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THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 963 JR]

BETWEEN

THE LAW SOCIETY OF IRELAND

APPLICANT

AND
THE COMPETITION AUTHORITY

RESPONDENTS

Judgment of O'Neill J. delivered the 21st day of December, 2005.
On 4th August, 2004, the respondents published a notice dated 28th July, 2004. That notice read as follows:

"Notice in respect of Legal Representation of persons attending before the Competition Authority

ARTICLE 1
2. Introduction

This notice is published by The Competition Authority, 14 Parnell Square, Dublin 1, ("the Authority") pursuant to the function conferred on it by s. 30(1)(d) of the Competition Act, 2002 ("The Act"). Its purpose is to give guidance to businesses and legal practitioners on the Authority's policy in relation to the legal representation of persons attending before the Authority, consistent with the rights of the public in the integrity and effective functioning of the Authority's investigative processes.

ARTICLE 2

3. Definitions

For the purposes of this notice:-

'Attending before the Competition Authority', means:

(a) attending before the Authority, (whether at the offices of the Authority or elsewhere) on foot of a summons issued pursuant to s. 31(1)(a) of the Act;

(b) attending before the Authority (whether at the offices of the Authority or elsewhere) for the purposes of examination on oath pursuant to s. 31(1)(b) of the Act;

(c) attending before the Authority (whether at the offices of the Authority or elsewhere) for the purposes of producing documents on foot of a requirement made pursuant to section 31(1)(c) of the Act;

(d) attending at oral hearings held by the Authority (whether in the offices of the Authority or elsewhere);

(e) attending at merger pre-notification meetings with the Authority (whether at the offices of the Authority or elsewhere);

(f) attending voluntarily before the Authority (whether in the offices of the Authority or elsewhere);

(g) for the purposes of tendering information and producing document:

'Authority' includes members of the Authority or any of them, members of staff of the Authority or any of them, and authorised officers appointed under s. 45(1) of the Act,

'Lawyer' includes a solicitor, another solicitor in the firm to which the first mentioned solicitor belongs, and a barrister,

'Person' includes both natural persons and undertakings as defined in s. 3(1) of the Act. ARTICLE 3

General Policy
(1) The Authority's ability to carry out effectively its investigative functions under the Act relies heavily on its right to obtain fully the information and forthright testimony and statements of persons attending before it without such efforts being compromised by conflicts which potentially arise where the same lawyer represents more than one person attending before the authority.

(2) The Authority recognises the right to legal representation of persons attending before it who are under investigation by the Authority. As a matter of law, the same right does not extend to persons who are merely witnesses attending before the Authority and who are not, or are not likely to be, the subject of an investigation. However, as a matter of general policy, the Authority will permit such witnesses to be legally represented so long as the choice of representation does not threaten to compromise the integrity or proper functioning of its investigative processes.

(3) In general the Authority takes the view that the integrity of its processes is, or is likely to be compromised by the fact that the same lawyer represents more than one person in any particular matter, be it two parties to an investigation or a party to an investigation and a witness relevant to that investigation. In general, therefore, the Authority will not permit the same lawyer to represent both persons.

(4) In circumstances where the Authority is of the opinion that the integrity of its processes may be compromised by the fact that the same lawyer represents more than one person in any particular matter it will permit that lawyer to appear before it on behalf of

only one of those persons.

ARTICLE 4
Exceptions

Notwithstanding its general policy, the Authority may allow, upon application a legal representative to act for more than one person or witness in relation to the same matter if the Authority is satisfied that the integrity of its processes will not thereby be compromised.

***ARTICLE* 5**
Special Provisions in relation to Merger Review

> *Notwithstanding the provisions of Article 3, as a matter of general policy, the Authority will permit the same lawyer to act for more than one person in the course of the review of a merger or acquisition pursuant to part 3 of the Act, unless the Authority is of the opinion that in any particular case that such representation has the potential to compromise the integrity of the review process."*

The applicants being aggrieved by the content of Articles 3 and 4 of this notice sought and were granted leave to apply for judicial review by order of this court (McKechnie J.) on 3rd November, 2004, to pursue the reliefs which are set out in the notice of motion which *inter alia* include, a declaration that the decision of the respondent dated 28th July, 2004, is *ultra vires* the powers and functions of the respondent pursuant to s. 30(1) of the Companies Act, 2002, a declaration that the decision was not made by the respondent pursuant to any statutory or other lawful power, a declaration that in purporting to veto a choice of lawyer made by a party to an investigation or a witness that the respondents unreasonably and disproportionately infringes the rights of such persons to a lawyer of their choice and to basic fairness and procedures guaranteed by Article 40.3 of the Constitution, and finally a declaration that the decision of the respondents infringes the rights of such persons to a fair hearing pursuant to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), and as a consequence of the foregoing the decision as notified in the above notice was *ultra vires* the powers of the respondent and was null and void and of no legal force and effect. In addition the applicants obtained leave to apply for an injunction restraining the respondents from implementing or applying the provisions of Article 3(3) and Article 3(4) and Article 4 and Article 5 of the notice and also obtained leave to apply for an order of certiorari quashing the decision.

The applicant was given leave in the alternative to claim a declaration pursuant to s. 5 of the European Convention on Human Rights Act, 2003, that the decision as aforesaid is incompatible with the State's obligations under Article 6.1 of the ECHR.

The affidavit of Ray Leonard the manager of the Cartels Division of the respondents, at paragraph 8 sets out the problems or difficulties confronted by the respondents, which the content of the notice sought to address as follows:-

> *"8. As outlined above, in certain instances in the past the fact that different persons use the same lawyer has caused difficulties in respect of investigations. The following are examples from my personal experience.*
>
> *(a) In one instance where the Authority was investing an alleged cartel, an employee of one of the members of the alleged cartel gave certain information to case officers of the Authority at an informal meeting. The information was subsequently used to seek and obtain warrants to conduct searches of premises. Another member of the alleged cartel then asked his solicitor (who also represented other members of the cartel) to write to the member whose employee had furnished the information asking him to sanction his employee. Subsequently the Authority summonsed the employees of four members of the cartel to attend separately before it and the same solicitor responded, saying he also represented the employees and would accompany them to the hearings. The Authority wrote in advance of the hearings to the solicitor, telling him that it would not admit him to the hearing. It was unsatisfactory from the Authority's perspective that the same solicitor was representing all the parties and was in a position where he was being asked by one of his clients to intervene in the manner that could serve to frustrate the investigation;*
>
> *(b) In another instance, one solicitor represented 10 of approximately 16 persons under investigation. Inevitably, issues arose as to the event in which the solicitor was in a position to avail himself of this knowledge arising out of matters and documents disclosed in the interviews of the prime movers of the cartel to prevent minor players from making admissions that might incriminate the major players. On a number of occasions during the course of interviews with minor players, the solicitor refused to allow his client to answer questions put to these minor players. The Authority was concerned that certain facts that might otherwise have been disclosed were not disclosed since one solicitor acted for so many of the persons under investigation. In addition, the Authority was concerned that the common representation acted to the detriment of the interests of the minor players, and as a result to the detriment of the investigative process. Consequently these minor players may not have proffered information that they would otherwise have proffered which could have underlined their minimum involvement in the cartel under investigation. In addition, the fact that only one solicitor acts for a number of persons under investigation militates against any one person under investigation getting completely impartial advice as to the suitability of the Immunity Programme made available by the Director of Public Prosecutions through the agency of the Authority.*
>
> *9. In the circumstances the Authority has no doubt but that the common representation of a number of persons under investigation certainly impacts negatively on the investigation process."*

The first issue that arises is whether or not the impugned articles in the notice are *ultra vires* the expressed statutory powers given to the respondents under the Act.

Relevant to this issue are ss. 31 and 37 of the Act and in particular s. 31(1)(d) and sub-s. 5 of s. 37.

These read as follows.

> *"30.(1) The Authority shall have, in addition to the functions assigned to it by any other provision of this Act or of any other enactment, the following functions:*

(a) to study and analyse any practice or method of competition affecting the supply and distribution of goods or the provision of services or any other matter relating to competition (which may consist of, or include, a study or analysis of any development outside the State);

(b) to carry out an investigation, either on its own initiative or in response to a complaint made to it by any person, into any breach of this Act that may be occurring or has occurred;

(c) to advise the Government, Ministers of the Government and Ministers of State concerning the implications for competition in markets for goods and services of proposals for legislation (including any instruments to be made under any enactment);

(d) to publish notices containing practical guidance as to how the provisions of this Act may be complied with;

(e) to advise public authorities generally on issues concerning competition which may arise in the performance of their functions;

(f) to identify and comment on constraints imposed by any enactment or administrative practice on the operation of competition in the economy;

(g) to carry on such activities as it considers appropriate so as to inform the public about issues concerning competition."

15. Section 37 of the Act reads as follows:

"37-(1) The quorum for a meeting of the Authority shall be 3 members unless the Minister otherwise authorises.

(2) At a meeting of the Authority-

(a) the chairperson of the Authority shall, if present, be chairperson of the meeting;

(b) if and so long as the chairperson of the Authority is not present or if the office of chairperson is vacant, the members of the Authority who are present shall choose one of their number to be chairperson of the meeting.

(3) Every question at a meeting of the Authority shall be determined by a majority of the votes of the members present and voting on the question and, in the case of an equal division of votes, the chairperson of the meeting shall have a second or casting vote.

(4) The Authority may act notwithstanding vacancies in its membership.

(5) Subject to this Act, the Authority may regulate its own procedures."

It was submitted for the applicants that s. 30(1)(d) is there for the purposes of enabling the respondent to publish notices which would give practical guidance to persons other than the respondent itself, namely natural persons or undertakings as defined in the Act, as to how to comply with the substantive provisions of the Act. It was submitted that the essence of the material to be published under s. 30(1)(d) would be guideline material, with the necessary implication that the persons to whom the notice might be addressed, were not be bound in law to follow the guideline and could choose an alternative way, if one was available, to achieve compliance with the Act. It was submitted that this subsection does not empower the laying down of binding rules such as the rule against multiple representation, impugned in these proceedings and in any event any notice published under this subsection must be addressed to persons or undertakings outside of the respondent and the subsection was never intended to be used as a vehicle for the enactment or promulgation by the respondent itself, of rules governing the conduct by it, of its investigative role.

The respondents submit that the prohibition on multiple representation was not an absolute or inflexible rule and that in any case, where it was warranted by the particular circumstances, the Authority could and would depart from that policy, as it is expressly provided for in Article 4 of the notice.

The respondents draw attention to the hypothetical nature of the challenge in these proceedings of the applicants, and whilst the respondents concede that the applicants have a *locus standi* to bring these proceedings they submit that in the absence of any evidence put forward by the applicants as to any particular difficulty encountered by their members with the operation of Articles 3, and 4 or 5 of the notice, that in effect what they are seeking to do is to have the policy set out in the notice struck down *in limine*.

The respondents point to the very limited nature of the prohibition, namely that it does not deny legal representation as occurred in the case of *O'Brien v. The Personal Injuries Assessment Board* (Unreported, High Court judgment, MacMenamin J., 25th January, 2005); nor does it seek to limit the number of legal representatives permitted to accompany persons to a hearing, such as was condemned in the case of *In Re: Commission to Inquire into Child Abuse* [2002] 3 I.R. 459, nor does it seek to assert a power to select the legal representatives of any person attending it; nor does it seek to exercise anything in the way of a general power of veto over the selection of legal representatives by those persons. It was submitted that the notice merely indicates that, in general, the respondents would not permit the same lawyer to represent more than one person appearing before it in connection with the particular investigation.

There is no doubt that the range of restriction sought to be imposed by Articles 3, 4 and 5 of the notice is much more limited than the types of restrictions sought to be imposed, in the *O'Brien* case where there was a complete exclusion of legal representation and *in Re: Commission to Inquire into Child Abuse*, where it was sought to limit the numbers of legal representatives in attendance during hearings. Nevertheless the restriction contemplated in the notice does have the effect of stopping a client having the legal representative of their choosing in the circumstance, where that legal representative is also acting for another person in the same matter, under investigation. That in my view is a significant interference with the client/lawyer relationship which cannot be discounted as being *de minimus.*

I am of opinion that the applicants are right in their submission that s. 30(1)(d) was not intended to be used for the publication by the respondent of rules governing the conduct by it of its investigative processes and in particular the conduct of oral hearings. In my

view the proper subject matter of a notice under s. 30(1)(d) is material addressed to persons or undertakings who are the suppliers of goods and services and whose commercial activities fall to be regulated by the respondent under the provisions of the Act; to assist those persons by means of guidelines, in achieving compliance with their obligations under the substantive provisions of the Act. An essential feature of material published under sub-s. (1)(d) is that it is not a binding rule, or a rule of general application, but is merely a guideline which may be adopted, or rejected if another alternative means of compliance is available.

I have come to the conclusion therefore that s. 30(1)(d) does not empower the respondents to publish the notice impugned in these proceedings.

This brings me to a consideration of s. 37(5) of the Act.

It was submitted for the respondents that if the respondents were not empowered by s. 30(1)(d) to publish this notice, that there was an ample power to do so in s. 37(5). I cannot accept that submission. In my view the entirety of s. 37 is confined to the regulation of meetings of the Authority itself, and sub-s. 37(5) does no more than to enable the respondents to regulate its own procedures for the conducting of meetings of the Authority itself. It does not enable or empower the respondents to enact or promulgate rules for the conducting of its investigative role and in particular oral hearings held as part of the investigative process.

I am quite satisfied that sub-s. 37(5) does not provide either expressly, or as necessarily and incidental to the power given by s. 37(5), a power to have published the notice in question in these proceedings.

This brings me to the question of whether or not the power to make the decision which is reflected in the notice and the power to publish the notice is a power which is one, which is necessarily and properly required for the carrying into effect of the purpose of the incorporation of the respondents or it is to be regarded as incidental to or consequential upon the things which the legislature has authorised the respondents to do. The following passage from the judgment of Hamilton C.J. in *Keane v. An Bord Pleanála* (No. 2) [1997] 1 I.R. 484 states the law in regard to the powers of statutory corporations. In that instance he was referring to the powers of the Commissioners of Irish Lights where he says:-

> *"The powers of the Commissioners, being a body created by statute, are limited by the statute which created it and extend no further than is expressly stated therein or is necessarily and properly required for carrying into effect the purposes of incorporation or may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised."*

Section 30 already quoted above sets out the functions assigned to the respondents by the Act of 2002. Of relevance here are the functions set out at s. 30(1)(b).

Section 31 sets out certain powers which the respondents have for the purposes of its functions under the Act. Section 31 reads as follows:

> *"31-(1) The Authority may, for the purposes of its functions under this Act, do all or any of the following things:*
>
> *(a) summon witnesses to attend before it,*
>
> *(b) examine on oath (which the Authority, or any member of staff of the Authority duly authorised by the Authority, is by this section authorised to administer) the witnesses attending before it,*
>
> *(c) require any such witness to produce to the Authority any document in his or her power or control.*
>
> *(2) A witness before the Authority pursuant to subsection (1)(a), shall be entitled to the same immunities and privileges as if he or she were a witness before the High Court.*
>
> *(3) A summons to be issued for the purposes of subsection (1)(a) shall be signed by a member of the Authority.*
>
> *(4) Any person who-*
>
> *(a) on being duly summoned as a witness before the Authority makes default in attending, or*
>
> *(b) being in attendance as a witness refuses to take an oath legally required by the Authority to be taken, or to produce any document in his or her power or control legally required by the Authority to be produced by him or her, or to answer any question to which the Authority may legally require an answer, or*
>
> *(c) does any other thing which, if the Authority were a court having power to commit for contempt of court, would be a contempt of such court, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 6 months or to both such fine and such imprisonment."*

It is clear that the respondents are empowered under s. 30(1)(b) to conduct investigations into alleged breaches of the Act and in order to do that they may use the powers that are given to them under s. 31. In the context of the use by them of the powers conferred under s. 31 the respondents rightly concede that persons under investigation are entitled as of right to avail of legal representation in any hearings conducted by the respondent. Although the respondents assert that persons who appear before them as witnesses, are not entitled as of right to legal representation, as a matter of policy the respondents concede to those persons a right to avail of legal representation.

In my view methodologies used or practices followed by the respondents in the conduct of investigations and in particular oral hearings, pursuant to the express powers given to them in ss. 30 and 31, are a matter which must fairly be regarded as incidental to or consequential upon the functions given to the respondent under s. 30 and the powers given under s. 31.

It necessarily follows from this that notification to the public of the creation of or variation of any such methodologies or practices must not only be regarded as incidental or consequential to those functions, but indeed could be said to be necessary to the fair and reasonable exercise by the respondents of its functions and powers, for the simple and obvious reason that if practices were to be

adopted concerning legal representation it would be essential that persons to be investigated by the respondents would know in advance what these practises were so that they could arrange their legal representation accordingly.

I am satisfied therefore that the respondents did have a power which was incidental to or consequential upon the functions and powers conferred upon the respondents under ss. 30 and 31 of the Act, to publish notices of the kind impugned in these proceedings. If the respondents did have that power, in my view the mere fact that the source of the power for the making of a notice was misdescribed as being under s. 30(1)(d), cannot deprive the notice of validity, solely on the ground of a lack of power to make it or issue it, when in fact the respondents lawfully enjoyed that power as discussed above.

I have reached the conclusion therefore that the notice is not *ultra vires* the powers of the respondent merely because the express provisions of s. 30(1)(d) or s. 37(5) of the Act do not expressly provide for that power, the power in question being necessarily incidental and consequential upon the functions and powers conferred in ss. 30 and 31 of the Act.

This brings me to the next question which necessarily arises and that is whether or not the content of the notice, i.e. the restriction on the choice of legal representation contained in the notice, unreasonably and disproportionately infringes the right of persons appearing before the respondents to the lawyer of their choice and thus infringes the right to fair procedures guaranteed by Article 40.3. of the Constitution.

In approaching this issue one must bear in mind the precise nature of the restriction contained in the impugned notice. As noted earlier there is no restriction on either the number of legal representatives that may attend at hearings, or indeed any other kind of restriction save that there is a general prohibition on one lawyer representing more than one person in any matter under investigation. Necessarily in certain circumstances this restricts or indeed vetoes what may be the choice of lawyer made by one or more of these persons. It was submitted by the applicant that, whilst there are very few Irish cases which deal explicitly with the question of whether a person is entitled as part of their right to fair procedures under Article 40.3 of the Constitution, to the lawyer of their own choice, such a right has generally been taken to be axiomatic and that therefore the Oireachtas has not attempted to circumscribe this right. It was further submitted that it is implicit in the important cases dealing with the right to legal representation namely in Re: *Haughey* [1971] I.R. 217, *McGuire v. Ardagh* [2002] 1 I.R. 385, *O'Brien v. Personal Injuries Assessment Board* (High Court, Unreported, January 25th, 2005) and in *Re: Commission to Inquire into Child Abuse* [2002] 3 I.R. 459 that the choice of lawyer is for the client and that it is not permissible for authorities to interfere with that right.

It is submitted that the cases of *The State (Freeman) v. Connellan* [1986] I.R. 443 and the case of Wheat v. United States 486 U.S. 153 are authority for the proposition that the right to choose one's own lawyer could only be denied or curtailed by a court or tribunal for the gravest or at the very least good and sufficient reason and hence that there must be a strong presumption in favour of freedom of choice of one's own lawyer, whereas the restriction or prohibition sought to be imposed by the respondents reverses that presumption, and that reversal is a disproportionate solution to the problems sought to be identified by the respondents.

For the respondents it was submitted that the authorities do not establish that there is a right to freedom of choice of one's lawyer. They submit that that choice may be curtailed by a court or tribunal and in that regard they rely upon the Authority of the cases of *The State (Royal) v. Kelly* [1974] I.R. 259 and *Wheat v. The United States* 486 U.S. 153 and also a case of *The State (Freeman) v. Connellan* [1986] I.R. 443.

. They submit that the nature of the proceedings conducted by the respondents are such as to remove these proceedings from the kind of proceedings contemplated in the In *Re Haughey* case, in that the respondents do not make findings which they report in any kind of public way; that the nature of the proceedings conducted is investigative only and solely for the purposes of enabling the respondents to discharge their functions under the Act. They submit that the only purpose of the investigative process is to enable them subsequently, if they form an opinion, for that purpose, that there has been a breach or breaches of the Act, either to take civil proceedings pursuant to s. 14 of the Act, or to themselves prosecute certain offences summarily or to send the fruits of their investigation to the Director of Public Prosecutions who may bring a prosecution on indictment under s. 11 of the Act. It was submitted, that whilst under s. 31 a person summonsed to appear before the respondents is obliged to answer questions, under the same section a person being questioned enjoys the same privileges and immunities as if giving evidence in the High Court. Hence the privilege against self incrimination remains available to such a person. It was submitted, relying upon the case of *In the matter of National Irish Banks Limited and In the matter of the Companies Act* [1999] 3 I.R. 145 that evidence obtained under the compulsion of s. 31(4) of the Act, would not be admissible in subsequent criminal proceedings unless it could be demonstrated that the evidence was given voluntarily. It was submitted arising out of the foregoing that the investigation conducted by the respondents did not decide or determine anything against a person under investigation and that being so, where the respondents found themselves in the position that the integrity and effectiveness of their investigative processes was being impeded or hampered by multiple persons represented by one lawyer, where it was apparent to the respondents that conflicts of interest could be present, that the restriction or prohibition contained in the notice was an entirely proportionate curtailment of the right to freedom of choice of a lawyer, [if there was such a right protected by the Constitution], to ensure that the respondent could carry out effectively the function given to them in s. 30(1)(b).

It was submitted that the disciplinary role of the applicants in relation to conflicts of interest as set out in the applicant's code of conduct was to no avail, as far as the respondents were concerned, in dealing with the problem of conflicts of interest resulting from multiple representation. This was for two reasons, firstly because the respondents doubted, not being the client of the conflicted solicitor, that it would have a *locus standi* to make a complaint to the applicants in relation to that conflict, and secondly even if it had such a standing, that the time taken and the difficulties involved in pursuing such a complaint would fail to protect the effectiveness or integrity of its investigation.

The first aspect of this problem to be addressed is whether or not there is a right to freedom of choice of ones own lawyer, as an aspect of the right to fair procedures guaranteed by Article 40.3 of the Constitution.

Although much attention was focused in the submissions and in the argument before the court on the nature of the proceedings conducted by the respondents, the outcome of those proceedings and the consequences for persons under investigation, it would appear to me that these matters do not have a decisive bearing upon the question I have to deal with, having regard to the fact that the respondents concede that persons under investigation by it have a right to legal representation, and that persons appearing as witnesses can by invariable concession avail of legal representation. That being so, the proceedings before the respondents can be said to be or be deemed to be of sufficient significance or consequence, for either persons under investigation, or witnesses, to merit the fullest legal representation. No doubt other aspects of the rights set out in the In *Re Haughey* case may or may not always be present, such as notice in advance of allegations made, but we are not concerned with these matters in these proceedings.

Whether or not there is a right to freedom of choice of ones own lawyer is an issue which appears to have been expressly considered

in two cases namely *The State (Royle) v. Kelly* [1974] I.R. 259 and also in the case of *The State (Freeman) v. Connellan* [1986] I.R. 433. Both of these cases concerned freedom of choice of solicitor under the Free Legal Aid Scheme established under the Criminal Justice (Legal Aid) Act 1962. In *The State (Royle) v. Kelly* case Walsh J. said the following:

> *"Mr. Justice Butler in the High Court expressed the view, with which I agree, that the Special Criminal Court was acting within the powers granted to it under the statutory free legal-aid provisions in refusing to assign Mr. Concannon, and that the court had a discretion as to whom it would assign. What the limits of that discretion are it is not here necessary to decide; but in view of the fact that Mr. Concannon had expressly withdrawn from the case the court was entitled to hold him to that withdrawal."*

Barr J. in *The State (Freeman) v. Connellan*, having considered the steps that a District Court must take relative to the assignment of a solicitor under the Criminal Free Legal Aid Scheme, went on to say the following at p. 439:

> *"These requirements raise important questions about how far the court is obliged to go in ascertaining the wishes of the applicant as to the assignment of a solicitor to represent him and to what extent the court should accommodate him in that regard. It seems to me that a meaningful operation of the regulation, within the spirit and intention of the Act of 1962 and in the light of the applicant's constitutional rights, requires that in circumstances where the court has any reservation about the assignment to the applicant of a solicitor nominated by him, the judge should ask the defendant why he wishes to have the services of that particular solicitor. The court should then consider the reasons (if any) put forward by the applicant before assigning a solicitor to represent him. I am also of opinion that the court should be very slow indeed to refuse to nominate the applicant's choice of solicitor if the person nominated is duly qualified for assignment and should do so only if in the view of the judge there is good and sufficient reason why the applicant should be deprived of the services of the solicitor nominated by him. Where in any particular case the court, having considered and given due weight to the representations of the applicant, is satisfied, nonetheless, that there is a strong, compelling reason for refusing to assign the solicitor of the applicant's choice, the judge should state that reason and enquire whether the defendant wishes to nominate any other particular solicitor. If he does nominate a second solicitor then that application should be considered in the same way. The court should choose a solicitor for the applicant only where he has not nominated one himself or where any nominated by him are unable to accept assignment or are not acceptable to the court for good and sufficient reason. This interpretation is in accord with the nature of the scheme of legal aid in criminal cases as devised by the legislature, which includes two important dimensions, namely, the opportunity given to each qualified applicant to nominate his own solicitor (though the court is not bound to allocate the solicitor chosen), and the creation of panels of all practising solicitors and barristers who are willing to participate in the scheme..."*

As is apparent, both of these cases concerned the choice of solicitor under the provisions of the Criminal Justice (Legal Aid) Act, 1962 and in particular regulation 7(1) of the Criminal Justice (Legal Aid) Regulations, 1965 which reads as follows:

> *"7.-(1) Upon the grant of a certificate for free legal aid, the court granting the certificate shall, having taken into consideration the representations (if any) of the person to whom the certificate was granted, assign to him a solicitor from the appropriate list kept pursuant to Regulation 4 of these Regulations to act for him in the preparation and conduct of his case."*

Walsh J. in *The State (Royle)* case held that this regulation gave to the relevant court a discretion as to who or what solicitor it would assign to an accused person. The scope of that discretion was not considered in that case and specifically there was no express consideration as to whether there was a freedom of choice of solicitor and if so, to what extent. Barr J. in *The State (Freeman v. Connellan*) concluded that freedom of choice of solicitor under this Legal Aid Scheme should only be denied for good and sufficient reasons.

In the case of *Wheat v. United States* 486 U.S. 153 in delivering the majority opinion Chief Justice Rehnquist said the following at p. 148:

> *"Thus why the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers."*

Later at p. 149 he says:

> *"Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them….Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardised by unregulated multiple representation."*

Further on at p. 152 he says:

> *"Viewing the situation as it did before trial, we hold that the District Court's refusal to permit the substitution of counsel in this case was within its discretion and did not violate the petitioner's Sixth Amendment rights. Other District Courts might have reached differing or opposite conclusions with equal justification but that does not mean that one conclusion was 'right' and the other 'wrong'. The District Court must recognise a presumption in favour of petitioners counsel of choice but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court."*

Although dissenting from the majority opinion in that case, Justice Marshal with whom Justice Brennan joined, at p. 153 said the following:

> *"The right to counsel of choice as the courts notes is not absolute. When a defendant's selection of counsel, under the particular facts and circumstances of a case, gravely imperils the prospect of a fair trial, a trial court may justifiably refuse to accede to the choice. A trial court may in certain situations reject a defendants choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process. As the court states however, the trial court must recognise a presumption in favour of a defendant's counsel of choice. This presumption means that a trial court may not reject a defendant's chosen counsel on the ground of a*

potential conflict of interest absent of showing that both the likelihood and the dimensions of the feared conflict are substantial…".

In that case the minority dissented on the basis of what they characterised as an exaggeration of the significance of the potential conflict of interest and inadequate weight given to waivers by other defendants of their right to conflict free lawyers.

What is clear from the opinions however, is that there was no dissent in relation to the general principle, to the effect, that there was a strong presumption in favour of freedom of choice of lawyer, but that in the interests of ensuring a fair trial, that choice could be interfered with or denied by the trial court where multiple representation by a lawyer gave rise to either actual conflict of interest or a serious potential for that conflict to arise during the trial.

It is not clear from the report in this case whether or not the defence lawyers were State funded.

As is apparent the two Irish cases deal with choice of solicitor under the Criminal Legal Aid Scheme and the U.S. case deals only with a choice of representation in a criminal trial.

Here we are dealing with a somewhat different problem. Firstly the legal representation is not State funded, it is the result of contracts freely entered into between the legal representatives in question and persons under investigation by the respondents or witnesses. Needless to remark the fees of these legal representatives must be paid by the persons under investigation or by witnesses if they avail of legal representation. Thus there can be no question of the respondents having a discretion similar to that afforded to a court under regulation 7(1) of the Criminal Justice (Legal Aid) Regulations, 1965.

Notwithstanding the specific discretion given to a court under the above regulations, Barr J. nonetheless held that in *The State (Freeman) v. Connellan* that freedom of choice of solicitor, from the Legal Aid panel, should not be denied save for good and sufficient reasons. The conclusion of Barr J. in that regard would appear to me to be similar to that reached by the U.S. Supreme Court in the *Wheat* case namely that a presumption in favour of choice of lawyer must be recognised.

As is clear from the opinions in the *Wheat* case, where a defending lawyer had a conflict of interest as between multiple defendants, certain deleterious effects can result, such as the failure to properly cross-examine, the failure to call evidence which benefits one defendant perhaps at the expense of another, or the failure to point out or emphasise disparities of involvement between two defendants. These deficiencies could result in there not being a fair trial and damage public confidence in the rendition of a just verdict. Hence, while there is a presumption in favour of freedom of choice of lawyer, the court retains a discretion to deny that freedom of choice where the consequences of it are likely to damage the prospect of a satisfactory and fair trial and ultimately public confidence in the process.

In civil proceedings, where a lawyer has a conflict of interest between two clients, similar deficiencies can occur, i.e. the case of one client may not be adequately represented either through cross-examination or the leading of evidence or in submissions. This in turn may result in the outcome of the proceedings being correct or unjustly unfavourable to the disadvantaged client.

Whilst these are very important factors to be considered I do not think that they could have the same weight as they would have in criminal proceedings.

That leaves me to conclude that in civil proceedings such as the type conducted by the respondents there must be a strong presumption in favour of freedom of choice of representation. Although it is the case that in these proceedings the clients will invariably be paying for their own lawyers, this factor does not in my view add significantly to the weight or strength of this presumption. Regardless of who is paying for the representation the principle must in my view remain essentially the same.

It could not in my view be said that a person availing of the Criminal Free Legal Aid Scheme should have less autonomy or control over the conduct of their defence and in particular what lawyers were selected to conduct that defence, than would be the case if they were contracting for the services and paying for them themselves.

I am satisfied that were a tribunal, empowered to veto a choice of lawyer made by a party appearing before it, invariably this would give rise to a perception of unfairness, on the part of the person denied freedom of choice. Where the tribunal was in effect the adversary as in the position of the respondents, that perception will be very strong indeed. The interference by a tribunal with a choice of lawyer will in many instances cause actual unfairness because of the disruption of confidence, which is an essential aspect of every successful lawyer/client relationship.

I am satisfied that a person facing a tribunal in respect of which it is appropriate to have legal representation does, as an incident or aspect of the right to fair procedures, have a constitutional right pursuant to Article 40.3 of the Constitution to freely select the lawyers that will represent him or her, from the relevant pool of lawyers willing to accept instructions.

Every tribunal has the right and indeed the duty to control its own proceedings so that it can discharge its lawful function in accordance with law and respecting the constitutional rights of all those who appear before it.

There will be rare cases where for one reason or another and specifically where conflicts of interest arise, and the choice by a person of a particular lawyer may have the effect of hampering or impeding the tribunal from discharging its lawful function.

Examples of this in the criminal sphere were illustrated above.

The appropriate balance between the constitutional right of a person facing a tribunal to freely choose their legal representatives, and the right and duty of the tribunal to control its proceedings so as to discharge its function in accordance with the constitution and the law, is achieved by the aforesaid strong presumption in favour of a freedom of choice of legal representation, but with the retention in the tribunal of a discretion to deny that freedom of choice where it is apparent, that to permit a particular legal representative to act, would have the likely result of frustrating or impeding the tribunal discharging its lawful function.

It would have to be observed that in all types of proceedings and in particular proceedings of a civil nature, the likelihood of a choice of legal representative being an obstacle of the proper conduct of the proceedings, will be rare indeed.

This brings me to a consideration of the content of the notice impugned in this case. Article 3(3) and Article 3(4) amount to a general prohibition on the same lawyer representing more than one client in any matter under investigation by the respondents. Article 4 makes the provision for the granting of exemption from that general prohibition, where the respondents are satisfied that the integrity

of its processes will not be compromised.

The problem which the respondents seek to address in this notice is that of conflict of interest arising in situations where there is multiple representation by one lawyer.

It must be remembered that in many situations of multiple representation there will be no conflict of interest. It cannot be assumed that lawyers will neglect or ignore their professional duties and obligations by continuing to act where such a conflict exists.

There will be many other situations where, though a conflict of interest might exist, it will not have the affect of impeding the respondent's investigative process. The respondents cannot complain if on the advice of a legal representative who is acting for more that one person, a person under investigation or a witness, refuses to answer a question because it might incriminate that person. Where a person refuses to answer a question because it might adversely affect another person be it on the advice of a legal representative who was representing others, or otherwise it would seem to me that there is nothing to prevent the respondents from bringing to the attention of the person in question the provisions of s. 31(4) of the Act of 2002 and thereupon demanding a reply under the compulsion of the subsection. A legal representative, whether acting for a single client or multiple clients, simply lacks competence to prevent a client answering a question which might incriminate another, in a properly conducted investigative hearing.

Insofar as the respondents complain, that where there was multiple representation, a person who might benefit from the Immunity Programme might not do so because of the suitability of that programme might not be advised to them, it would seem to me that a practical and simple solution to that problem is for the respondents to notify all persons either under investigation or appearing as witnesses to whom that programme could apply, of the existence of the programme and of its terms and of its potential suitability, and where appropriate inviting a person to avail of it.

I am satisfied that the matters which the respondents have drawn to the attention of the court as being the justification or the reason for the issuance of this notice do not justify a general prohibition of the kind contained in the notice.

I am also satisfied that the contents of the Notice does not satisfy the proportionality test as that test is laid down by Costello J. *in Heaney v. Ireland* [1994] 3 I.R at p. 607.

In reaching this conclusion I do so notwithstanding rejecting the applicants submission, to the effect that the respondents, if concerned about a conflict of interest, on the part of lawyers, should deal with the matter, by making a complaint to the applicants, who have the statutory function of dealing with such complaints made against solicitors. In my view this avenue of complaint, even if it were available to the respondents, would be unlikely to preserve the effectiveness of its investigative processes, or at the very least could result in lengthy delays, in completing investigations.

I am of the opinion that the respondents have impermissibly reversed the presumption, as an essential aspect of the right to fair procedures, in favour of a freedom of choice of legal representatives, and in so doing impermissibly infringed the right of a person appearing before them, either under investigation or as a witness, to choose their own legal representatives.

The foregoing conclusion leads to the granting of an order of certiorari in respect of the impugned notice and would be sufficient to dispose of these proceedings, but in deference to the submissions of counsel I think it is appropriate to give an opinion on the final claim, made in the alternative, in these proceedings, which is for a declaration pursuant to s. 5 of the European Convention on Human Rights Act, 2003, [Act of 2003], that the decision of the respondents in the impugned notice is incompatible with the States obligation under Article 6.1 of the E.C.H.R.

The applicant contends that persons appearing before the tribunal are entitled to avail of Article 6(3)(c) of the E.C.H.R. which gives to a person a right *"to defend himself in person or through legal assistance of his own choosing"*, and notwithstanding that this right is expressly given in respect of criminal cases, the applicant submits that it represents a broader principle of procedural fairness which would apply in proceedings such as those conducted by the respondents. The applicants submit that Article 6 is activated or engaged in criminal proceedings in the early investigative stages similar to the type of investigative processes conducted by the respondents. It was submitted that the right to silence and the right not to incriminate oneself are international standards of fair procedures and that Article 6 protects an accused person from coercion or oppression by a State authority. It was submitted that Article 6 applies at the point of interrogation and that a compelled reply can be a breach of the E.C.H.R. It was submitted that Article 6(1) requires that an accused person cannot be required to incriminate himself and that the drawing of an inference of guilt from silence infringes Article 6. It was submitted that the Article 6 rights are engaged where a person is aware that he is being *"seriously investigated"* and in this respect reliance is placed on the case of *X v. U.K.* [1998] 25 E.H.R.R. 88.

For the respondent it was submitted that Article 6 was not engaged by its investigative processes and even if it had been engaged the notice did not in any way breach Article 6. It was submitted that Article 6 does not require that there be freedom of choice of legal representatives but what it requires is that a person is to have either the legal representative of their choice or a legal representative made available to them. It is submitted that a document which does not have the force of law is not a *"statutory provision"* within the meaning of s. 1(1) of the European Convention on Human Rights Act, 2003. It was submitted that the case of *Croissant v. Germany* [1992] 16 E.C.H.R. 135 is authority for the proposition that a court can for good and sufficient reason interfere with freedom of choice of legal representatives. In that case the court compelled a defendant in criminal proceedings to have the services of a third lawyer so that adjournments or delays would be avoided.

For the Attorney General it was submitted that the policy in the impugned notice was not compatible with Article 6 of the Convention and that there must be a compelling justification for interfering with the choice of lawyer where the client is paying. It was submitted that the flaw in the notice was that the correct approach should have been a case by case analysis rather than a general rule. It was submitted that the notice was caught by the definition of *"statutory provision"* in s. 1(1) of the Act of 2003, because it was a *"rule"* and was not mere guidance. Thus the notice could be made the subject matter of a declaration pursuant to s. 5(1) of the Act of 2003. It was submitted, relying upon the case of *Heaney and McGuiness v. Ireland* 33 E.H.R.R. 264 that a person was to be deemed charged with criminal conduct before a formal charge was preferred. Like the *Heaney* case where a person is asked to account for his movements under s. 52 of The Offences Against the State Act 1939, when summoned before the respondents a person is asked to account for commercial action. It was submitted that some investigations did not involve Article 6 because no rights were determined. It was submitted that the respondents investigation goes further, leading to civil proceedings or to summary prosecution or to the referral of the papers to the Director of Public Prosecutions for prosecution on indictment. Thus it was submitted that what the respondents do is part of a process where a *"charge"* is laid and therefore Article 6 was engaged. It was submitted that if Article 6 was engaged it was submitted that the notice was incompatible with it because there is a right under Article 6 as part of the right to a fair hearing to choose ones legal representative. Whereas this is not an absolute right, the reasons put forward on affidavit by the respondents are not sufficiently compelling to justify a general prohibition of the type contained in the

notice. It was submitted that the respondents by their notice fundamentally misunderstand the importance of what at a minimum is the *prima facie* entitlement of a person under investigation to a lawyer of their own choice as part of the requirements of a fair hearing within the meaning of Article 6.1 and wrongly reverses a general rule with the exception.

I am satisfied that the content of the notice impugned does fall within the definition of a *"statutory provision"* as contained in s. 1(1) of the Act of 2003. In my view the prohibition on multiple representation contained in the notice is a "rule" within that definition and in addition falls comfortably within the meaning of *"other like documents"*, as set out in the definition.

Thus the content of Articles 3 and 4 of the notice can be the subject matter of a declaration under s. 5 of the Act of 2003.

The next question which arises is whether or not Article 6(1) of E.C.H.R. can be invoked in respect of the investigative proceedings of the respondents to which Articles 3 and 4 of the notice apply.

Here it is necessary to consider the nature of those proceedings and the consequences of them. Three consequences can flow pursuant to the Act of 2002, namely, the respondents can themselves initiate a prosecution for breaches of the Act summarily, they can send their papers to the Director of Public Prosecutions who can initiate a prosecution for breaches of the Act on indictment, or they can take civil proceedings to restrain breaches of the Act.

It has to be borne in mind that the primary purpose of an investigation will be to ascertain whether or not breaches of the Act have been committed by certain persons. In essence therefore these investigations are investigations to determine whether or not a crime such as a breach of s. 4 or 5 of the Act has been committed by a particular person or persons. It is therefore in essence a criminal investigation. Whether or not a "charge" is laid against any particular person will depend upon the progress of each investigation. In this context, *"charge"* has been defined by the European Court of Human Rights in the case of Serves v. France [1997] 28 E.H.R.R. 265 at paragraph 42 of the judgment, where the following is said in respect of what is a *"charge"* for the purposes of Article 6(1):

> *"That concept is 'autonomous'; it has to be understood within the meaning of the convention and not solely within its meaning in domestic law. It may thus be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence', a definition that also corresponds to the test whether 'the situation of the (suspect) has been substantially affected'.*

I would be of opinion that a *"charge"* for the purposes of Article 6(1) of the Convention arises in the context of investigative proceedings of the respondents, at the point where there is an intimation to a person that it is alleged that he has committed any or all of the criminal offences set out in the Act of 2002. Manifestly this could happen at various stages but it would appear to me, that for many persons who may be described as either the target of an investigation or the subject of an investigation, that it would be likely to arise very early on in the investigation, if not in fact at the point where certain persons are summonsed to appear before the respondents, not as witnesses but as persons being investigated. This would tend to suggest that Article 6(1) is engaged from that point onwards.

Against that, it is submitted by the respondents that they do not decide or determine anything and that insofar as any determination arises out of their investigation that can only happen in either criminal proceedings or civil proceedings, in which a person under investigation by the respondents can invoke Article 6 rights for their protection.

In my view the crucial question is not just, whether or not the respondents make any determination either of criminal or of civil liability but in addition, whether or not in the investigative process an event can occur which in later proceedings, be they criminal or civil can have a decisive effect on a determination of either criminal or civil liability on the part of a person investigated.

It would appear to me, that the only such kind of decisive event that could occur in the investigative process would be the bringing into being of evidence which would be admissible in later criminal or civil proceedings. The Act of 2002 does not give evidence gathered in the investigation any evidential status in later proceedings, criminal or civil. Insofar as criminal proceedings are concerned reference has been made and reliance placed by the respondents on the case of *In the matter of National Irish Banks Limited and In the matter of the Companies Act [1999]* 3 I.R. 145, to submit that evidence obtained under the compulsion of statutory provisions such as s. 31 of the Act of 2002, will not be admissible in a subsequent criminal trial unless the trial judge were to be satisfied that the evidence was given voluntarily. On the face of it that would seem to rule out any risk of a person under investigation suffering a decisive prejudice so far as subsequent criminal proceedings were concerned. However Mr. Maurice Collins S.C. in his submissions for the respondent said that the respondents take the view that the respondents may caution a person under investigation as the guards would do in the course of a criminal investigation and the respondents take the view that compelled testimony may be admissible against an accused in a subsequent criminal prosecution. If the respondents are correct in their view then it necessarily follows that a person under investigation before them may have the evidence given by them in the investigation admitted in subsequent criminal proceedings to a finding of their guilt in those proceedings.

This would only arise, it would seem to me, where a person volunteered evidence which tended to incriminate themselves, because it could be said, that they had voluntarily waived the priveledge against self incrimination.

I am of opinion, that faced with an appropriate caution from the respondents and in order to understand the potential consequences of that for the purpose of giving evidence both, persons, who are the target of an investigation and witnesses, would need legal advice and assistance, in order to know, which questions, they were obliged to answer by virtue of sec. 31(1)(40 and which questions they would be entitled to refuse to answer, exercising the privilege against self incrimination.

The potential creation of decisive evidence admissible in later criminal proceedings out of all this, suggests to me that Article 6 ought to apply.

In my view any court charged with the jurisdiction of having regard to the State's obligations under Article 6 of the Convention would feel compelled to the view, that in the circumstances revealed in this case, that Article 6(1) was engaged.

Apart from or indeed in addition to the foregoing it would seem probable that evidence given by a person in the investigative process would be admissible against that person in subsequent civil proceedings. Thus the taking of evidence by the respondents in its investigative processes would in that circumstance be likely to be decisive in determining the rights and liabilities of a person under investigation in subsequent civil proceedings. That fact alone would on the authorities be sufficient in my view to invoke Article 6(1) of the Convention.

This brings me to a consideration of whether or not the content of Articles 3 and 4 of the impugned notice constitute a breach of

Article 6(1) of the E.C.H.R. Article 6(1) of the E.C.H.R. reads as follows:

"Right to a fair trial.

> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*
>
> *…*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*
>
> *…*
>
> > *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require…".*

Those cases decided by the European Court of Human Rights that concern choice of lawyer are mainly concerned with the choice of lawyer in the circumstances where legal representation is being provided by the State. It is clear in that circumstance, there is not under the convention a right to an unfettered choice of lawyer and the cases illustrate a variety of circumstances in which that freedom of choice has been curtailed. However in *Croissant v. Germany* 16 E.H.R.R. 135 at paragraph 27 of the judgment the following was said.

> *"Again, the appointment of more than one defence counsel is not of itself inconsistent with the Convention it may indeed be called for in specific cases in the interests of justice. However, before nominating more than one counsel a court should pay heed to the accused's views as to the number needed, especially where, as in Germany, he will in principle have to bear the consequent costs if he is convicted. An appointment that runs counter to those wishes will be incompatible with a notion of a fair trial under Article 6(1) if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification."*

Further on at paragraph 29 the following was said:

> *"It is true that Article 6(3)(c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also whereas in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendants wishes; indeed German law contemplates such a course. However, they can override those wishes when they are relevant and sufficient grounds for holding that is necessary in the interests of justice."*

If freedom of choice of lawyer cannot be denied in a criminal trial where legal assistance is being provided by the State, without good and sufficient reason, it would seem to me to be unarguable that the Convention would require as an incident of a fair trial, that the freedom of choice of lawyer by a client who is paying for the services of a lawyer would be respected and not interfered with save for the gravest and most compelling of reasons which must necessarily in my view establish that the choice of lawyer made, would for whatever reason, grossly impede the conduct of the proceedings in question.

. As discussed above where the Tribunal conducting the proceedings interferes with the choice of lawyer made by a party to the proceeding, at the very least there will invariably be a perception by the party affected that the proceedings have not been conducted in a fair manner. This will almost certainly be so when the Tribunal, is itself the adversary of the person appearing before it, as in the position of the respondents. The interference by a Tribunal with a choice of lawyer made by a party appearing before it may frequently have the consequence, because of the disruption of the relationship of lawyer and client and of the confidence which a client should have in his or her lawyer, of actually inhibiting a fair hearing.

I would be of opinion, that as a general proposition Article 6(1) requires that persons before tribunals which have a jurisdiction to determine rights and impose liabilities either in the primary hearing before them or to cause decisive events to occur which materially affect the determination in secondary proceedings, consequent upon the primary proceedings, have the right to choose their legal representatives, subject only to the tribunal having a discretion to interfere with that choice, as discussed above.

In this case, for the reasons which I have discussed above I do not think that the reasons put forward by the respondents as a justification for the prohibition contained in Articles 3 and 4 of the impugned notice go nearly as far as establishing that the prohibition is necessary in order to enable the respondents to effectively discharge their function. For that reason in my view these reasons cannot amount to a sufficient justification for denying a freedom of choice of lawyer which is required as an integral aspect of a fair trial, as guaranteed by Article 6(1) of the E.C.H.R.

I should observe that in the affidavits of Ray Leonard and elsewhere in the submissions some stress was placed by the respondents on *"the integrity"* of their investigations. I am unable to see anything at all in their complaints which have anything to do with the integrity of their investigations. I can see that they have a concern about the effectiveness of their investigations, but in my view the integrity of their investigations is achieved by ensuring that their investigations are carried out in accordance with the relevant statutory provisions, the relevant common law and respecting the constitutional rights of those who are affected by their investigations.

It is of course the case that because of the fact that I have already held that the impugned notice breaches Article 40.3 of the Constitution, and that therefore on that ground alone there should be an order of certiorari, by virtue of s. 5 of the Act of 2003, it is impermissible to make the declaration of incompatibility envisaged in s. 5, there being another adequate legal remedy available.