this be so, a situation would exist which the Constitution prohibits.

This principle, *viz* that the State and society are also entitled to have criminal cases tried fairly and in accordance with law, was re-iterated in *Quilligan (No 2).* Walsh J said in that case (at p.53):

> "The respondents stand charged with murder which is the most serious of all crimes in our law. They are entitled as of right to a fair trial but the People, who in the Director of Public Prosecutions have brought this prosecution, are also entitled to have the matter tried and fairly tried in accordance with law."

It has been stated many times that a trial will not be a trial in due course of law for the purposes of Article 38.1 if the accused can demonstrate that there is a real or serious risk that the trial will be unfair. (See (*inter alia*) *D v. Director of Public Prosecutions* [1994] 2 I.R. 465; *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 ; *B v Director of Public Prosecutions* [1997] 3 I.R. 140; *P.C. v Director of Public Prosecutions* [1999] 2 IR 25 and *Bowes & McGrath v. Director of Public Prosecutions*, (unreported, Supreme Court, 6 February, 2003 and [2003] IESC 9.) Moreover, in any balancing of rights situation as between the State's right to prosecute on the one hand and the accused's right to a fair trial on the other hand it is beyond all doubt that the accused's right to a fair trial is the superior right and it is the one that must be vindicated. In *B v Director of Public Prosecutions* [1997] 3 I.R. 140, Denham J said (at p.196):

> "The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant's right would prevail, see *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 at pp. 473 and 4*; Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476 at p. 506."

Having said that, and as Finlay C.J. has made clear in *Z v. Director of Public Prosecutions*:

> "[A]n onus to establish a real risk of an unfair trial …….necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

The key wording here is "appropriate rulings and directions on the part of the trial judge." While a trial judge is obliged to take steps to defend and vindicate the accused's right to a fair trial the steps he takes must be appropriate steps. In other words they must be steps taken within jurisdiction.

The opportunity to prepare a defence.
In The *State (Healy) v. Donoghue*, Gannon J identified "the right to have an opportunity for preparation of the defence" as being among "the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy". It is to this end that there exists upon the prosecution in a criminal trial a duty of disclosure. Obviously the State cannot be allowed to conduct trial by ambush and an accused must know the case against him if he is to answer it. However, for an accused to be afforded a truly fair trial it is not sufficient that he should be merely advised of the nature of the charge and of the evidence that the State intends to adduce against him. More is required. An accused needs to be aware of the existence of all relevant evidence within the knowledge or possession of the prosecution so that, in the words of McCarthy J in *The People (Director of Public Prosecutions) v. Tuite* (1983) 2 Frewen 175 at 181.) "if the prosecution does not adduce such evidence, the defence may, if it wishes, do so." Moreover, an inherent and essential part of the necessary preparations for the defence of a criminal case is that the defendant's lawyers should have the opportunity to plan effective lines of cross-examination. To do so they require access to necessary materials and an adequate period of time in which to consider them. Adapting an old adage for my purpose, success in cross examination is often, as in many other things, the fruit of "10% inspiration and 90% perspiration". This very point was made by Hardiman J in *J.F.*, in a passage that I have quoted already in my review of the second named notice party's submissions, but which bears repeating, when he said:

> "Oral contradiction in a public forum is the culmination of the work of the cross-examiner but it is by no means the whole of it. All effective cross-examinations…are the result of intensive preparation. It is of the essence of the right to cross-examine that the cross-examiner, the advocate selected by the person impugned, should have access to the materials for cross-examination. Study and assessment of these materials is a vital part of the process of cross-examination. It is also a vital factor in the formulation of the advice an advocate gives to his client."

In summary, a defendant's lawyer needs to prepare thoroughly for an effective cross-examination. To do he has to have the necessary materials and so if the prosecution have knowledge of, or are in possession of, relevant material that may assist him they must disclose it.

The risk to a fair trial in the present case
In the present case the applicant is possession of materials which may, potentially, be relevant or useful in the defence of the charges pending against the second and third named notice parties. They are not, however, in the possession of the first named notice party who is the prosecutor. The prosecutor has requested the applicant to make these materials available to him so that he might consider them and, if appropriate, possibly make some or all of them available to the lawyers for the second and third named notice parties in accordance with his duty of disclosure. The applicant is not a party to the criminal proceedings and, for its own reasons, which are ostensibly legitimate and rational, has refused to make them available.

However, although none of the lawyers in the criminal proceeding have seen the actual material in respect of which disclosure is sought, they are united in their view that it ought to be made available, at least to the first named notice party in the first instance, with a view to him assessing its potential relevance and, possibly disclosing it to the defence teams. The Director of Public Prosecutions, the lawyers for both accused and the Attorney General are ad idem in their belief that there is a real and substantial risk that the accused may not receive a fair trial unless the material in question is made available in the manner suggested. The respondent, a very experienced and careful trial Judge, clearly shares their view and this Court will not gainsay him in that.

The motion seeking directions from the trial judge
So what then was to be done when the parties, and particularly the lawyers for both accused, became concerned about a risk that the accused persons might not receive a fair trial? The proper and appropriate step was to seek directions from the trial judge. This lawyers for the second named accused (the third named notice party herein) duly did, and the respondent was then faced with considering whether an unfair trial could be avoided by appropriate rulings and directions on his part. The specific relief sought in the relevant Notice of Motion, as against the Minister for Health, The Health Service Executive, Ireland and the Attorney General respectively, was in each case an *"Order directing the [addressee] to take all reasonable steps to obtain, and subsequently make disclosure to the Second-Named Accused of the following documentary material etc etc".* As will recalled the applicant in the present proceedings vehemently opposed this application and requested the respondent to state a case for the opinion of the Supreme Court. After careful consideration the respondent concluded on the 27th of May 2008 that in order to safeguard the right to a fair trial of each accused respectively, it was necessary for him to make an order in the terms of the order that the applicant now seeks to impugn. In doing so he stated *"I am of the view that the law as it has now been developed in respect of precedent allows the trial Judge clearly to make the order and I don't think that I need any assistance in relation to that."* There is no doubt in my mind that he was referring to Geoghegan J's obiter dictum in *J.F. v Judge Michael Reilly and the Director of Public Prosecutions and the Midland Health Board (Notice Party),* although strictly speaking it is incorrect to attribute precedent value to an obiter statement. It is clear that this is so from his initial ruling on the 20th of May 2008 wherein he stated: *"there are indications from the Supreme Court that there reposes in the trial judge in the trial, following fair procedures, [power??] to deal with these issues, and in certain cases to deal with issues which are not directly in the power of procurement of the DPP, and may be, or are, in the possession of a third-party, which is either a State party, or which is funded by a State agency."*

Jurisdiction generally
There are two different aspects to jurisdiction. The first aspect relates to the entitlement of a Court to hear or determine

any particular matter, whether it be civil or criminal. When speaking of jurisdiction in this sense only it may be convenient to refer to it as "jurisdiction in the narrow sense". The second aspect relates to the substantive and procedural powers and remedies available to the Court in the course of hearing a particular matter in respect of which it may have jurisdiction in the narrow sense. When speaking of jurisdiction as embracing both of these aspects it may be convenient to refer to it as "jurisdiction in the broad sense."

Although Article 34.3.10 speaks in terms of the High Court being "invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal," that does not mean that the High Court can do what it likes when hearing a case, even if it be a criminal case where constitutional rights are at stake. It is obliged, in particular, to respect the principle of the separation of powers on a tripartite basis as between the legislature, the executive and the judiciary. The reference to "full original jurisdiction" is a reference to it's jurisdiction in the narrow sense. It means that the High Court's jurisdiction to hear and determine civil or criminal cases, as in its "constitutional entitlement" to do so, is unlimited. To quote Messrs Hogan and Whyte in "JM Kelly, The Irish Constitution" (4th ed, at para 6.2.02):

> "That is to say, no cause of action known to the law is constitutionally excluded from the jurisdiction of the High Court, nor any criminal matter; though …a statutory 'distribution' of jurisdiction may have the effect of confining certain matters with exclusive effect to some other courts."

It is a matter of some controversy and debate among lawyers as to whether Article 34. 3.10 is creative of jurisdiction or merely investitive of jurisdiction. There has been no definitive statement on this question from the Supreme Court. A majority of a three member Court (Walsh J and Griffin J) thought so in *RD Cox Ltd v Owners of MV Fritz Raabe* [2002] 1 ILRM 532. However, there was a strong dissenting judgment from Henchy J. More recently, the Supreme Court has adopted an approach more in line with views of Henchy J in *The People (Director of Public Prosecution) v Sweeney* [2001] 4 IR 102 in as much as Geoghegan J focussed on the historical antecedents of the High Court's criminal jurisdiction and did not see Article 34.3.10 as creating a jurisdiction which did not otherwise exist.

By virtue of s. 11(1) of the Courts (Supplemental Provisions) Act, 1961 the High Court when exercising its criminal jurisdiction (in the narrow sense) is known as "The Central Criminal Court."

As regards the jurisdiction of the High Court in the broad sense, in most cases the procedural powers and substantive remedies available to it are expressly provided for in primary or secondary statute law (including the Rules of the Superior Courts) and, occasionally, on the basis that the power or remedy in question, though non-statutory, is well recognised and long established within the common law or the law of equity in Ireland. However, and in addition, it may in certain circumstances also act on the basis that it has an "inherent" jurisdiction. The High Court is regarded as having (in the words of Messrs Hogan and Whyte at para 6.2.04) "a general capacity to afford a remedy where a right is breached, even though no action, or other remedy in statutory vesture, appropriate to the assertion of the right is immediately obvious." Again, to quote Messrs Hogan and Whyte (at para 6.2.04):

> "This proposition has been stated with reference to the courts generally in the context of breach of constitutional rights in a number of cases, but was first stated with specific reference to the High Court and to the assertion of mere statutory rights, by Gavan Duffy J in *O'Doherty v. Attorney General* [1941] IR 569."

However, recent jurisprudence suggests that this is a jurisdiction to be exercised with considerable restraint, and only in exceptional circumstances. This is something I will come back to.

The jurisdiction of the Circuit Court in indictable criminal matters
The Circuit Court is a court of limited and local jurisdiction. Nevertheless s. 25 of the Courts (Supplemental Provisions) Act, 1961 (as amended) provides (*inter alia*):

> "(1) Subject to subsection (2) of this section, the Circuit Court shall have and may exercise every jurisdiction as respects indictable offences for the time being vested in the Central Criminal Court ….."

[Subsection (2) expressly excludes from the Circuit Court's jurisdiction in respect of certain categories of offences.]

Although it has been held that the Central Criminal Court is in fact the High Court sitting in the exercise of its criminal jurisdiction, s.25 (1) of the 1961 Act is manifestly not to be interpreted as conferring "full original jurisdiction" on the Circuit Court in criminal matters, even in the narrow sense. It does not do so, not least because, unlike the High Court, the Circuit Court has no power to interpret the Constitution. However, in most other respects, notwithstanding that the Circuit Court has its own rules, the procedural powers and substantive remedies available to it in the exercise of its criminal jurisdiction mirror those of the Central Criminal Court. It is appropriate that this should be so because the constitutional imperative contained in Article 38.1 of the Constitution to provide trial in due course of law applies as much to the Circuit Court as it does to the High Court sitting as the Central Criminal Court. Although, as I have said, the Circuit Court has no entitlement to interpret the Constitution when engaged upon a criminal trial, it is, nevertheless, and in common with every other Court in the land, obliged to apply and uphold the Constitution. In the normal course of events it is obliged to do so using the range of procedural powers and substantive remedies provided to it under primary and secondary statute law, or such as are recognised as continuing to exist at common law for use in that context.

Recourse to inherent jurisdiction
The following passage from the judgment of O'Dalaigh C.J. in *The State (Quinn) v Ryan* [1965] IR 70 is frequently cited in support of the proposition that the courts have the power to create new remedies for the protection of constitutional rights. The former Chief Justice said (at p.122):

> "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one

> can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires."

However, as Hardiman J has pointed out in *Sinnott v. Minister for Education* [2001] 2 IR 549 this passage has to be read in it's particular context. In that case the prosecutor, having been arrested in Dublin on foot of a British arrest warrant, had successfully sought and obtained from the High Court an absolute Order of Habeas Corpus on the grounds that the warrant was bad. The British authorities then issued a new warrant on foot of which the prosecutor was re-arrested by An Garda Siochána shortly after his release. The circumstances surrounding this were characterised by O'Dalaigh C.J in the following terms:

> "a plan was laid by the police, Irish and British, to remove the prosecutor after his arrest on the new warrant from the area of jurisdiction of our Courts with such dispatch that he would have no opportunity whatever of questioning the validity of the warrant. It is also clear that the applicant's solicitor was refused information (and in one instance supplied with misinformation) as to his client's whereabouts while his client was still within the jurisdiction, and that this refusal was persisted in while the prosecutor was still in Northern Ireland.
>
> It should be pointed out that in zeal for celerity of action the plan provided for sending the prosecutor into Northern Ireland where on no view of the law he was authorised to be sent. The authority of the warrant (if authority it had) was to transmit him to Britain. To have done this would, however, have involved delay in Dublin while the departure of aeroplane or ship was awaited. But any delay within the jurisdiction might have afforded the prosecutor's solicitor an opportunity to challenge the validity of the new warrant in the Courts and this would have set at nought the whole purpose of this plan.
>
> In plain language the purpose of the police plan was to eliminate the Courts and to defeat the rule of law as a factor in Government."

According to Hardiman J in *Sinnott's* case (at p.709) the celebrated passage was -

> "not an assertion of an unrestricted general power in the judicial arm of government but rather a strong and entirely appropriate statement that a petty fogging, legalistic response to an order in the terms of Article 40.4 of the Constitution will not be permitted to obscure the realities of the case, or to preclude appropriate action by the courts."

He is clearly right about this. What the Chief Justice in fact had in mind was to penalise the offenders for contempt of the High Court, and not the fashioning of some new remedy. That it is so is apparent from the last sentence of the paragraph in question (which is rarely quoted) and from the short paragraph that immediately follows it:

> "Anyone who sets himself such a course is guilty of contempt of the Courts and is punishable accordingly.
>
> The proper order to be made in respect of Detective Inspector Matthew G. Ryan is that he be served with notice to show cause why he should not be held to be guilty of contempt of the Courts and dealt with accordingly."

I have previously alluded to the fact that the judiciary are obliged to respect the principle of the separation of powers. While it may be argued that every Court arguably has, to a greater or lesser extent, an inherent jurisdiction to fashion new remedies in order to vindicate constitutional rights, there is a real danger associated with the exercise of such inherent jurisdiction that a Court may cross the line and that the process it is engaged in may amount *de facto* to legislation, or executive action, by the Court, thereby breaching the principle of the separation of powers. The dangers in this regard have been pointed out many times before.

In the case of *M.M. v P.M.* [1986] ILRM 515 McMahon J rejected the idea that Article 34. 3.10 of the Constitution invested the High Court with an inherent jurisdiction to create a new ground of nullity of marriage. He said (at p.517):

> "Under the Constitution the jurisdiction of the High Court extends to determining all questions of nullity of marriage, but that is a jurisdiction which clearly must be exercised upon grounds to be determined by the legislature. For the courts to add new grounds would be to engage in legislation."

Speaking on the same theme in *Sinnott v. The Minister for Education* [2001] 2 IR 545 Hardiman J said (at pp 707/708):

> In *Buckley and Others (Sinn Féin) v. Attorney General and Another* [1950] I.R. 67, the High Court and the Supreme Court affirmed in strong terms the courts' independence of the other branches of government, and specifically the unconstitutionality of a legislative measure purporting to determine the disposal of funds when the courts were seized of the issue. The striking affirmation in that case of the separation of powers has already been quoted. It appears to me that the courts must be equally concerned not to infringe upon the proper prerogatives and area of operations of the other branches of government. The functions of these branches, like those of the courts, are themselves of constitutional origin and constitutionally defined.
>
> In my view, the foregoing principles underlie the essential distinction drawn by Costello J. between issues which can be pursued in the Four Courts and issues which, to comply with the Constitution, must be pursued in Leinster House. It is easy to imagine a particular case in which a party might think, and might convince a judge, that a particular act or omission of the legislature or executive was clearly wrong and that another course of action (outlined perhaps in considerable detail in uncontradicted evidence) clearly right or at least preferable. That indeed was what happened in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181. But even if a court were quite satisfied that this situation existed, that fact alone would not justify it in purporting to take a decision properly within the remit of the legislature or the executive. I reiterate that it is an independent constitutional value, essential to the maintenance of parliamentary democracy, that the legislature and the executive retain their proper independence in their respective spheres of action. In these spheres, the executive is answerable to Dáil Éireann and the members

of the legislature are answerable to the electorate.

Moreover, the independence of these organs of government within their spheres must be real and not merely nominal. This is imperatively required by the Constitution. Article 15.2.10 provides:-

> 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.'

Equally, Article 28.2 provides that:-

> 'The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.'

Article 28.4.1 provides that:-

> 'The Government shall be responsible to Dáil Éireann .' "

In *T.D. and others v The Minister for Education and others* [2001] 4 I.R. 259 the Supreme Court had occasion to consider mandatory orders made Kelly J in the High Court directing the respondents (various Ministers and government agencies) to take specific actions to implement a policy previously formulated by the respondents which was intended to deal with the general problem of children with special needs, purportedly in vindication of the constitutional rights of the applicants. In his judgment Murray J. (as he then was) sets out the High Court judge's reasoning for making the orders in question. He said:

"…there were four factors which the learned High Court Judge stated at p. 84 he should take into account before deciding on whether or not to grant the mandatory injunctions.'First, the High Court has already granted declaratory relief concerning the obligations of the State towards minors of the type involved here. Secondly, if that declaration is to be of any benefit to the minors in whose favour it was made, the necessary steps consequent upon it must be taken expeditiously. Otherwise the minors will achieve majority without any benefit being gained by them. Thirdly, the effect of a failure to provide the appropriate facilities must have had a profound effect on the lives of children and put them at risk of harm. It continues to do so. Fourthly, due regard must be had to the efforts made on the part of the State to address the difficulties to date.'

In deciding that the court had jurisdiction to make the orders sought in order to vindicate the rights identified by Geoghegan, J. in *F.N. v. Minister for Education* [1995] 1 I.R. 409, the learned High Court Judge cited the following authorities at p. 82: -

> 'Hamilton C.J., in *D.G. v. Eastern Health Board* [1997] 3 I.R. 511 at p. 522 said:-
>
> If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts had the jurisdiction to do all things necessary to vindicate such rights.

As stated by Ó Dálaigh C.J. in the course of his judgment in *The State (Quinn) v. Ryan* [1965] I.R. at p. 122:-

> "It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires".'

The learned High Court Judge then went on to cite what he had stated in his judgment in *D.B. v. Minister for Justice* [1999] 1 I.R. 29 at p. 40 thereof:-

> 'These quotations seem to me to establish the proposition that in carrying out its constitutional function of defending and vindicating personal rights, the Court must have available to it any power necessary to do so in an effective way. If that were not the case, this Court could not carry out the obligation imposed upon it to vindicate and defend such rights. This power exists regardless of the status of a respondent. The fact that in the present case the principle respondent is the Minister for Health is no reason for believing that he is in some way immune from orders of this court in excess of mere declarations if such orders are required to vindicate the personal rights of a citizen'.

He then went on to quote what Finlay C.J. had said in *Crotty v. An Taoiseach* [1987] I.R. 713 at p. 773:-

> '"With regard to the executive, the position would appear to be as follows:- This Court has on appeal from the High Court a right and duty to interfere with activities of the executive in order to protect or secure the constitutional rights of individual litigants where such rights have been or are being invaded by those activities or where activities of the executive threaten an invasion of such rights. This right of intervention is expressly vested in the High Court and Supreme Court by the provisions of Article 34, s. 3, sub-s. 1 and 34, s. 4, sub-s. 3 of the Constitution and impliedly arises from the form of the judicial oath contained in Article 34, s. 3, sub-s. 1 of the Constitution.'

Commenting on this justification at p. 335 of his judgment, Murray J said:

> "It seems to me, that in incorporating the policy programme as part of a High Court order, the policy is taken out of the hands of the Executive, which is left with no discretionary powers of its own. It becomes the policy and programme of the court which cannot be varied or any decision taken which might involve delay (or an adjustment of policy) without the permission and order of the court. A judicial imperative is substituted for executive policy. The judge becomes the final decision maker. In short he is administrator of that discrete policy. That is not a judicial function within the ambit of the Constitution.
>
> Another inevitable consequence of the High Court order would be to undermine the answerability of the Executive to Dáil Éireann and thus impinge on core constitutional functions of both those organs of State. Article 28.4.1 provides 'The Government shall be responsible to Dáil Éireann'."

Murray J further expressed the view that:

> "The jurisdiction of the courts as envisaged by the Constitution is ample to defend and vindicate rights guaranteed by the Constitution, as the experience of many decades has demonstrated. Judicial statements as to the amplitude of the powers of the court in this regard in such cases as *The State (Quinn) v. Ryan* [1965] I.R. 70 and *D.G v. Eastern Health Board* [1997] 3 I.R. 511, can only be interpreted and applied within the ambit of the role conferred by the Constitution on the courts with due respect to the role and function of the executive and the legislature. Any other approach would introduce incoherence into the concept of the separation of powers as delineated by the Constitution. In my view the grounds relied upon by the learned High Court Judge did not entitle him to make the

mandatory order."

He went on to state further:

> "In coming to the conclusions above I do not wish to determine that the courts may never make a mandatory order in any form as opposed to a declaratory or other order, against an organ of state.
>
> In so far as *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10, *Crotty v. An Taoiseach* [1987] I.R. 713 and District Judge McMenamin v. Ireland [1996] 3 I.R. 100 might be said to be authority for the making of some form of mandatory order where there is "a clear disregard" by the State of its constitutional obligations, it must be borne in mind that in none of those cases was a mandatory order granted. I have already made the distinction between "interfering" in the actions of other organs of State in order to ensure compliance with the Constitution and taking over their core functions so that they are exercised by the courts. For example, a mandatory order directing the executive to fulfil a legal obligation (without specifying the means or policy to be used in fulfilling the obligation) *in lieu* of a declaratory order as to the nature of its obligations could only be granted, if at all, in exceptional circumstances where an organ or agency of the State had disregarded its constitutional obligations in an exemplary fashion. In my view the phrase "clear disregard" can only be understood to mean a conscious and deliberate decision by the organ of state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or recklessness. A court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory order made by the court."

Concurring with Murray J on this point Hardiman J said (at p.372):

> "Such an order, in my view, could only be made as an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself. I do not believe that any circumstances which would justify the granting of such an order have occurred since the enactment of the Constitution 64 years ago. I am quite certain that none are disclosed by the evidence in the present case."

Dealing earlier in his judgment with the learned High Court judge's reliance on inherent jurisdiction to make the orders in question, Hardiman J had this to say:

> "I believe that all of the suggested foundations for a jurisdiction to make an order of the kind in question here are based on a misapprehension of the powers of the superior courts in relation to those of the other organs of government. The Constitution, in my view, does not attribute to any of the branches of government an overall, or residual, supervisory power over the others. It creates three equal powers, none of which is generally dominant. Equality of the powers can only operate in practice on the basis that each has its discrete remit. Since each of the powers, legislative, executive and judicial must "fit harmoniously into the general constitutional order and modulation" as Henchy J. said in *The People v. O'Shea* [1982] I.R. 384, the Constitution provided specifically for certain mutual checks and balances. These include the power of the courts to ensure that legislation is consistent with the Constitution, the power of the legislature to remove a judge of the superior courts and the power of the executive to tender binding advice to the President as to the appointment of judges.
>
> The existence of these specific powers does not, in my view, suggest that the separation of powers is in any general sense a porous one, still less that a court, or any other organ of government, can strike its own balance, in a particular case, as to how the separation of powers is to be observed.
>
> I believe, with great respect to the High Court judgment, that its view of the separation of powers is unduly courts centred. The proposition that "The court has to attempt to fill the vacuum which exists by reason of the failure of the legislature and the executive" seems to me to come close to asserting a general residual power in the courts, in the event of a (judicially determined) failure by the other branches of government to discharge some (possibly judicially identified) constitutional duty. If this were accepted I believe it would have the effect of attributing a paramountcy to the judicial branch of government which I do not consider the Constitution vested in it."
>
> At p. 369 of the report, he adds:
>
> > "The terms of Article 40.3.1 involve the State in a guarantee to "respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen". This guarantee is given by the State and not uniquely by any one of the organs of state. It is a guarantee to respect, vindicate and defend these rights "by its laws". Since the Constitution is the fundamental law of the State, it follows that the solemn task of respecting, vindicating and defending these rights is to be undertaken by all the organs of State, each in its constitutionally mandated and delimited sphere.
> >
> > These propositions appear to me to be amply borne out by authority. As to the proposition that the obligations imposed by the article are imposed on each branch of government, in *The People v. Shaw* [1982] I.R. 1, Kenny J. said of Article 40.3. at p. 62:-
> >
> > > "The obligation to implement this guarantee is imposed not on the Oireachtas only but on each branch of the State which exercises the powers of legislating, executing and giving judgment on those laws …"
>
> As to the relevance of the separation of powers to the discharge of other functions and obligations imposed by the Constitution, Finlay C.J. said, in *Crotty v. An Taoiseach* [1987] I.R. 713 at p. 772:-
>
> > "The separation of powers between the legislature, the executive and the judiciary, set out in Article 6 of the Constitution, is fundamental to all its provisions. It was identified by the former Supreme Court in *Buckley and Others (Sinn Féin) v. Attorney General and Another* [1950] I.R. 67 and has since been repeatedly acknowledged and implemented by this Court. It involves for each of the three constitutional organs concerned not only rights but duties also; not only areas of activity and function, but boundaries to them as well."
>
> In effect, each organ of government shows respect for the others by recognising the boundaries of which Finlay C.J. spoke. I do not believe that the boundaries are porous or capable of being ignored or breached because one

organ rightly or wrongly considers that another organ is unwise or inadequate in the discharge of its own duties. It is easy to imagine circumstances in which a hypothetical legislature or executive might be annoyed or frustrated or even outraged by a judicial decision, or even by the very idea that the judiciary would decide a particular issue, as happened in *Buckley and Others (Sinn Féin) v. Attorney General and Another* . But it is now an axiom of our constitutional dispensation that, assuming the decision to be properly within the judicial sphere, the other organs cannot remove the matter in issue from that sphere or set aside the decision in a *lis inter partes*. There is an obvious corollary of this in relation to matters properly within the sphere of the legislature or executive."

Although the need for judicial restraint in both the fashioning of new remedies and the enlargement of existing remedies on the basis of inherent jurisdiction has recently been extensively covered , both in the *T.D.* case and in the *Sinnott* case, it is also worth noting for completeness that in 1999 Barrington J sounded a note of caution in a somewhat similar vein (although not expressly on the basis of concerns about separation of powers) in his judgment in *Doyle v Comissioner of An Garda Siochána* [1999] 1 I.R. 249. In that case Barrington J rejected an argument that the High Court had an inherent jurisdiction deriving from Article 34.3.10 to expand the ancient action for sole discovery so as to enable the plaintiff to utilise it in aide of an application by him to the European Commission on Human Rights under article 25 of the European Convention on Human rights. In his judgment Barrington J said:

"The plaintiff submits that his right to bring a claim against the United Kingdom under the provisions of the European Convention on Human Rights is one of the unspecified personal rights protected by Article 40.3 of the Constitution. He then turns to Article 34.3.1 of the Constitution which provides:-

> "The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal."

He therefore submits that there can be no question about the jurisdiction of the Irish court to make the order which he seeks. He distinguishes the present case from *Megaleasing U.K. Ltd. V. Barrett* [1993] I.L.R.M. 497 and the earlier English cases on the same subject because, he says, he is not seeking the identity of the wrongdoer but seeking the aid of the Irish courts in obtaining evidence to prove the wrong to the satisfaction of the European Court of Human Rights.

Assuming, for the moment, that the plaintiff is right in his submissions on these abstract points of law it is difficult to see how they assist him in the concrete circumstances of this case. It may be true that the jurisdiction conferred on the High Court by Article 34, being constitutional in nature, is more deeply entrenched and formidable, than the common law jurisdiction discussed above. But *Megaleasing U.K. Ltd. V. Barrett* [1993] I.L.R.M. 497, did not turn upon want of jurisdiction. It turned upon self restraint which the court should observe in exercising a jurisdiction which could have very far fetched implications and which might, unless exercised with restraint, result in injustice. There is no reason why the court should not observe equal restraint in exercising its jurisdiction under Article 34.3.1 of the Constitution."

The nature of the respondent's order

The respondent's order is not "a Disclosure Order" in the commonly understood sense. Strictly speaking there is no such remedy as a disclosure order known to the criminal law. Disclosure, as has rightly been pointed out by the applicants, is a legal duty that rests on the prosecuting authorities in a criminal trial. A trial judge, to whom a properly grounded pre-trial application for directions is made, can declare that the prosecutor either has or has not complied with his duty of disclosure. Where the prosecutor is found to be in default, the Court can further direct him, in a non-binding way, to make the requisite disclosure. Such a direction is sometimes characterised as a "Disclosure Order" but this is really a misnomer as the direction is non-binding. By non-binding I mean that I do not believe that it would be open to the trial judge to seek to sanction the prosecutor for contempt on the grounds of non-compliance with his direction, for example by means of a fine or by attachment and committal.

The true nature of such a direction is that it is an admonishment to the prosecutor that if proper disclosure is not made in accordance with his duty there may be consequences for the prosecution arising from the Court's duty to ensure that any trial of the accused is a trial in due course of law. For example, where the degree of default is sufficient to cause the accused to face a real and substantial risk of an unfair trial the prosecution will not be allowed to proceed.

Neither is the respondent's order an "Order for Discovery". As the Supreme Court has held in *Sweeney* and in *D.H.*, discovery as understood in the civil law, and as provided for under the Rules of the Superior courts, is not available in Irish criminal law. Further, it is clear that there is no residual common law jurisdiction to grant to discovery in criminal cases, to which respondent might have had recourse in support of his order. That much is clear from at least the year 1751 when, in the case of *Lord Montague v. Dudman* 2 Ves Sen 396, the Lord Chancellor of the day stated:

"A bill of discovery lies here in aid of some proceedings in this court in order to deliver the party from the necessity of procuring evidence, or to aid the proceeding in some suit relating to a civil right in a court of common law, as an action; but not to aid the prosecution of an indictment or information, or to aid the defence to it."

It seems to this Court that respondent has made a novel order. It is in effect a mandatory order, in reality an injunction, directed to a non-party in the criminal proceedings requiring that party to disclose the material in controversy to the first named notice party. Though not an order for discovery it is a mandatory order that is in certain respects, but not in other respects, analogous to or akin to an order for third party discovery on the civil side.

The question that must now be asked is whether the respondent had jurisdiction to make the order in question or whether, on the contrary, he has exceeded his jurisdiction.

Did the respondent have jurisdiction to make the order in question.?

As previously mentioned, it is clear that the respondent has acted in the belief that the Supreme Court, and in particular Geoghegan J, has signalled the existence of an inherent jurisdiction on the part of a trial judge to make an order of the variety that the respondent has made. In doing so I believe that the respondent was attempting to accommodate and indeed to uphold and vindicate on the one hand, the State's constitutional right to prosecute the second and third named notice parties, and on the other hand the constitutional rights enuring to both the second and third named notice parties, respectively, to be tried fairly and in due course of law.

The difficulty with this is that while there was no means open to him to accommodate the constitutional rights of both prosecution and defence other than by recourse to the fashioning of a novel remedy, he was not obliged to do that. It was certainly his duty to attempt to accommodate the rights of both parties using all or any of the conventional powers and remedies available to the Court. However, if he was unable to do so I do not believe that he was then obliged to do so at all costs and by resorting to extraordinary measures. He was not, in the words of Hardiman J, faced with "circumstances of great crisis" nor was he required to act "for the protection of the constitutional order itself." It is clear from established precedent that faced with conflicting constitutional rights that were irreconcilable by conventional means, he ought then to have engaged in a balancing of rights exercise. In the words of Denham J in *B v Director of Public Prosecutions* [1997] 3 I.R. 140 at p.196 "The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant's right would prevail."

In the view of this Court the present lacuna in the law is unsatisfactory in as much as, in cases such as the present, it may have the effect of depriving the State of its right to proceed with a prosecution. Clearly there needs to be a legal mechanism by means of which a third party in possession of material that is potentially relevant to a defendant's defence in a criminal trial can be compelled to disclose it, at least to the prosecuting authority who is usually, though not invariably, the Director of Public Prosecutions. In my opinion this is primarily a matter for the legislature. Legislation in this area is likely to be complex and to be influenced by major public and executive policy considerations. Some of these were rehearsed by Geoghegan J at the beginning of his judgment in *J.F*. So while the State's right to prosecute may have to sacrificed and overridden in the instant case for the greater good, the State will not necessarily be without a remedy should a similar problem arise in the future. However, it is a matter for the legislative organ of the State to enact the necessary legislation. This is not something within the remit of the Courts.

In my view, notwithstanding his worthy motives, the respondent in fashioning a novel remedy in the manner in which he has done was not justified in doing so. *Prima facie*, the evidence does not establish that the applicant, as an agent of the State, has disregarded constitutional obligations in an exemplary fashion. Indeed, it is hotly contested as to whether the applicant, a corporate legal person in its own right, is in fact under any constitutional obligation to make disclosure in aid of the accused persons' defences. The issue as to whether or not it is under any such obligation will most likely involve questions of constitutional interpretation, and with the benefit of hindsight, this is an aspect of the matter on which the respondent might have usefully stated a case.

So what then are we to understand from Geoghegan J's obiter dictum in *J.F.* It has to placed in its proper context. That context is to be found at the beginning of his judgment in that case where he states:

> "In the background to this appeal is a most important legal issue which has never been fully considered by the courts of this jurisdiction. That is the question of the right (if any) of an accused to production or at least sight of documents in the possession of third parties where such access is, with reason, considered by the accused's legal advisers to be necessary to ensure a fair trial. There are different aspects to this problem. There is the question of whether there can ever be such legal access without the permission of the relevant third party. There is the question of whether a distinction might be made between State or State funded third parties and other third parties and then particularly in the context of statements made by a complainant in a sex crime case in the possession of a health board, as to whether there would be a countervailing duty of confidentiality. Misconceived attempts have been made to get around these difficulties. One of them has been the attempted invoking of the Rules of the Superior Courts 1986 relating to the discovery of documents. In two decisions of this court, *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102 and *D.H. v. Judge Groarke* [2002] 3 I.R. 522 (the latter being a decision of a five judge court), it has been held that the rules relating to discovery of documents and in particular the rules relating to third party discovery in the Rules of the Superior Courts do not apply to criminal trials. For the reasons explained by Keane C.J. in the latter judgment, the original regime of discovery of documents between parties and the later regime of third party discovery contained in the Rules of the Superior Courts were not intended to apply to criminal trials and are not appropriate having regard to the underlying purpose of those rules. It was made clear, however, by this court that its decisions in those cases were not in any way diminishing the obligations of the prosecution as to disclosure which is a quite different concept. That obligation of the prosecution has been traditionally viewed by the Director of Public Prosecutions as logically confined to documents within his possession or lawful procurement. It may be arguable as to whether this is too narrow a view of the obligations of the Director of Public Prosecutions. Certainly, the guidelines of the Attorney General of England and Wales relating to disclosure seem to suggest a rather wider obligation in that jurisdiction. This whole problem has been coped with in different ways in the jurisdictions of England and Wales, Canada, New South Wales, the United States of America and no doubt elsewhere also. There are areas still to be explored but as in the case of invoking the discovery procedures under the Rules of the Superior Courts, I am quite satisfied, as was the trial judge, Macken J., in this case that availing of the deposition procedure is no solution. That is the only issue which arises in this appeal and it is the only issue which I intend to address."

This Court is of the view that, contrary to the belief of the respondent, and all of the notice parties to the present proceedings, Geoghegan J was merely flagging that notwithstanding the decisions of the Supreme Court in *Sweeney*, *D.H,* and *J.F.* respectively, the door remains open for further argument as to the right (if any) of an accused to production or at least sight of documents in the possession of third parties where such access is, with reason, considered by the accused's legal advisers to be necessary to ensure a fair trial.

In my view he was doing no more than identifying that there is scope for arguing that State or State funded third parties might be regarded as being in a different situation to other third party bodies, and that this would be an issue that would have to be decided in a suitable case by the court which would ultimately be trying the defendant and on notice to the Director of Public Prosecutions, the body in question and the Attorney General.. I do not believe, however, that he was suggesting or implying an entitlement on the part of trial judges to fashion wholly novel remedies that were hitherto unknown to the law. Rather, in referring to the guidelines of the Attorney General of England and Wales relating to disclosure and the duty imposed on prosecutors in that jurisdiction to pursue the third party, (if necessary by means of recourse to the Courts under s. 2 of the Criminal Procedure (Attendance of Witnesses) Act, 1965) he may have had in mind that a greater onus could be placed upon the prosecutor in this jurisdiction to secure the co-operation of a relevant third parties, particularly where those third parties are state or state funded bodies. For example, the prosecutor could be regarded as being under a general duty to engage from time to time with all state or state funded bodies, and outside of the context of any particular case, in an effort to develop agreed protocols (incorporating appropriate safeguards to

address legitimate third party concerns) to facilitate disclosure of documents and information to the D.P.P whenever the need for such disclosure should arise. Were the DPP subject to that kind of more onerous duty a trial judge could at a directions hearing (i) declare the extent of the duty of the relevant third party; (ii) declare it to be the duty of the prosecutor to actively pursue the third party for access to the material and (iii) direct what further specific steps (if any) the prosecutor might reasonably be expected to take, in the event of third party persistence in declining or refusing to allow the prosecutor to have access to the material in question. It is very much to be hoped that any third party, and in particular a state or state-funded body, would not lightly disregard a Court's declaration as to the extent of its duty. Ultimately, however, the effectiveness of such action may be limited and, in the absence of sanctions provided for in legislation, it may from time to time prove ineffective. However, it should always be possible to vindicate the rights of an affected accused by staying his or her trial.

In conclusion, I do not consider that the respondent in this case was justified in fashioning a novel remedy without a sound jurisdictional basis for doing so. While a trial judge may have an inherent jurisdiction to resort to extraordinary measures of that sort as a last resort in truly exceptional circumstances, such circumstances did not exist in this case. Though it may be desirable that trial judges should have available to them a remedy similar to that fashioned by the respondent, that is something that requires to be addressed in legislation to be enacted by the legislature should they see fit to do so.

In all the circumstances I consider the respondent to have exceeded his jurisdiction and, accordingly, I will grant to the applicant the Declaration sought at para D (i) of it's Statement of Grounds, and an Order of *Certiorari* in the terms sought at para D (iii) of the said Statement of Grounds. I will hear applications as to, and arguments concerning, costs at a future date.