Neutral Citation Number: [2007] IEHC 471

THE HIGH COURT
DUBLIN

2005 No. 269 COS

OFFICE OF DIRECTOR OF CORPORATE ENFORCEMENT

APPLICANT

AND
MR. J. LACEY

RESPONDENT

Judgment delivered by Mr. Justice Murphy on 3rd October 2007

1. This is an application for cross-examination on affidavit of the respondent, Mr. Lacey. Clearly it is contended at this stage that such cross-examination should be allowed. The correspondence, originally inserted in the papers that the Court read last week, indicated that Mr. Lacey would only consent in the event of there being a cross-examination order as against the deponent for the Director of Corporate Enforcement, and that affidavit is the one that has been put in issue today, that is the second affidavit of Mr. O'Rafferty. The Court in any event will make a consent order for the examination of Mr. Lacey.

2. Two issues then are still extant: one is the issue of whether there should be cross-examination of the deponent on behalf of the Director and, secondly, whether the second affidavit of that deponent, Mr. O'Rafferty, should be expunged to the extent that some of the matters there are matters outside the knowledge of Mr. O'Rourke, that they are in the nature of comment, argument and submission.

3. There was no application in relation to hearsay, although arguments have been made by way of analogy with hearsay matters in affidavits and there also have been some analogies in relation to scandalous matters, which fall within a different sub rule of the Rules of the Superior Courts.

4. Taking that latter matter first, which is not relevant otherwise than by way of analogy, it is clear that the rules of the Court, in particular Order 40, Rule 12 deal with scandalous matters and give the Court indeed a right to expunge those matters from affidavits or indeed in the event of affidavits being replete with such comments to refuse to allow those affidavits to be introduced in evidence.

5. The issue arises of whether this is a matter simply for the rules or indeed is a matter of inherent jurisdiction of the Court. There are some authorities that have been cited in relation to the inherent jurisdiction of the Court with regard to the management of court matters which, by way of analogy, is prayed in aid by the applicant, Mr. Lacey, as against the Director.

6. The question of Sub Rule 4 is clearly a matter which is directly relevant, that provides, Rule 4, Order 40, that affidavits should be confined to such facts as the witness is able of his own knowledge to prove and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to belief with the grounds thereof may be admitted and the cost of any affidavit shall unnecessarily set forth matters of hearsay, of an argumentative nature or copies of, or extracts from documents shall not be allowed.

7. I should, first of all, comment: It has been submitted that this differs in terms of the remedies that are available from that in Rule 12, which allows the Court where it is scandalous to strike out those affidavits. There is no question of that under Rule 4, Order 40, that is to say that it is a matter in relation to costs if it unnecessarily sets forth matters of hearsay or of an argumentative nature. Again the word is "argumentative" which of course can be, perhaps, close to advocacy, which has been mentioned, but does not appear to me to go as far as comment, or indeed submissions.

8. In relation to the means of knowledge, it is clear that Section 22 of the 1990 Act, which deals with Inspectors reports to be evidence, is a short section, and it states:-

> "A document purporting to be a copy or a report of an Inspector appointed under the provisions of this part shall be admissible in any civil proceedings as evidence:
>
> (a) Of the fact set out therein without further proof, unless the contrary is shown and;
>
> (b) Of the opinion of the Inspectors in relation to any matters contained in the report."

9. Curiously this refers back to *Savings and Investment Bank v. Gascoigne Investments Netherlands BV*, a 1984 case cited in 1 All England Reports at 296, which is interesting in terms of the opinions of the Inspectors not being allowed in evidence. It is clear that this section does two things: It allows the facts set out without further proof of the Inspectors, as in the present case of the inspection of the National Irish Bank, to be admitted in proof unless the contrary is shown. Clearly that is a matter for the trial of the action. It may very well be that there will be evidence given, indeed there are hints of that in terms of the fairly lengthy affidavits that are before the Court in this motion, that the contrary may indeed be shown.

10. Secondly:-

> "Of opinion of the Inspectors in relation to any matters contained in the report."

11. That would appear to go some distance beyond the strictures of *Savings Investment Bank v. Gascoigne*. In any event the question is: Should the opinion of the Director be a matter which is in evidence? In order to explore that the Court needs to consider a number of other matters in relation to the history of affidavits and the submissions that are made in relation thereto, and indeed the judgment of my late colleague, O'Donovan J. on 16th November last.

12. Perhaps I should start with that because that, of course, was an application for cross-examination of a Director, indeed a person who had taken over from Mr. Lacey in National Irish Bank in 1994, and an application was made by the Director there for his cross-examination because certainly on the pleadings in *Seymour* the respondent challenged certain findings, but more importantly the inferences and the issue of liability as found by the Inspectors. O'Donovan J. said that the courts tend to allow cross-examination where there is a conflict and that that followed the view of Keane C.J. in *Holland v. The Information Commissioner*.

13. He then referred to the affidavit of Ann Keating, the principal solicitor for the Director of Corporate Enforcement, which was categorised as not so much as to facts but inference and opinions drawn and expressed by the Inspectors and the construction of facts. Clearly that falls within Section 22, where there was a conflict then, certainly on the pleadings, although in the hearing it was not quite so stark, that the findings and the inferences of the Inspectors were indeed being challenged, that is with an attempt to

show the contrary. Clearly in that case the conclusion was that the cross-examination should be allowed.

14. Mr. McGrath in his application before this Court says that that refers not just to conflicts of facts but also conflicts in relation to common submissions, and so on, and particularly he says that that is not the role of the Director of Corporate Enforcement or the Authorised Officer, Mr. O'Rafferty, in relation to evidence. He had no difficulty with the first affidavit of Mr. O'Rafferty but he had a difficulty with regard to the second affidavit, and it was on the basis of the second affidavit that he was asking the Court to make a similar order in respect of cross-examination of Mr. O'Rafferty.

15. Mr. O'Rafferty's second affidavit, which is the one that is relied on as having extraneous material in it and indeed opinions, submissions and arguments masquerading as facts or interwoven with facts so as to give the appearance of being factual matters within the knowledge of the authorised officer -- in fact does deal with the source of knowledge in the normal way and to that extent there is an understanding that what is dealt with in the second affidavit is a matter within the knowledge of the deponent, and it says so in the normal way:-

> "I am an officer of the Director of Corporate Enforcement. I am authorised by the Director, the applicant herein, to make this affidavit on his behalf. I do so from facts within my own knowledge, save for where otherwise appears and where so appearing I believe the same to be true and accurate."

16. The purpose of the second affidavit is stated to be in response to the first and second affidavit of the respondent. The first affidavit was sworn on 3rd October, 2005, and the second affidavit was sworn almost one year later on 2nd April, 2006.

17. Mr. O'Rafferty's affidavit was then sworn on 22nd of October, the end of the month, the second affidavit.

18. Perhaps in terms of overview it is somewhat significant that Mr. O'Rafferty's first affidavit had four exhibits, it was dealing with the Inspector's report and matters that grounded the application. Mr. Lacey's more extensive affidavits contained some 26 exhibits in total and the second affidavit then replying to those two affidavits contained a further four exhibits. This has some relevance insofar as the object of Mr. O'Rafferty's second affidavit is concerned, that is to reply to the affidavits of Mr. Lacey.

19. The structure of the second affidavit of Mr. O'Rafferty is stated at paragraph three to deal with the documents disclosed by Mr. Lacey and address issues raised by Mr. Lacey. Clearly on a perusal and without having the advantage of having the red book of the exhibits, in particular one of those exhibits, to which I will refer in a moment, it seems to the Court that the second affidavit of Mr. O'Rourke is doing that, it is replying to the documents referred to by Mr. Lacey and includes, it appears to me, possibly some other documents that have been the subject of discovery. To this extent it is clear that if one is to analyse the materials that are used in all of the affidavits one can do so in the following way, and I will come back to the affidavit in a moment:

20. The first matter is the facts and the inferences in the report itself. It seems to be clear that Section 22 covers that and that indeed is what is contained in the first affidavit of Mr. O'Rafferty. There are also appendices in the report to which reference is made and would appear to me to fall into exactly the same category. What there also is, is of course, the documents to which the Inspectors had access to and, perhaps, more importantly, the examination of the various witnesses by the Inspectors. Clearly a report is simply going to form a summary and indeed the conclusions of the Inspectors as they are required to do.

21. Insofar as voluntary discovery was made by the Bank, both to the Director and to Mr. Lacey, and again I do not need to go into the detail of how this was done, it would seem to me that those are matters that are also relevant to the affidavit, both the replying affidavits of Mr. Lacey and also Mr. O'Rafferty's response thereto. Even though those are not part of the report they are so amenable to the Court by virtue of two things, first of all that they are referred to by Mr. Lacey, therefore matters that are clearly relevant, he is entitled to refer to them, but it also seems that Mr. O'Rafferty can refer to those matters as well. In addition there has been discovery and indeed both sides have stated, of course without prejudice to what they do include in their affidavits, that they may wish to refer to other documents during the hearing, and again it appears to me that they are entitled thereto. Again there does not seem to be any difficulty in terms of procedure with regard to those matters.

22. We then move to a further category, which is the question of public documents, and in particular reference is made by Mr. O'Rafferty to the Public Accounts Committee Inquiry in relation to National Irish Bank and also to the Central Bank Inquiry in relation to that Bank. In both cases Mr. Lacey gave evidence, and the evidence given is a matter of public record. It does seem to me that it is relevant and there cannot alone be reference thereto but it would appear in relation to the cut and thrust of affidavits and replying affidavits that parties do comment in relation thereto. Clearly such comment may indeed be a matter for submission and indeed may be the subject of submissions, but it does not seem to this Court that the fact that they are included in an affidavit, notwithstanding what Order 40, Rule 4 says, there is any prejudice suffered in relation to their inclusion. Indeed on one view it may be in ease of the other party to know what the arguments are, although again I do not think it is a matter to which Rule 4, Order 40 strictly speaking should allow. It does not seem to me there is any issue, certainly in relation to public documents and the question of limited comment, or it does not seem to me to be prejudicial to the other party.

23. It does seem to me to be very, very clear that the trial judge in dealing with this matter will certainly differentiate between facts and comments on those facts, but to parse and analyse an affidavit and simply say "that is more comment" is a practice that I do not think should be advocated by the courts, this is particularly so where comments have already been made in previous affidavits to which the instant affidavit was replying, and where comments are made as well. While one would like more exact pleadings there is no doubt that a practice has crept in where some comments are made, and indeed an argument can be made that they are within the knowledge of the deponent insofar as they are making an observation on documents which are relevant.

24. I have already referred to the exhibits and the affidavits of the respondent and I have said that it seems to me that Mr. O'Rafferty is entitled to comment on those, as indeed he would appear to be entitled to refer to other documents which were the subject of discovery. Beyond that it does not seem to me that any deponent is entitled to refer to extraneous matters, first of all because they would not be relevant in a particular case, such as this application under Section 160 for the disqualification of directors, but also it would be unfair to refer to these without them being part of the common purview of discovery or indeed going back to the report, the evidence of which, unless the contrary is proved, to be taken as factual.

25. The position of the Director is the next matter which I should deal with:- the Director for Corporate Enforcement has of course a statutory role in relation to applications under Section 60, this is very clear from the development in company law where Inspectors have a role and the Director of Corporate Enforcement has a role in seeking to have disqualification issues brought before the Court.

26. Mr. O'Rafferty is an authorised officer and to that extent he is carrying out the role of the Director of Corporate Enforcement. The statutory role under Section 12 of the Company Law Enforcement Act of 2001 seems clear, this does allow of course the role of the

Director to bring such applications before the Court but also to distinguish his role between the role of a plaintiff in a civil case. Clearly the issue of disqualification is an important one and it has certain consequences for those who have been made respondents to such an application.

27. I stress that the role of the Director is different insofar as he relies on the information that is contained, the information as to facts, but also as to opinions as contained in the report of the Inspectors. The Inspectors themselves are not party to these matters nor indeed would it seem to be amenable to cross-examination in relation to their conclusions, that is not to say that their findings cannot be challenged, and the person or the party that is the respondent to that challenge is of course the Director of Corporate Enforcement.

28. The role then of the Director, as I say, is somewhat different and insofar as the analysis I have made of the facts are concerned the only matters within the knowledge of Mr. O'Rafferty, the authorised officer, are matters which are common and would appear, as I have already indicated, to be relevant, that is to say on the analysis one has to ask: Are there any matters which are outside the categories which I have referred to? In order to do that it is necessary now to go through the affidavit in relation to the points that are made and it seems to me that there are 13 matters within the second affidavit of Mr. O'Rafferty that I have to examine now:-

29. The first occurs at paragraph seven of the affidavit, which says:-

> "Furthermore, the respondent made oral and written submissions to the Inspectors following the release to him of their provisional findings. As is clear from such documents, the latter of which I beg to refer, and which is marked with the letters D.O.R. 3 and I have signed my name prior to the swearing hereof and from the report itself that the Inspectors were keenly aware...",

30. And it this phrase 'keenly aware' "...that the respondent had been Chief Executive from April 1988 until April 1994, and not for the entire period with which the report was concerned. It is therefore somewhat difficult to understand the assertions of the respondent, Mr. Lacey, in paragraph 35 of his first affidavit to the effect that they had failed to recognise this.

31. It seems to me that taking that paragraph as a whole it is a response to what Mr. Lacey mentioned in paragraph 35 of his first affidavit, and indeed I have no doubt it is a matter not alone to which Mr. Lacey is entitled to stress, and will stress, in relation to his duties and responsibilities within NIB at the time, they are necessarily confined, it seems to me, to April 1988 to April 1994.

32. What Mr. McGrath on behalf of Mr. Lacey is saying is that phrase "were keenly aware" is an opinion of Mr. O'Rafferty, the authorised officer, and is inappropriate in an affidavit which should deal with the facts of the report and not, if I can use the phrase, being a gloss on the report or being a matter which is seemingly factual that does not derive from the report itself. To my mind the phrase is somewhat innoxious; to say "keenly aware" may indeed have a little degree of comment in it, if indeed it has not come into the report itself. Nobody has made the argument that this phrase comes from the report of the Inspectors. It does seem to me to be at best innocuous in terms of the type of prejudice that would be suffered. I would make the point, and I make it again, in relation to some of the other paragraphs, that a trial judge is not going to be influenced by "keenly aware" rather than by "being aware" or referring back to the report itself. While it might have been preferable to have done that, as I say the role of the Court is not to redraft an affidavit or suggest that an affidavit should be parsed and analysed to that extent.

33. The second matter comes shortly after that in paragraph eight under the heading: "Seriousness of the practices to be engaged in". Again it is a relatively short paragraph, which states:

> "As is reflected in the Bank's reaction paper..."

34. That is the NIB reaction paper to the original development of the Inspector's assessment.

> "...the seriousness of these matters which form the subject of the inspection and the report should not be underestimated."

35. This phrase, and I do not think I need to read any more, is a matter of comment, it appears to me to be beyond what the report actually said. I cannot see any prejudice in it nor can I see anybody regarding that as a fact distinct from what the report was. Indeed if I may simply refer to the sentence that follows:

> "Thus with regard to the Bank's liability in respect of DIRT for the period 6th April, 1996, to 5th April, 1999, which included the respondent's tenure of office as Chief Executive but which also spanned the time as Deputy Chief Executive and his term as a non Executive Director the Bank paid the Revenue some €6.5 million by way of settlement of its DIRT liabilities."

36. Again this may be a lot more than the report said, the report does not say it in that way, it does not appear to me that this is a matter to which the Court could seriously say that that must be struck out of the affidavit because it is not facts within his own knowledge, clearly it is a matter that derives from the Report and the comment from that. In relation to those first matters it does not seem to me that the Court should intervene.

37. The next matter is paragraph ten, which refers again to this matter of the Bank being a licensed bank and:

> "As reflected by its statutory regime..."

38. The affidavit says,

> "...which does not permit the carrying out of a banking business without licensing Central Bank, now the financial regulator, A bank is founded on a relationship of trust. In addition, as is addressed below in relation to the question of DIRT..."

39. that is Deposit Interest Retention Tax

> "... the Bank owed clear duties to the Revenue Commissioners, which were themselves at least *quasi fiduciary* in nature. Accordingly, the duty of the directors and officers of the Bank must be seen in the context of the nature of the business, and while it might be a matter more appropriate for submissions such underlies the need for the Respondent and others to ensure that improper practices did not occur."

40. What is acknowledged there is this may be a matter more appropriate for submissions, and I certainly agree with that, that it would have been better had this paragraph simply been a matter of submissions. It would appear to derive from the judgment of Kelly J. in the *Director of Corporate Enforcement v. D'arcy*, which I think was a matter which was dealt with before Mr. Seymour's case and Mr. Kearns' case.

41. The question then is: Should this be omitted or not? It does appear to me to be acknowledged by the Director, or by the Authorised Officers of the Director, to be a matter which might indeed be more appropriate for a submission. Then I ask the question: What prejudice is suffered in relation thereto? If it is comment is it not comment that the Director is entitled to make, or the authorised officers are entitled to make? On that basis while it may indeed have been more appropriate to have omitted that it does not appear to me that that is a matter that I should strike out in relation to the matter nor indeed, and this perhaps is a point that needs to be stressed again, is it a matter which justifies cross-examination of the deponent of this affidavit.

42. What is the answer to be if the deponent is cross-examined? What is the basis of you saying that the Bank owed clear duties to the Revenue Commissioners, which were themselves at least *quasi fiduciary* in nature? It really is a matter for legal submission, it seems to me and the Deposit Interest Retention Tax, as with that, has been described in some judgments as being a matter of a *quasi fiduciary* nature insofar as the taxpayer is holding money that is gathered on behalf of the State, the same would apply to pay relief and social insurance, and so on. Again it appears to me that while it might have been better to have omitted that and leave it to submissions that it is not a matter in which the Court should interfere.

43. The same would apply in relation to paragraph 12, where there is a comment which even goes further, it says:-

> "This approach in itself shows the misplaced understanding of the duty of care and skill which a Director, and particularly a Chief Executive Officer, owes to the Company. As part of that duty Directors have both collectively and individually a continuing duty to acquire and maintain an understanding of the Company's business, without which they are unable to discharge properly their duties as directors. Furthermore, where delegation is permitted the exercise of delegation does not absolve a Director from the duty to supervise the discharge of delegated functions."

44. This comes *Garr on Company Law*, it comes from the *City Equitable Fire Insurance* case but perhaps even more so the *Regal (Hastings)* case. It is an old chestnut with regard to directors' liability, it is not a matter which should have been included in an affidavit. Again I ask, if one is to draw a line through that then one downloads it to the submissions, but it does not seem to me, other than making that obvious comment, that the Court should interfere.

45. The next paragraph is 13, which follows on that, again it does not appear to me that I need to go into any detail. It does go beyond what is in the report, as indeed does the following paragraph, 14, it is a comment, a comment that does not refer to the affidavit of Mr. Lacey and to the same extent then it would seem to me that that is a paragraph which should not have been included in the affidavit. That is paragraphs 12 and 13, and 14, I would make the same comment on.

46. One could of course in relation to paragraph 13 distinguish between the first part and then the reference, which goes even further in the last sentence, which I will cite:-

> "However, in the light of the attack which the respondent seeks to make on the findings of the Inspectors and with his knowledge at least as Deputy Chief Executive he may have had some relevance."

47. That may indeed come from the attack but it goes beyond, it seems to me, what is relevant from the knowledge of the deponent in that case. Again I ask the question: should the Court interfere? It does not appear to me that it should.

48. The remaining matter, paragraph 17, is regarded as being more important, and Mr. McGrath highlights this matter, it is a comment in relation to the Central Bank. It is a short paragraph:-

> "The respondent makes reference to a visit by the Central Bank. There is no evidence what inspection, if any, was carried out by the examiners. The letter dated 28th January 1992, exhibited as part of JL15...",

49. …which I do not have. I do not have the exhibits, nor indeed do I want them. ..indicates that this was the first such visit. On that basis it would be reasonable to assume that any work carried out would have been summary in nature and more in the nature of information-gathering rather than investigatory. The basis of Mr. O'Rafferty making that comment there is no basis given for that but, perhaps, more importantly, in terms of a balance Mr. Lacey in his third affidavit in paragraph 25 refers specifically to that and refutes that. It does seem to me to that extent the Court need not interfere.

50. The matter is clearly dealt with by Mr. Lacey, as he is entitled to do, he begs to refer to paragraph 17, the one I have just cited:-

> "Mr. O'Rafferty, where he makes the speculative assumption that the inspection carried out by the Central Bank was summary in nature and more in the nature of information-gathering rather than investigatory in fact the inspection carried out by the Central Bank involved a full scale examination of the Bank and its records and a team from the Central Bank were working in the Bank for a number of weeks to complete it. It is also important to reiterate that despite a number of regular reviews the Central Bank did not at any point during my tenure as Chief Executive raise any concerns in relation to the shortcomings identified by the Inspectors. So however infelicitous that comment may have been in paragraph 17 of the authorised officer of the Director of Corporate Enforcement it is replied to, and that seems to me to be the end of that matter."

51. The next matter complained of was paragraph 22, which is a lengthy paragraph, I just need to refer to the first part of it:-

> "As far as the findings that such did in fact exist..."

52. Relating back to bogus, non-resident accounts:-

> "...throughout the network the Inspectors, of course, had the benefit of interviewing on oath numerous customers and bank managers",

53. and then they refer to paragraphs in the report itself, and there is an extensive reference there. However at the end of that there is a comment to which Mr. McGrath takes exception, most of these accounts would have existed during the respondent's term

as Chief Executive, remember the DIRT theme audit referred to the time that Mr. Lacey was Chief Executive, but some time before that as well. Here Mr. O'Rafferty is saying most of the accounts would have existed during Mr Lacey's term as Chief Executive, then he goes on. Again it does seem to me that this is not a matter that comes from Mr. O'Rafferty, it is a matter that would seem to emanate from the report itself and insofar as it is a comment it is restricted to most of these accounts, there is nothing further, and accordingly it does not seem either this is a matter to which the Court should interfere with.

54. Paragraph 27 refers specifically to s. 32 of the Finance Act, 1986, which is the section dealing with Deposit Interest Retention Tax, the quotation from that, again one need not have that in an affidavit because it is a matter, clearly, of statutory law, and then there is a comment on it:-

> "Accordingly the Bank was obliged to deduct interest."

55. Again it does seem to me that this is a submission rather than a matter of fact that Mr. O'Rafferty has included, it would, perhaps, have been better to have left that to submissions, but it does not seem to me that there is any prejudice in relation to the matter, that if the Court was to start putting blue lines through that there would be no deficiency in the affidavit and I have no doubt it will form part of submissions.

56. The third last matter is paragraph 33, that again is a comment, as follows:-

> "On the question of responsibility the Director adopts the position of the Inspectors that the culture and operating environment of the Bank was not conducive to the creation adherence by bank staff to legal and procedural requirement. As Chief Executive the respondent had a duty to familiarise himself with all aspects of the Bank's business and was ultimately responsible for the flawed culture and operating environment which permitted, or even encouraged in certain instances, non compliance with the Bank."

57. There are two elements to that, the first one is that the Director adopts the position of the Inspectors, the Court has no difficulty whatsoever with that, indeed it would appear that the Director needs to say: Yes, I adopt the findings of the Inspectors, as indeed s. 22 of the 1990 Act allows. What happens then afterwards as Chief Executive, the respondent had a duty to familiarise himself. Again, this is a comment which seems to me more legal in nature in terms of the responsibility of chief executives, and again there is argument in relation to the role of a chief executive. Again I ask, if one were to put a blue pencil through that one where would that leave us? It would simply be a matter for submissions.

58. The second last matter is the Public Accounts Committee, which is paragraph 38, again it does not appear to me, for the same reasons, that I need interfere with that.

59. Finally, paragraph 40 is as follows:

> "On the evidence contained in the report it was appropriate that the Inspectors should have found that the respondent knew or ought to have been aware of the promotion and sale practices of the Bank having regard to a number of matters",

60. which are detailed there.

61. Again it does seem to me that that extensive paragraph in the affidavit towards the end does seem to be argumentative in nature. In the circumstances it seems inconceivable that the respondent did not ask or was not informed of the reasons for the success of the Clerical Medical Insurance, the CMI Insurance Scheme or other products having regard *inter alia* to his regular contacts with his senior management team and branch managers through the country. Again that appears to go somewhat beyond simply a reiteration of what the report said, however with regard to this it does seem that that comment is not at odds with what the report referred to in relation to the CMI Insurance Scheme.

62. Having gone through those matters the Court has already commented on perhaps it being unnecessary to include some of those matters but it does not seem for that reason that the Court should interfere with the affidavit, the affidavit is a matter of record within the proceedings, it does not seem to me to be a matter which gives rise to any information which is outside the categories to which I have already referred, that there is not information there, there is comment, certainly, but there is not information which is outside the report, matters of public record, discovery by the parties and, more particularly, in terms of the documents exhibited in Mr. Lacey's two affidavits.

63. I conclude by saying that the equality of arms between the parties is always a matter of representation, that the constitutional right to a fair hearing, to equality in that sense is not being denied either party. There is a difference between the role of the Director, the statutory role of the Director, and to that extent there is no synergy in relation to the Court having to make an order for cross-examination of the Director, or Mr. O'Rafferty in this case as his authorised officer, just because an order has been made in relation to the respondent.

64. The Court has been aware of the issue of prejudice. It has also been conscious of the possibility of opinion, argument and submissions being masqueraded as facts. It does not appear to me that a trial judge is going to be misled in relation to the issues of comment that I have referred to. There is nothing scandalous, there is nothing irrelevant, even if the matter does go at times beyond the giving of facts. Accordingly it seems to me that I should refuse the application of the respondent in relation to an order for cross-examination of Mr. O'Rafferty and I should also decline to strike out any part of the second affidavit, which we have analysed.