Neutral Citation: [2016] IEHC 162

THE HIGH COURT

Record No. 2015/9210P

BETWEEN:-

CRH PLC, IRISH CEMENT LIMITED AND SEAMUS LYNCH

Plaintiffs

– AND –

THE COMPETITION AND CONSUMER PROTECTION COMMISSION

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 5th April, 2016.

Part 1

Overview

1. It is helpful to begin with a simple example of the nature of the issue presenting. Suppose there are three filing cabinets sitting in a room on private premises. A search warrant has the effect that State officers may enter those premises and take the contents of the middle cabinet; there may also be some papers in the other two cabinets to which they are entitled. The officers enter the premises and seize the entire contents of all three cabinets, despite being told at the moment of seizure that the second and third cabinets contain much to which they are not entitled. The owner of the premises later writes to the State officers and says, 'You are entitled to the contents of the middle cabinet but I want those contents of the other cabinets to which you are not entitled returned to me. Some of the material in those other cabinets does not even belong to me.' The State officers say 'The effect of our warrant is such that we may be entitled to some of the contents of the other cabinets. So we will go through all the material in those other cabinets and let you know what it is that we are entitled to.' The owner of the private premises where the cabinets are located suggests a process whereby the contents of the other cabinets would be sifted to ensure that the State officers get access to the documents to which they are entitled, but do not get access to those documents which they never had any entitlement to take away. 'To act otherwise,' he maintains, 'would, amongst other matters, involve an unwarranted intrusion upon the right of privacy'. Though the owner is open to any reasonable solution, none can be agreed. So the parties come to court to see what the law requires. That, in a nutshell, and stripped of the particularity of the facts now presenting, is the nature of the dispute presenting in these proceedings.

Part 2

The Facts

2. Last May a 'dawn raid' was done at the premises of Irish Cement Limited at Platin, County Louth, by authorised officers of the Commission, acting pursuant to a search warrant. In the course of that raid, the officers took a copy of the entirety of the e-mail box of Mr Lynch, a senior executive within the CRH group, of which Irish Cement is part. It appears to the court, on the balance of probabilities – to the extent that this continues to be contested by the Commission, if at all – that some of the e-mails and attachments in that e-mail box almost certainly were not caught by the terms of the warrant. The central issue now arising between the parties is what is to be done about those e-mails and attachments which it is claimed that the Commission does not lawfully have in its possession.

3. A more detailed chronology of the 'dawn raid', with some limited court narrative, is set out in the Appendix hereto, which forms part of this judgment. However, the foregoing suffices by way of an initial summary of the background facts. Such other facts as are relevant are introduced by the court in the course of the judgment that follows.

Part 3

The Parties

4. CRH plc is a publicly listed international building materials group operating in countries across the Americas, Europe and Asia.

5. Irish Cement Limited is an Irish-incorporated company and a subsidiary of CRH plc. It has its registered office at Platin, County Louth. The business done by Irish Cement at Platin involves the production and supply of a range of cement products.

6. Mr Seamus Lynch is a senior executive within the CRH Group.

7. The Competition and Consumer Protection Commission needs no introduction. It is the statutory body charged with responsibility for, inter alia, investigating suspected breaches of (a) the Competition Act 2002, as amended, and (b) Articles 101 and 102 of the Treaty on the Functioning of the European Union.

Part 4

The Reliefs Sought
8. By way of plenary summons of 10th November last, the plaintiffs seek the following principal reliefs:

> (1) a declaration that the Commission has acted ultra vires and contrary to s.37 of the Competition and Consumer Protection Act 2014, and outside the scope of its search warrant of 12th May, 2015, in seizing books, documents and records unrelated to activity in connection with the business of supplying or distributing goods or providing a service at the premises of Irish Cement Limited at Platin;
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> (2) a declaration in accordance with s.3 of the European Convention on Human Rights Act 2003 that the Commission has acted in contravention of Art.8 of the European Convention on Human Rights;
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> (3) a declaration that the Commission has acted in breach of Arts. 7 and 8 of the Charter of Fundamental Rights of the European Union;
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> (4) a declaration that the Commission has acted in breach of the plaintiffs' right to privacy under Art. 40.3 of the Constitution;
>
> (5) a declaration that the Commission has acted in breach of the Data Protection Acts 1988 and 2003; and
>
> (6) an injunction restraining the Commission from accessing, reviewing or making any use whatsoever of any books, documents or records, howsoever described, which were seized by the Commission on 14th May, 2015, and which do not relate to an activity in connection with the business of supplying or distributing goods or providing a service at the premises of Irish Cement at Platin.

9. Certain other reliefs are also sought.

Part 5

Section 37
A. The Text of Section 37(1)–(3).

10. The 'dawn raid' done at Irish Cement's premises was done pursuant to s.37 of the Competition and Consumer Protection Act 2014.That section is comprised of 14 sub-sections but, to a very large extent, it suffices to recite three of them, s.37(1)–(3), for the purposes of this judgment:

> *"(1) For the purpose of obtaining any information which may be required in relation to a matter under investigation under the Act of 2002[1]an authorised officer may, on production of a warrant issued under subsection (3), authorising him or her to exercise one or more specified powers under subsection (2), exercise that power or those powers.*
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> *(2) The powers mentioned in subsection (1) are the following:*
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> *"(a) to enter, if necessary by reasonable force, and search any place at which any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business is carried on[2];*
>
> *(b) [this subsection is not relevant to these proceedings]….*
>
> *(c) to seize and retain any books, documents or records relating to an activity[3]found at any place referred to in paragraph (a)[4]…and take any other steps which appear to the officer to be necessary for preserving, or preventing interference with, such books, documents or records;*
>
> *(d) to require any person who carries on an activity referred to in paragraph (a) and any person employed in connection therewith to –*
>
> *(i) give to the authorised officer his or her name, home address and occupation, and*
>
> *(ii) provide to the authorised officer any books documents or records relating to that activity which are in that person's power or control, and to give to the officer such information as he or she may reasonably require in regard to any entries in such books, documents or records, and where such books, documents or records are kept in a non-legible form to reproduce them in a legible form;*
>
> *(e) to inspect and take copies[5]of or extracts from any such books, documents or records[6], including in the case of information in a non-legible form, copies of or extracts from such information in a permanent legible form….*
>
> *(3) If a judge of the District Court is satisfied by information on oath of an authorised officer that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence under the Act of 2002 is to be found in any place, the judge may issue a warrant authorised officer (accompanied by…other authorised officers or members of An Garda Síochána…) at any time or times within one month from the date of the issue of the warrant, on production if so requested of the warrant, to enter and search the place using reasonable force where necessary, and exercise all or any of the powers conferred on an authorised officer under this section.[7]"*
>
> *B. A Consideration of the Numbered References in the Above-Quoted Text.*

11. The court engages in some element of statutory interpretation in its consideration below of the text of s.37 that is adjacent to the square-bracketed numbers included in the above quote. As will be seen, the court confines itself to a literal interpretation of the Act of 2014. In this, the court is mindful of the observations of McGuinness J. in *D.B. v. Minister for Health* [2003] 3 I.R. 12, 49, that *"In the interpretation of statutes the starting point should be the literal approach – the plain ordinary meaning of the words used",* and of Blayney J.'s reliance in Howard v. Commissioners of Public Works [1994] 1 I.R. 101, 151, on the observation in the 7th edition of *Craies on Statute Law*(1971), 65, that *"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense."* It does not appear to the court that a literal reading of s.37 yields any ambiguity, lack of clarity, self-contradiction or absurdity such as would require that it be given any alternative

reading.

12. Re: [1]. Section 37(1) clearly indicates that, on production of a warrant issued under s.37(3), an authorised officer may exercise one or more of the powers specified in s.37(2) *"[f]or the purpose of obtaining any information which may be required in relation to a matter under investigation"* (that matter being here the possible contravention by Irish Cement of certain competition law requirements, as identified by the Commission in the course of an investigation into the supply of bagged cement in Ireland).

13. Re: [2]. What is thegeneral effect of s.37(2) in the context of the within application? It seems to the court that the answer to this last question is best approached by asking two preliminary questions:

> *a. What is the "place" referred to in s.37(2)?*
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> *It is the place named in the search warrant, being Irish Cement's business premises in Platin, Co. Louth.*
>
> *b. What is meant by "activity" in s.37(2)*
>
> *This is a defined term given a specific meaning by s.34 of the Act of 2014, which states it to include "any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business".*

14. Marrying the answers to a. and b. together, it appears to the court that the general effect of s.37(2), in the context of the present proceedings, is that it empowered one or more authorised officers to enter, if necessary by reasonable force, and search, the premises of Irish Cement, being a place at which activity in connection with the business of supplying or distributing goods or providing a service and/or activity in connection with the organisation or assistance of persons engaged in any such business is carried on.

15. Re: [3], [5] and [6]. More particularly, pursuant to s.37(2)(c) and (e) an authorised officer may "seize and retain documents or records relating to an activity" or "inspect and take copies" from "such…records". The powers so conferred are very broad. Between them those provisions grant seizure, retention, inspection and copying powers to authorised officers in respect of "any books, documents or records relating to an activity found at any place referred to in paragraph (a)", which in this case transmutes into 'any books, documents or records relating to an activity and which are found at Platin'. The term "activity", it will be recalled is wide, extending to "any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business". Wide too is the term "records", which is defined in s.34 as meaning in addition to records in writing, "(a) discs, tapes, sound-tracks or other devices in which information, sounds or signals are embodied so as to be capable (with or without the aid of some other instrument) of being reproduced in legible or audible form" – a definition which, it need hardly be noted, is sufficiently broad to capture, e.g., an electronic file, including an e-mail box or a network file, whether related or otherwise.

16. All of the foregoing would appear, at first glance, to yield the result that having required that the Commission go to a judge and get a search warrant – which search warrant was obtained here on the basis of a sworn information indicating that it was believed that evidence of competition law breaches would be found at Irish Cement's premises at Platin – the Oireachtas, by way of s.37(2)(c) and (e), allows the Commission, once that search warrant has been obtained, to go onto Irish Cement's premises and 'hoover up', per s.37(2)(c) *"any books, documents or records relating to an activity found at any place [here the premises of Irish Cement]".* Provided those books, documents or records are found on the premises of Irish Cement, an authorised officer, it might at first glance appear, can seize, retain, etc. them, so long as they relate to an *"activity",* i.e. not to some activity of Irish Cement but to "any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business". Even the most illiberal of judges would likely balk at the foregoing – were that where matters ended (and it is not). What was the point, one might ask, of involving the District Judge and requiring there to be a search warrant if at the end of the day the Commission was to enjoy a veritable carte blanche in terms of its powers of search and seizure, etc? But having descended to the depths of s.37(2), one needs to 'up periscope' for just a moment, swivel the focus back to s.37(1) and recall the overriding provision therein that an authorised officer may exercise one or more of the powers specified in s.37(2) only "[f]or the purpose of obtaining any information which may be required in relation to a matter under investigation". This last-quoted text establishes an overriding constraint which has the effect that the vast breadth of information which s.37(2)(c) and (e) appear to allow the Commission to 'hoover up' is by law, and in practice, entirely – perhaps even radically – constrained. Yes, the 'hoovering' extends to any books, documents or records found at the place being searched, so long as they relate to "an activity" – which may even be an activity not being done at the premises that is being searched – but the powers of an authorised officer in this regard must, pursuant to s.37(1) be exercised "only "[f]or the purpose of obtaining any information which may be required in relation to a matter under investigation".

17. The only question that appears truly to arise in this regard is whether the "matter under investigation" is the Commission's general investigation of the supply of bagged cement in Ireland or, alternatively, the Commission's more specific investigation of alleged breaches of competition law by Irish Cement. Given, inter alia, the intrusive nature of search warrants and the fact that with alleged breaches of competition law one may be straying into the area of criminality, the court inclines to the view that the 'matters under investigation' in the context of the within proceedings is Irish Cement's alleged contraventions of competition law.

18. In passing, the court notes the plaintiffs' contention that the activity referred to in s. 37(2)(c) must relate to the activity done at the premises where the search is done. This, with respect, is wrong. Section 37(2)(c) confers on an authorised officer a power *"to seize and retain any books, documents or records relating to an activity found at any place"*. The plaintiffs' contention would require the court to construe this provision as conferring a power *"to seize and retain any books, documents or records"*, provided those documents relate *"to an activity found at any place".* One needs merely to posit the proposition so to see how wrong it is. An authorised officer engaged in a search 'finds' *"books, documents or records".* S/he does not 'find' an activity. To suggest otherwise is grammatically, and legally, wrong. The natural and legally proper reading of s.37(2)(c) is that it confers on an authorised officer a power *"to seize and retain any books, documents or records"* that relate *"to any activity"* and which are *"found at any place",* the relevant place in these proceedings being that identified by the District Judge in his search warrant, viz. Irish Cement's premises at Platin, Co. Louth.

19. Re: [7]. The District Judge who, on 12th May last, acting pursuant to s.37(3),granted the search warrant that preceded the 'dawn raid' on Irish Cement's premises, did so on an ex parte basis by reference to certain sworn information of an officer of the Commission. That sworn information indicated that the need for the warrant arose from a Commission investigation relating to the supply of bagged cement in Ireland. As part of that investigation, the Commission was (and presumably is) concerned that Irish Cement has contravened certain provisions of Irish and/or EU competition law. The Commission considered that evidence of any such

breach would be found at Irish Cement's business premises in Platin, Co. Louth. Based on the sworn information placed before him, the District Judge issued a search warrant authorising, inter alia, one or more authorised officers of the Commission, to enter and search those premises and to exercise, in the course of that entry and search, all or any of the powers conferred on an authorised officer under s.37 of the Act of 2014. Thus even a reading of the warrant bounces one back to a consideration of s.37.

Part 6

Terra Incognita?
A. Overview.

20. All the above is well and good, but in mapping out how a search is to be done and what authorised officers may do during such a search, the Act of 2014 leaves greatly uncharted what is to be done with material, other than legally privileged material, that is seized and ought never to have been seized. Here one crosses a line on the map crafted by our elected lawmakers in the Act of 2014 and enters terra incognita (or near-incognita). There is nothing in the Act to indicate what ought to be done as regards such material. One has arrived at a place that seems largely, if not entirely, ungoverned by law. The Commission maintains, not that this is provided anywhere in the Act of 2014, that the proper thing to be done is that it should go through all of the materials that it now possesses, whether or not that material, to recall the wording of s.37(1), *"may be required in relation to a matter under investigation",* weeding out the wheat to which it is entitled from the chaff to which it is not and keeping only the former. The Commission acknowledges that this is an intrusive process but so, it says, are all search and seizure processes; it points also to the comfort to be drawn by the plaintiffs from the prohibition to which the Commission is subject under s.25 of the Act of 2014 as regards the disclosure of confidential information.

B. Section 25 of the Act of 2014.

21. Even a cursory reading of s.25 suggests it to be the leakiest of sieves when it comes to the protection of confidential information, being as much, if not more concerned with when such information may be disclosed, as when it may not. Thus, per s.25:

> *"(1) A person shall not, unless authorised by the Commission or by a member of the staff of the Commission duly authorised in that behalf so to do, or required by law, disclose confidential information obtained by him or her in his or her capacity, or while performing duties as –*
>
> *(a) a member of the Commission,*
>
> *(b) a member of the staff of the Commission,*
>
> *(c) an authorised officer, or*
>
> *(d) a person engaged by the Commission in any other capacity.*
>
> *(2) Subsection (1) shall not apply to –*
>
> *(a) a communication made by a member of the Commission, a member of the staff of the Commission, or an authorised officer, in the performance of any of his or her functions under this Act, being a communication the making of which was necessary for the performance by the member, member of the staff of the Commission or authorised officer of any such function, or*
>
> *(b) the disclosure by a member of the Commission, a member of the staff of the Commission or an authorised officer to any person or body mentioned in paragraphs (a) to (q) of section 24(1) of information which, in the opinion of the member, member of the staff of the Commission, or authorised officer, may relate to the commission of an offence (whether an offence under this Act or not).*
>
> *[The persons referred to in s.24(1)(a)–(q) are (a) a member of An Garda Síochána, (b) the Director of Corporate Enforcement, (c) an officer of the Revenue Commissioners, (d) the Central Bank of Ireland, (e) the Commission for Communications Regulation, (f) the Department of Social Protection, (g) the Irish Auditing and Accounting Supervisory Authority, (h) the Broadcasting Authority of Ireland, (i) the Commission for Aviation Regulation, (j) the Commission for Energy Regulation, (k) the Data Protection Commissioner, (l) the Environmental Protection Agency, (m) the Financial Services Ombudsman, (n) the Food Safety Authority of Ireland, (o) the Health Insurance Authority, (p) the National Transport Authority, and (q) such other person as may be prescribed after consultation by the Minister with any other Minister of the Government appearing to the Minister to be concerned.]*
>
> *(3) A person who contravenes subsection (1) commits an offence….*
>
> *(4) Nothing in subsection (1) shall prevent the disclosure of information by means of a report made –*
>
> *(a) to the Commission, or*
>
> *(b) by or on behalf of the Commission to the Minister.*
>
> *(5) In this section 'confidential information' includes –*
>
> *(a) information that is expressed by the Commission to be confidential either as regards particular information or as regards information of a particular class or description, and*
>
> *(b) proposals of a commercial nature or tenders submitted to the Commission by contractors, consultants or any other person."*

22. The court has no doubt from all it has seen and heard that the Commission (a) seeks to treat all information brought into its possession by way of search and seizure with a suitable level of care, and (b) is well aware of the private character and the occasional commercial value of the information that it possesses. However, the plaintiffs could be forgiven for believing, as they do, that the rather 'leaky' duty of confidentiality imposed by s.25 of the Act of 2014 goes nowhere towards meeting their fundamental concern that, thanks to the 'dawn raid' done at the premises of Irish Cement last May, the Commission now has in its possession

information to which it has at no time stood entitled to possess and which it ought not now to be allowed to consider. Notably, the Commission appears now to accept that it does possess some such information but maintains that it has a right to trawl through all the material that it possesses, apart from legally privileged material which is subject to a special statutory process pursuant to s.33 of the Act. The plaintiffs disagree.

C. An Aside on Section33.

23. Mention has been made of s.33 of the Act of 2014. It is worth pausing briefly to consider this provision as the process it establishes in respect of legally privileged material informs the type of process that the plaintiffs envision as appropriate for the Commission to adopt in respect of such material as it now possesses, and possession of which it is not entitled to under s.37 of the Act of 2014, such information not being, to borrow again from the wording of s.37(1), information that "may be required in relation to a matter under investigation".

24. Briefly, s.33 provides as follows:

- s.33(1) states that nothing in the Act of 2014 or in the Competition Act 2002 or the Consumer Protection Act 2007 compels the disclosure by any person of privileged legal material or authorises the taking of privileged legal material.

- notwithstanding this, s.33(2) allows for the compelled disclosure or seizure of information which it is apprehended may be subject to legal privilege, provided the said compelled disclosure or seizure is done by means whereby the confidentiality of the information can be maintained (as against the person compelling such disclosure or effecting such seizure), pending determination by the High Court as to whether the material is in fact privileged.

- under s.33(3), when such disclosure or seizure is done or effected, the person to whom disclosure is made or who makes the seizure (so here, the Commission) must, within 30 days after such disclosure/seizure, apply to the High Court for a determination as to whether the information is privileged;

- under s.33(4) the person compelled to make the disclosure or from whom information is taken may thereafter make like application to the High Court.

- under s.33(5), the High Court may, pending the making of a final determination, make such interim or interlocutory directions as it considers appropriate. These directions may include, inter alia, *"the appointment of a person with suitable legal qualifications possessing the level of experience, and the independence from any interest falling to be determined between the parties concerned, that the court considers to be appropriate for the purpose of – (i) examining the information, and (ii) preparing a report for the court with a view to assisting or facilitating the court in the making by the court of its determination as to whether the information is privileged legal material."*

- s.33(6) allows for an in camera hearing of applications under sub-sections (3), (4) and (5); and

- s.33(7) sets out certain definitions.

D. After the 'Raid'.

25. On 19th May, 2015, Arthur Cox wrote to the Commission in relation to various perceived issues arising in relation to the 'dawn raid' of the 14th , including the issue, raised during the 'raid', in relation to the seizure by the Commission of the entirety of Mr Lynch's mailbox data. The plaintiffs have consistently accepted that any data relating to the Irish Cement roles held by Seamus Lynch is within the scope of the search warrant. However, they contend that other mailbox data copied during the 'dawn raid' of 14th May last is not. A complicating factor in all of this is that, as one would expect of an accomplished business executive, Mr Lynch has held various positions within the CRH group during his long years of service. Arthur Cox, the solicitors for the plaintiffs, have sought to break down Mr Lynch's service record into four key periods. These are identified as follows in the statement of claim:

> *"Period One: Up to 6 June 2011: Seamus Lynch was in full time employment with ICL[Irish Cement] up to 6 June 2011. In 2005, Seamus Lynch was appointed Sales and Marketing Directors at ICL and, in 2008, he was appointed as Managing Director of ICL….*
>
> *Period Two: 7 June 2011 to 31 May 2013. On 7 June 2011, Seamus Lynch stepped down as Managing Director of ICL and was appointed as Managing Director of CRH Benelux (within the CRH Materials Division), in which role he was employed by CRH. In this role he was responsible on behalf of CRH plc for two companies, Cementbouw BV in The Netherlands and VVM NV in Belgium. Seamus Lynch had no executive role in relation to ICL during this period, but was a non-executive director of ICL….*
>
> *Period Three: 1 June 2013 to 10 February 2014. On 1 June 2013, Seamus Lynch was reappointed as Managing Director of ICL and continued in this role until 10 February 2014. Seamus Lynch was also a Director of ICL during this period. During this time he continued as Managing Director of CRH Benelux (within the CRH Europe Materials Division).*
>
> *Period Four: 10 February 2014 to date. Seamus Lynch then stepped down as Managing Director of CRH Benelux (within the CRH Europe Materials Division) and stepped down as Managing Director of ICL and became Managing Director of CRH Ireland and Spain (within the CRH Europe Heavyside West Division). In this role, he is employed by CRH and has responsibility on behalf of CRH for certain Irish and Spanish subsidiaries. Seamus Lynch has had no executive role in relation to ICL during this period. From February 2014 to 7 August 2014, he was a non-executive director of ICL and on 7 August 2014 was appointed as Chairman of the Board of Directors of ICL."*

26. The plaintiffs accept that all e-mails and documents dated during Period One are within the scope of the search warrant. During Periods Two to Four, Mr Lynch held Irish Cement roles and the plaintiffs likewise accept that documents relating to those roles are within the search warrant. However, during those periods, Seamus Lynch also held intra-group roles that were unconnected with the business of ICL. The plaintiffs maintain that documents relating to those roles are outside the scope of the search warrant. They have suggested to the Commission a process that would see the materials that the Commission possesses sifted to see whether they should be in the possession of the Commission, with only such material that ought to be in the Commission's possession falling thereafter to be considered by the Commission. But the plaintiffs are not wedded to any particular process, and sensibly so – the process they initially suggested would see some element of 'self-sifting' which seems, with respect, entirely unacceptable. More attractive to the court would be a s.33-style process that would see some impartiality brought to the sifting that requires to be done.

Regardless of the approach, at the end of the day the plaintiffs just want the return to them, un-read by the Commission, of any material that the Commission was not authorised to take during the search, such information not being, to borrow again from the wording of s.37(1), information that *"may be required in relation to a matter under investigation".* Given the near, if not absolute inevitability that a search and seizure process will see items seized that ought never to have been seized, it is perhaps surprising that this issue is not addressed in the Act of 2014 and has not arisen previously for adjudication, but it appears that it has not.

27. Returning to the four-period break-down of Mr Lynch's history, it emerged during the course of cross-examination of Mr Lynch,at the hearing of the within application, that the neat division of roles which that break-down purports to establish is not quite as neat in reality. However, the fact that this is so does not seem to the court to advance matters greatly, if at all. It merely suggests that identifying Mr Lynch's Irish Cement and non-Irish Cement activities is more complicated than the statement of claim would have one believe – and it would not be the first statement of claim which posits a state of reality that, on examination before or by the court, sits somewhat askance with reality. Yet that this should be so does nothing, with respect, to address the fundamental issue at hand, which is that the plaintiffs contend that there are some materials which were copied by the Commission without its being authorised by the search warrant of 12th May last to so copy, which remain in the possession of the Commission, which the Commission has never had any entitlement to possess, and which it ought never therefore to see. Identifying the said materials may be more complex than the statement of claim would have one believe, but it remains the fact that those materials exist and must somehow be identifiable. That s.37 of the Act of 2014 should allow the Commission to possess such materials and does not contain a mechanism whereby this can be remedied without the Commission reviewing those materials has the result, the plaintiffs claim, that certain of their respective fundamental rights stand to be contravened.

Part 7

Human Rights: Overview
A. General

28. The plaintiffs contend that the manner in which the 'dawn raid' was done at the premises of Irish Cement, pursuant to s.37 of the Act of 2014, contravenes the respective rights of one or all of the plaintiffs under the European Convention on Human Rights and/or the EU Charter of Fundamental Rights.

B. Relevance of European Convention on Human Rights?

29. The court accepts that when interpreting and applying any statutory provision or rule of law it is under an obligation, pursuant to s.2 of the European Convention on Human Rights Act 2003, to undertake such interpretation/application, insofar as possible and subject to the rules of law relating to such interpretation/application, in a manner compatible with the State's obligations under the European Convention. The court notes too that under s.3(1) of the Act of 2003, every organ of the State (this would include the court and the Commission) must, subject to statute and any rule of law, perform its functions in a manner compatible with the State's obligations under the Convention.

30. The foregoing are straightforward and, one would have thought, uncontroversial obligations. Yet mention of them by the plaintiffs appears to have caused no little angst on the part of the Commission. Thus counsel for the Commission has contended that: (i) the court needs to be careful not to be induced into arriving at a Convention-inspired interpretation of legislation that is contra legem, i.e.an interpretation that would contradict or defy what the Act of 2014 provides; and (ii) the plaintiffs, by raising the European Convention on Human Rights, are engaged in a collateral attack on s.37.

31. As to (i), care is undoubtedly required. As to (ii), the plaintiffs have referred the court in this regard to the recent case of *Fingleton v. Central Bank* [2016] IEHC 1. There, Mr Fingleton sought to contend that the Central Bank's administrative sanctions process amounts to the administration of justice other than by the courts. However, he did not challenge the enactment that allowed for that process. In the course of his judgment in the case, Noonan J. noted, at para.136 that:

> *"[T]his argument is misconceived because it amounts to a submission that if the natural and ordinary meaning of the words used by the Act renders it unconstitutional, the court must find some other meaning, a novel proposition."*

32. It is clear from the above-quoted text that what Noonan J. found objectionable was the proposition that he ought, in effect,to engage in a *contra legem* interpretation of legislation, if a literal interpretation of that legislation suggested it to be unconstitutional. But that is far removed from what is being asked of the court in these proceedings. Here, all that is being sought of the court is that it do what it must do, i.e. act consistent with ss.2 and 3 of the Act of 2003, and do too what the plaintiffs have asked it to do, i.e. consider whether the Commission has acted in a manner consistent with s.3.

33. In passing, the court notes that it is empowered under s.2 to make an order for damages in the event that the plaintiffs have suffered any injury, loss or damage, as a result of any contravention by the Commission of s.3(1). However, the plaintiffs have indicated that it is issues of principle, not matters of principal that concern them most. So although they have included a claim for damages among the reliefs sought, they are far more interested in securing a declaration, in accordance with section 3, that the Commission has acted in contravention of Art.8 of the European Convention on Human Rights. Clearly if the court can award damages for a contravention, it can arrive at a conclusion as to whether or not such a contravention arises, and can declare the conclusion it has reached, regardless of whether damages are ordered.

Part 8

European Convention on Human Rights
A. Article 8.

i. Overview.

34. Article 8(1) of the European Convention on Human Rights provides that *"Everyone has the right to respect for his private and family life, his home and his correspondence".* However, this right is not absolute. Thus Article 8(2) of the Convention provides as follows:

> *"There shall be no interference by a public authority with the exercise of this right except [1] such as is in accordance with the law and [2] is necessary in a democratic society [a] in the interests of national security, public safety or the*

economic well-being of the country, [b] for the prevention of disorder or crime, [c] for the protection of health or morals, or [d] for the protection of rights and freedoms of others."

35. It is accepted by all of the parties that the 'dawn raid' on the premises of Irish Cement, and the copying of records found thereon, can constitute an interference by a public authority with the private life of one or more of the plaintiffs. So the sole issue arising for the court in this regard is whether such interference as has occurred has been done (1) in accordance with law and (2) is necessary in a democratic society.

ii. Olsson.

36. In *Olsson v. Sweden* (No 1) (App. No. 10465/83, 24th March, 1988),at 25, the European Court of Human Rights (ECHR) identified the requirements flowing from the phrase "in accordance with the law" as follows:

> *"(a) A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail; however, experience shows that absolute precision is unattainable and the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent are vague….*
>
> *(b) The phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law; it thus implies that there must be a measure of protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by, inter alia, paragraph 1 of Article 8….*
>
> *(c) A law which confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference".*

37. The court does not consider any of this to present a difficulty as regards the conduct of the 'dawn raid' that is in issue in these proceedings and the taking away of the materials that were taken thereafter. Nor does it consider a difficulty necessarily to present with a limited, inadvertent seizure that is done, to use a colloquialism 'despite the best will in the world' and which is, in truth, either inevitable or next to inevitable in a search and seizure done by human operatives. Where the court does consider a difficulty to arise, by reference to the above-quoted text, is when it comes to the *terra incognita* (or near-*incognita*) that it has referred to previously above, viz. when one moves into the space of determining what is to happen in respect of materials (other than legally privileged materials covered by s.33) which are taken during such a 'raid' and which do not, to borrow again the wording of s.37(1), comprise information that *"may be required in relation to a matter under investigation".* The Commission says it is entitled to screen all the information that it has taken, the plaintiffs claim that such a screening will involve a contravention of fundamental human rights. The Act of 2014 offers no guidance as to what is to be done in this regard and here, it seems to the court, one enters the realm of arbitrariness, against which there is no true protection afforded by the Act, the 'leaky' text of s.25 notwithstanding.

38. The ECHR moves on in Olsson, to consider the meaning of the phrase *"necessary in a democratic society"* which appears in Art.8(2), stating:

> *"According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, in determining whether an interference is 'necessary in a democratic society', the Court will take into account that a margin of appreciation is left to the Contracting States…".*

39. The court would make the same point as it made immediately above, viz. that it does not consider this observation of the ECHR to present an issue as regards the doing of the 'dawn raid', or the taking by the Commission of any of the material that was taken. However, when it comes to what is to be done thereafter as regards materials that ought never to have been taken by the Commission, when one enters the *terra incognita* (or near-*incognita*) that the court has identified above, it is entirely unclear to the court how it is proportionate to the legitimate aim pursued by the Commission in doing the dawn raid and taking such information as it took, that it ought now to be permitted to view and review such material as it is not allowed to possess, without there being any impartial screening of such information as it now possesses. That such a form of screening is reasonably practicable is evident from the provision made in s.33 of the Act as to legally privileged material.

iii. Niemetz.

40. In *Niemetz v. Germany* (1993) 16 EHRR 97, the ECHR considered a claim that Art.8 of the Convention had been offended by the execution of a search warrant. Notably, the plaintiff there was a lawyer and the search was carried out at his office, so those who conducted the search were engaged in a much more delicate exercise than in the present proceedings where it was the business premises of a commercial entity, Irish Cement, that were being searched and where adequate protection appears to exist, by way of s.33, when it comes to the taking of material that may enjoy legal privilege. Notwithstanding this difference in circumstance, it appears to the court that the judgment in Niemetz is of some relevance to the present application, though it must be viewed through the prism of its particular facts. The court's attention has been drawn by the plaintiffs, inter alia, to the fact that the ECHR in Niemetz was unable to justify such interference as occurred there, notwithstanding that the authorities in that case were granted a warrant pursuant to a prior judicial authorisation. This, per the ECHR at para.37, was because:

> *"The warrant was drawn in broad terms, in that it ordered a search for and seizure of 'documents', without any limitation….The search impinged on professional secrecy to an extent that appears disproportionate in the circumstances."*

41. To the extent that the plaintiffs contend a parallel situation to arise in the present circumstances, the court respectfully does not agree. The search warrant that issued in this case is suitably constrained in ambit and effect. It grants liberty to enter and search *"the premises of Irish Cement Limited at Platin…Co. Meath using reasonable force where necessary, and exercise all or any of the powers conferred on an authorised officer under Section 37 of the Competition and Consumer Protection Act 2014 in the course of that entry and search…".* Those powers have been extensively considered above, including the overriding constraint imposed by s.37(1) whereby an authorised officer may exercise one or more of the powers specified in s.37(2) only "[f]or the purpose of obtaining any information which may be required in relation to a matter under investigation". Here that investigation was the ongoing investigation into alleged competition law contraventions by Irish Cement. Acknowledging that it is nearly, if not actually inevitable

that even the best run 'dawn raids' will see a seizure of some materials that ought not to have been taken, the question that arises is what is to happen as regards the vetting of the material seized and the return of such material as ought not to have been seized. Here one enters the *terra incognita* (or near-*incognita*) to which the court has referred above, and here and in this regard it appears to the court that the potential for disproportionality arises.

iv. Societé Colas.

42. In *Societé Colas v. France* [2004] 39 EHRR 373, the ECHR had to consider whether interference by a public authority was compatible with Art.8(1) in circumstances where the French Directorate for Competition, Consumer Affairs and Fraud Prevention had done 'dawn raids' on 56 companies and seized thousands of documents under French legislation which allowed the Directorate to do so without any judicial authorisation – a process completely at variance with that which pertains in the present case. The ECHR concluded that, as the Directorate was granted its power under French legislation, the interference was in accordance with law as it had some basis in domestic law. The ECHR further held that the Directorate was pursuing the legitimate aims of the prevention of crime and the economic well-being of the country. However, the ECHR could not be persuaded that the Directorate's 'dawn raid' procedure was necessary in a democratic society as it did not provide for adequate and effective safeguards against abuse. The absence of a prior warrant by judge, the absence of a senior police officer, and the fact that the Directorate had exclusive competence to determine the expediency, number, length and scale of inspections were particular deficiencies perceived by the ECHR to arise. It does not seem to the court that Societé Colas is an especially pertinent case in the context of the within proceedings, save insofar as it emphasises again the requirement in Art.8(2) of the Convention that interference by a public authority with the exercise of the Art.8(1) right must, inter alia, be "necessary in a democratic society". The court has already considered the issue of necessity in the context of its consideration of Olsson above.

v. Robathin

43. The decision of the ECHR in *Robathin v. Austria* (App. No. 30457/06, 3rd July, 2012) arose from search and seizures of electronic data at a lawyer's office, and the contention that this was in breach of the lawyer's right to privacy under Art.8(1). As with *Niemetz*, the case perhaps needs to be approached with some caution given the particular sensitivity that attaches to a lawyer's records. Even so, the case is of interest, not least as the Austrian procedures included an obligation to store copied documents on disks which were to be sealed and brought before a judge for a decision as to whether or not they could be relied upon as evidence. The ECHR condemned 'general searches' of electronic documents which are not reasonably limited in their scope. Turning then to the question of whether the scope of the warrant was reasonably limited, the ECHR considered that the search warrant was couched in very broad terms noting, at para. 52, that *"the seizure and examination of all data went beyond what was necessary to achieve the legitimate aim".*

44. A few points arise. First, there was no 'general search' done in the present proceedings. Extensive evidence has been placed before the court as to how the Commission seeks to take a measured approach to such searches as it conducts, in line with relevant standards adopted by major jurisdictions such as the United Kingdom and the United States. Merely to quote a few paragraphs from the affidavit evidence of Mr James Plunkett, the IT manager with responsibility for digital forensics within the Commission, suffices to indicate the level of care that the Commission takes in this regard (and there is much more in the evidence before the court to indicate that this is so):

> *"11. In general the Commission's practice is, where possible, to remove electronic material from a premises for review off-site. There are a number of reasons for this, which are informed by the effect of a search on any premises, and in particular, on a business premises.*
>
> *12. In the first instance, during a search operation, the Commission does not want to impact a target business to the extent to which it cannot carry out daily business activities during the course of a search….*
>
> *14. In the second instance, the Commission tends not to conduct forensic examinations of electronic material during a search operation; looking at an electronic document such as an email in and of itself does not constitute a forensic examination must be conducted in a controlled environment. A controlled environment requires forensic examination of digital material within a digital forensic laboratory….*
>
> *17. In the third instance, in the event that encrypted files are located within the forensic dataset and the decryption codes are unavailable, to decrypt this material on-site would take an extended period of time. This can be completed for many file types in a controlled environment where adequate time can be located….*
>
> *19. The Commission's [considered view as to] best practice remains…that the gold-standard procedure is to seize original materials and/or make forensic acquisitions (that is, copies of digital material), and to conduct a digital forensic examination of such material at a later stage in a controlled environment within its forensic laboratory.*
>
> *20. Accordingly, the Commission endeavours to adopt a proportionate approach when executing a search warrant to minimise the disruption caused to the business being searched and when copying and removing digital evidence for review off-site, with a view to assisting the investigation. The Commission executes the least intervention required to meet the necessary objectives of the investigation in question under the different circumstances in issue. Inevitably, while still proportionate, this may result in more intervention in some cases than in others.*
>
> *21. The Commission always adopts the same approach to its digital forensic seizure of data and examinations, irrespective of whether the investigation in question is civil or criminal in nature. The approach adopted by the Commission is guided by that set out in the United Kingdom Association of Chief Police Officers (ACPO) Good Practice Guide for Digital Evidence and the United States Department of Justice Forensic Examination of Digital Evidence – A Guide for Law Enforcement."*

45. Whether as set of general principles, or as applied in the context of the 'dawn raid' done at Irish Cement's premises, the court cannot but, and does, conclude that in no sense can what was done by the Commission in that 'raid' be considered to constitute a general search. The court does not consider that the fact that a search done subject to such constraints as,

(a) are identified in the warrant, and/or

(b) appear in s.37, and/or

(c) are inherent in the good practices identified by Mr Plunkett in the above averments,

yielded a harvest of some material that ought never to have been taken suffices to create any difficulty from the perspective of Art.8(1). Such an eventuality seems all but, or in fact, inevitable, and it would be folly for the court to pretend otherwise. Where the court does consider a potential difficulty to present, as it has now repeatedly identified, is in what happens, after such a 'raid',with materials that ought never to have been taken by the Commission, i.e., when one enters the terra incognita (or near-incognita) that the court has identified above. How can it be proportionate to the legitimate aim pursued by the Commission in doing the 'dawn raid' and taking such information as it took, that it would now be permitted by law (if it is permitted by law) to view and review such material as it was not allowed to seize and possess?

46. Returning to the observations of the ECHR in *Robathin*, perhaps one further related observation might be made regarding the ECHR's findings in that case, as considered above. In the present case, for the reasons stated by the court in its consideration of *Niemetz* above, the court does not consider that it can reasonably or correctly be contended by the plaintiffs that the search warrant was couched in very broad terms. On the contrary, it appears to the court that in scope and effect the search warrant was entirely and properly constrained. Yes, it authorised a process which all but, if not entirely, inevitably saw the taking away of some material to which the Commission has never stood entitled to take or possess. But such is life. Unless the law were to require (and it does not) that authorised officers consider every individual document (whether electronic or physical) before they copy and/or take it, then it is likely if not inevitable that there will be some over-reach in every search. Again, to the court's mind the issue presenting in this regard, in the context of the search that is the subject of this judgment, is what happens afterwards, and here one wanders into the terra incognita (or near-incognita) that the court has identified elsewhere above, a place where the question of what the law allows and requires of the Commission seems entirely unclear, which want of clarity presents, ironically, the clearest of issues as regards Art.8 of the European Convention on Human Rights.

vi. Bernh Larsen.

47. In *Bernh Larsen Holding AS and others v. Norway* (App. No. 24117/08, 14th March 2013), the ECHR adjudicated upon an Art.8 claim that arose out of a complaint by three Norwegian companies concerning a decision of the Norwegian tax authorities ordering that tax auditors be provided with a copy of all data on a computer server used jointly by three companies. The ECHR found that there was no Art.8 violation arising, noting, inter alia, at para.42, the reference to the conclusion of the Norwegian Supreme Court (before the case went to Strasbourg) that:

> *"The aim of an inspection was to find out whether an archive contained documents that could be significant for tax assessment purposes. Access should therefore comprise all archives which the tax authorities had reason to assume contained information of significance for the tax assessment, not just those archives or parts of archives that included accountancy material. In the interests of efficiency of the tax audit, access at that stage should be relatively wide. Therefore, the companies' argument that it should be up to each tax subject to give binding indications as to which parts of the archive contained documents of significance for the tax assessment or the audit had to be rejected",*

which observation was followed by a similar observation of the ECHR itself, at para.180, that:

> *"The Court first observes that the purpose of a measure taken under sub-paragraph (b) was, as explained by the Supreme Court, to give the tax authorities a basis for assessing whether the tax subject possessed documents which they could require the latter to furnish….It was not limited to accountancy documents but extended to all documents that might be relevant to the tax assessment….Considerations of efficiency of the tax audit suggested that the tax authorities' possibilities to act should be relatively wide at the preparatory stage….The tax authorities could therefore not be bound by the tax subjects' indications as to which documents were relevant, even where the archive in question comprised documents belonging to other tax subjects."*

48. Some reliance was placed on this judgment by the Commission. However, the court does not see that it favours the Commission's position as much as the Commission might consider. This is because the court considers that the Commission exercised all due care to conduct the 'dawn raid' within the terms of a search warrant that issued from an impartial judge, and that to the extent that material was seized by the Commission that ought not to have been seized, this was not the result of some calculated and deliberate over-reaching grasp by the Commission but a near, if not absolute inevitability in any search and seizure process. The difficulty that the court considers to present is what happens next, what is to happen with the information that has been seized and which ought not to have been seized and in respect of which, s.33-style situations aside, there is no provision made in the Act of 2014. The Commission maintains that it should get to sift through all the material that it has seized and determine what comes within the terms of the search warrant and what does not. The plaintiffs contend that for the Commission to go through material that it was not authorised by warrant to remove gives rise, literally and legally, to an unwarranted breach of the right to privacy. This is a contention with which the court respectfully agrees.

vii. Delta Pekárny.

49. In *Delta Pekárny v. Czech Republic* (App. No. 97/11, 2nd October, 2014), the ECHR examined whether an inspection carried out by the Czech national competition authority at a company's premises in 2003 had given rise to an infringement of Art.8. The inspection was initiated on the basis of the Czech competition authority's notification of administrative proceedings. This only included a general reference to the relevant statutory provisions, and not a formal decision which would have been the subject of judicial supervision. The Czech anti-trust inspectors requested access to Delta Pekárny's documents and, in particular, to computer and e-mail correspondence of four company representatives, with the intention of accessing their e-mail boxes. So the facts, at least in this regard, were very similar to those now presenting before this Court – except that in the case of Delta Pekárny, the level of cooperation that was extended here by Irish Cement appears not to have been forthcoming. Thusone of the persons of whom access to e-mail was sought by the Czech competition authority refused to grant full access to same on the basis that it included private messages unrelated to the subject-matter of the inspection. In consequence, the Czech competition authority imposed a fine on Delta Pekárny for obstructing the authority's investigation. The ECHR found that the contested inspection had infringed the right to inviolability of the business premises because the inspection was not open to effective prior or subsequent judicial oversight.

50. Here the Commission maintains that there is effective prior and subsequent judicial oversight. There is certainly effective prior judicial oversight. Whether there is effective, available subsequent judicial oversight is not so apparent. The plaintiffs in this case happen to be especially well-funded and were able to bring a three-day High Court case that required the attendance of three distinguished senior counsel, at least two junior counsel,as well as two sets of solicitors for each day of trial. The financial cost of these proceedings is therefore enormous and certainly beyond the reach of many, if not most, people who would be subject to a 'dawn raid'. So while, in theory, anyone could bring proceedings of the type now presenting, in truth this is not a reality for many, if

not most, affected persons. A purportedly general remedy that is available to the privileged few and not the less privileged many is not an effective remedy. Moreover, as will be seen from the reliefs that the court grants later below, while the plaintiffs broadly 'win' this case, the reliefs granted to them stop the Commission from doing what it seeks to do, declare that certain contraventions of privacy would arise if this were done, but effectively leave it to the parties to resolve between them how next to proceed. That does not appear to the court to be a fully effective remedy. However, it seems to the court that it is as far as it can go in the context of the reliefs sought by the plaintiffs in these proceedings. While it might perhaps be possible – and here the court is engaged in pure speculation – to construct a different set of reliefs on a different set of pleadings, again the cost of getting to that point is, for many if not most people, prohibitive. It might perhaps be contended too that a general solution by way of statute (in a manner akin to that settled upon by s.33 of the Act of 2014 in respect of possibly legally privileged material) would be more effective than individually fashioned reliefs in individual cases. However, that is a matter for our elected lawmakers, not a matter for this Court to opine upon.

viii. Vinci Construction

51. On 2nd April last, in *Vinci Construction v. France* (63629/10, 2nd April, 2015) the ECHR found France to have committed two violations of the Convention arising from inspections carried out in 2007 at the premises of Vinci Construction and GTM génie civil et services by the French Directorate for Competition, Consumer Affairs and Fraud Prevention.

52. By an application of 3rd October, 2007, the Directorate requested of a judge at the Paris tribunal de grande instance that it be authorised to carry out inspections and seizures on the premises of the applicant companies. This request was made in the context of an investigation into illegal concerted practices. The judge acceded to the request in a decision of 5th October, and the inspections took place on 23rd October. Numerous documents and computer files were seized, as well as the entire contents of certain employee e-mail accounts.

53. Before the ECHR, the applicant companies alleged that the seizures had been widespread and indiscriminate, in that they had concerned several thousand documents, many of which were not connected to the investigation or were confidential, being protected by legal professional privilege. They also complained that no detailed inventory of the seized items had been drawn up.

54. A particular focus of the ECHR's concerns in the case was that the seizures had included the entirety of certain employees' professional e-mail accounts, as well as correspondence that had been exchanged with lawyers. The ECHR also noted that the applicant companies had been unable to discuss the appropriateness of the documents being seized or inspect their content while the operations were being conducted. So far as legally privileged correspondence is concerned, this Court considers that in the context of the within proceedings s.33 affords adequate protection in this regard. However, in the other respects just mentioned – the seizure of entire e-mail accounts and the absence (in this case) of any meaningful means of preventing the seizure of inappropriate documents – the facts in Vinci Construction and those presenting in this case are quite similar.

55. The companies in Vinci Construction had made use of an appeal process which involved a consideration by a judge of the lawfulness of the formal context in which the seizures were conducted. However, the ECHR considered that where a judge is called upon to examine reasoned allegations that specifically identify documents taken, notwithstanding that they were unrelated to the investigation or were covered by legal professional privilege, s/he was required, after doing a detailed examination and a specific review of proportionality, to rule on what would happen to those documents after that examination and to order their return where appropriate. Again, the Commission contends that this Court, by way of the present application, is satisfying the requirement as to effective post-search oversight which the ECHR clearly apprehends in Vinci Construction. The court has already stated, in the context of its consideration of Delta Pekárny above, why in its view there is not, in truth, effective and available post-'raid' judicial oversight.

Part 9

EU Charter of Fundamental Rights

56. Certain arguments have been raised by the plaintiffs that their rights under the EU Charter of Fundamental Rights stand to be violated if the Commission should now get to review documents that are in its possession but which it is not entitled to possess. These arguments, like some Conor McGregor opponents, fall at the first. Article 51 of the Charter provides that: *"The provisions of this Charter are addressed to the….Member States only when they are implementing Union law";* and the court is not confronted here with such an implementing measure. Pursuant to s.1(2) of the Act of 2014, the Competition Acts 2002 to 2012 and Parts 3 and 4 of the Act of 2014 may be cited together as the Competition Acts 2002 to 2014 and "shall be construed together as one Act". However, the within judgment is not concerned with Parts 3 and 4 of the Act of 2014. So to the extent that the Competition Acts 2002 to 2012, as amended and supplemented by Parts 3 and 4 of the Act of 2014, implement European Union law, the provisions under consideration in these proceedings are simply not a part of that corpus of legislation. And while s.37 is a provision that may facilitate the enforcement of, inter alia, European Union law, by empowering authorised officers to engage in searches and seizures whereby, inter alia, evidence of a breach of Article 101 and/or 102 of the TFEU may be obtained, to this Court's mind s.37 nonetheless does not fall properly to be viewed as a statutory provision that is implementing European Union law, in the sense of realising some provision of European Union law in Ireland. Taking all of this into account, no argument as to contravention of the EU Charter can succeed in the present application.

Part 10

The Constitution

57. The Constitution does not expressly recognise a general right to privacy; however, such a general right has been recognised as an implied constitutional right, deriving from Article 40.3 of the Constitution, since the decision of the Supreme Court over four decades ago in McGee v. Attorney General [1974] I.R. 284. The evolving recognition of the scope of this implied right took something of a leap forward in Kennedy v. Ireland [1987] I.R. 587, Hamilton P., as he then was, stating as follows, at 592et seq:

> *"Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and it is subject to the requirements of public order and morality….*
>
> *The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with. I emphasise the words 'deliberately, consciously and unjustifiably', because an individual must accept the risk of accidental interference*

with his communications and the fact that in certain circumstances the exigencies of the common good may require and justify such intrusion and interference."

58. It is of course possible to arrive at a right of privacy without going through the prism of Christian tradition, and in some respects Hamilton P.'s comments may appear a little antiquated. After all, notwithstanding that the Constitution continues in its wording to be reflective of a onetime mass adherence to the Christian faith of whatever denomination, a question perhaps arises whether it would be fully correct now to refer to the *"Christian nature"* of a laic republic, in which the public is increasingly secular and multi-cultural, as a critical basis for the source of a particular, and particularly important, right. But be all that as it may, the kernel of Hamilton P.'s comments has perhaps an even greater resonance today than it did 30 years ago. The world has utterly transformed in the three decades since, with all of us now living lives that involve massive amounts of personal information being routed through, and stored upon, electronic devices and systems of every nature, making our private actions and personal thoughts ever more vulnerable to the potential for unwarranted intrusion and interference of the type contemplated by Hamilton J. With this increased potential for intrusion and interference, there has undoubtedly come a greater awareness of the right of privacy, and a greater understanding as to its value, with the true limits of its reach remaining ever to be explored and amplified upon.

59. The rapid transformation of the world as the Information Age reached its quick and continuing crescendo, is evident from a judgment of the High Court, less than a decade after Kennedy, in *Hanahoe v. Hussey* [1998] 3 I.R. 69. There the court was concerned with the search of a solicitor's office pursuant to a warrant, and there Kinlen J. observed as follows, at 96:

"We live in an era of fantastic and intrusive invasions of privacy. The State, the media and the many electronic devices have combined in a growing and worrying assertion that the invasion is allowable because of the battle against crime and corruption and also based on the alleged 'public's right to know'. These invasions are increasing but the courts must be the restraining arm to protect privacy and only allow invasion into privacy where on balance it can be justified."

60. This Court must admit that it is generally in favour of what is colloquially referred to as the 'public right to know' – there is of course no such legal right. It seems, after all, a truism, that where a properly watchful public and media cannot see, evil so often thrives. But there are,of course,limits even to this, and Kinlen J.'s observations were considerably prescient, coming on the cusp of the era of mass internet usage.

61. Coming closer in time, the court has been referred to the decisions in *Competition Authority v. Irish Dental Association* [2005] 3 I.R. 208, in which McKechnie J. observed, at para.34:

"I am satisfied that the defendant [the Dental Association] has constitutional rights and that such rights of freedom of expression, most certainly, and probably also that of privacy, are not too remote so as to exclude their application to the present circumstances. Those rights to be enjoyed by an association like the defendant can have no greater application than to the business in which it is involved",

and also to the decision in *Digital Rights Ireland Limited v. Minister for Communications &Ors* [2010] 3 I.R. 251, a case which draws substantially on European-level case-law to amplify upon and buttress the constitutional right to privacy, in which McKechnie J. observes at para.56:

"In general I am satisfied that such a right to privacy must extend to companies as legal entities, separate and distinct from their members as natural persons. Such entities are an integral part of modern day business. It is therefore paramount that the interests of such legal persons are protected in the courts. Much of the case law considering a company's right to privacy is considered in the context of the invasion of its premises, however this is not the only way in which a company's privacy might be invaded. As I have said, access may be sought to confidential information or research, or to information or documents generated as part of delicate business negotiations. Commerce and industry could not survive if such access was unregulated. It is therefore clear to me that in principle some right of privacy must exist at least over some areas of a company's activity."

62. Still closer in time is the decision of the Court of Criminal Appeal in People v. Idah [2014] IECCA 3, where the fruits of Garda surveillance were in issue, MacMenamin J. observing as follows for the court, at 11:

"There can be no doubt that the State may make incursions into the right of privacy in accordance with law. This is particularly the case in circumstances where the State is seeking to provide in relation to 'the investigation of arrestable offences, the prevention of suspected arrestable offences and the safeguarding of the State against subversive and terrorist threats'. Nevertheless that law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which public authorities are entitled to resort to such covert measures and it must provide necessary safeguards for the rights of individuals potentially affected."

63. The above case-law clearly establishes that each of the plaintiffs in the present proceedings enjoys a constitutional right of privacy which can only be interfered with in a justifiable and proportionate manner. Again, where the court considers a difficulty to arise for the Commission in this regard is not in the conduct of the 'dawn raid' per se, nor even in the inadvertent taking away of information that is not covered by the warrant, an occurrence which to some extent is almost, if not entirely inevitable in the course of such a 'raid'. Rather, where the difficulty presents is when it comes to the terra incognita (or near-incognita) that the court has referred to previously above, i.e., when one moves into the space of determining what is to happen in respect of materials (other than legally privileged materials covered by s.33) which are taken during such a 'raid' and which do not, to borrow again the wording of s.37(1), comprise information that *"may be required in relation to a matter under investigation".*

64. Finally, in this regard, the court is mindful of the recent decision of the Supreme Court of Canada in *R. v. Vu* [2013] 3 S.C.R. 657. There the police had collected incriminating evidence against Mr Vu from two laptops and a cell-phone on the basis of a search warrant that did not specify that the police had authority to search those devices. Cromwell J., for the Court, agreed with the general proposition that a warrant authorising a search of a location for evidence confers the authority to conduct a reasonable examination of anything at that location in which the evidence might be found. Notably, however, he considered that a more nuanced analysis was needed to account for the unique nature of computers. In explaining why seizure of electronic data is different from other receptacles, Cromwell J. observed, at para.24:

"The privacy interests implicated by computer searches are markedly different from those at stake in searches of receptacles such as cupboards and filing cabinets. Computers potentially give police access to vast amounts of information that users cannot control, that they may not even be aware of or may have chosen to discard and which may not be, in any meaningful sense, located in the place of the search….It is difficult to imagine a more intrusive

invasion of privacy than the search of a personal or home computer….Computers are a multi-faceted instrumentality without precedent in our society."

65. An unwarranted intrusion of privacy at the office seems to this Court to be every bit as bad as the unwarranted search of a personal or home computer. For example, anyone who works outside the home and has a work e-mail address will almost certainly have mixed in among her or his business e-mails, all manner of personal e-mails to and from spouses, partners, children, other family members and friends. Even an e-mail sent with a business purpose may contain some personal chit-chat or invitation before or after the main body of the message. And strictly business e-mails may and often do contain highly sensitive commercial data which the author and/or recipient would never wish to see disclosed to a third party outside their company or beyond some other commercial grouping, not because the message is somehow unlawful or pertaining to criminality but for the simple reason that the contents of that message are their business and no-one else's. Computer hard-drives and servers do not, of course, contain just e-mails; they contain all manner of other records as well, some personal, some strictly business, many private, many confidential, many both. So when a warranted search occurs and information happens to be taken by the party doing the search, here the Commission, to which it is not entitled by law, and when the answer from the Commission to a person who complains that material has been seized that ought never to have been seized is 'We'll have a look at it anyway and get back to you', this Court must admit that it struggles to imagine a greater invasion of privacy in the situation arising. What business is it of the Commission, and by what legal principle or provision, does it contend that it may lawfully read information which it had no entitlement to seize, has no entitlement to possess, and which it is none of its business to know? There is no such legal provision: one has entered the terra incognita (or near-incognita) to which the court has made reference above. Should the Commission be allowed so to act it would quite literally be engaging in an entirely unwarranted – not to mention egregious – transgression of the right to privacy of one or more of the plaintiffs in these proceedings. To make matters worse, it is entirely clear from the statutory arrangements put in place by the Oireachtas via s.33 of the Act of 2014 in respect of purportedly legally privileged material, that there can be established, for now by private agreement between the Commission and the plaintiffs but perhaps also (though this is no matter for the court) by statute, an entirely reasonable and workable solution to the type of quandary now presenting. To this, the Commission appears to contend that its work is highly specialised (it undoubtedly is) and that it is best placed to determine what material is, to borrow from s.37(1), "information which may be required in relation to a matter under investigation". But that is no answer to the complaint that what the Commission holds in its hands, and wants to see, is material that it ought never to have held and thus has no right to see.

Part 11

The Data Protection Acts

66. The plaintiffs have come to court seeking, inter alia, a declaration that the Commission has acted in breach of the Data Protection Acts 1988 and 2003. Under s.8 of the Data Protection Acts:

> *"Any restriction in this Act on the processing of personal data do not apply if the processing is…*
>
> *(b) required for the purpose of preventing, detecting or investigating offences, apprehending or prosecuting offenders or assessing or collecting any tax, duty or other moneys owed or payable to the State, a local authority or a health board, in any case in which the application of those restrictions would be likely to prejudice any of the matters aforesaid…[or]*
>
> *(e) required by or under any enactment or by a rule of law or order of court…".*

67. In its current online guidance concerning the Data Protection Acts, the Data Protection Commissioner states, inter alia, the following in respect of s.8(a):

> *"If a data controller is approached by a law enforcement authority or by a tax collecting authority, which seeks to have personal data disclosed to it under this section of the Data Protection Act, it is a matter for the data controller: (i) to satisfy itself that the provisions of this section are met, for example by establishing the bona fides of the authority and by obtaining assurances that the disclosure is actually necessary, and not merely of side interest, for the investigation of an offence; and (ii) to decide whether or not to comply with the request for disclosure. While this section of the Data Protection Acts lifts the restrictions on disclosure by a data controller to a law enforcement authority or to a tax collecting authority, this section does not impose any obligation on a data controller to comply with the request for disclosure",*

and the following in respect of s.8(e):

> *"If you are under a legal obligation to disclose personal data, then this obligation takes precedence over the Data Protection Acts' prohibition on disclosure. However, if you have a statutory discretion to make information available, matters are not so clear-cut. The Data Protection Commissioner has found, in the past, that a statutory discretion to make information available did not come within the scope of section 8(e) of the Data Protection Act, and that accordingly the restriction on disclosure of personal data remained in force…".*

68. It is worth recalling, in light of the foregoing, what it is that the court has concluded, elsewhere above, that the Commission was entitled by law to do when conducting the 'dawn raid' at Irish Cement's premises. It was entitled inter alia, to seize (to quote s.37(2)(c) of the Act of 2014) *"any books, documents or records relating to an activity found"* thereat, provided such seizure, etc. was done by an authorised officer of the Commission (to quote s.37(1) of the Act of 2014) "[f]or the purpose of obtaining any information which may be required in relation to a matter under investigation". The investigation in question is the (ongoing) investigation into the alleged contravention of competition law by Irish Cement. The *"activity"* in question is not restricted to some activity of Irish Cement but (to quote s.34 of the Act of 2014) embraces *"any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business".* That activity could include, for example, activity of CRH, provided that it otherwise came within the ambit of the search, including the circumscription on seizure, etc. that is imposed by s.37(1).

69. Clearly there was a very wide breadth of information – including personal data – that the Commission was entitled to take away with it after the 'dawn raid', by virtue of the combined effect of its search warrant and s.37 of the Act of 2014. To the extent that the Commission was not entitled to any personal data being sought, it was of course open to the persons present at Irish Cement's premises (who, almost from the very start of the search, had the benefit of professional legal advice), to refuse to release to the Commission some or all of the personal data that was being sought by the authorised officers of the Commission. But, perhaps in the general spirit of cooperation that informed Irish Cement's actions vis-à-vis the Commission officials on the day of the 'dawn raid', Irish Cement elected to release the data sought. This being so, it cannot now 'off-load' all the consequences of any such election onto the Commission.

70. The long and the short of the foregoing is that:(1) Irish Cement allowed (a) the release of certain personal data to the Commission which is covered by s.8(e) – in which case no liability of any nature arises for either Irish Cement or the Commission, and/or (b) the release of certain personal data to the Commission, to which the Commission has no entitlement – in which case Irish Cement is liable as data controller for its breach of the Data Protection Acts in this regard; and (2) the Commission may have in its possession some personal data that was released to it without the relevant data subject consenting to such release and without there being a s.8 exemption applicable to such release.

71. As regards (2), sometime before the hearing of the present application, the Commission undertook that it would have no regard to any of the seized materials that are the subject of these proceedings, pending the issuance of the within judgment. It is not entirely clear to the court whether any regard was had to any of those materials by the Commission in the period post-seizure but pre-undertaking. However, based on the limited information before the court in this regard, it would seem entirely speculative for the court to reach any further conclusion as to whether the Commission has engaged in the processing or use of such data as may have been released to it without the relevant data subject consenting to such release and without there being a s.8 exemption applicable to such release. All the court would note in this regard is that the Commission is now a data controller in respect of such information and subject to all the obligations to which any data controller is subject by law.

Part 12

Collateral Challenge to Search?
72. It is clear to the court from all it has seen, read and heard that the plaintiffs in this case take serious and genuine objection, as a matter of general principle and of law, to the notion that the Commission should be allowed to swoop down in a 'dawn raid', carry off materials to which it has no legal entitlement, and then later consider those materials to which it has no entitlement as part of a sifting exercise to determine what it ought to have taken. They have suggested to the Commission a process whereby that material could be sifted without the Commission getting to view material that it had no right to take and has no right to possess. This suggestion has, to use colloquial parlance, 'fallen on deaf ears' and so the plaintiffs have brought the within proceedings.

73. The Commission, among its various contentions in these proceedings has submitted that one could suspect with reasonable cause that the whole purpose of these proceedings is to prevent enforcement action being taken by the Commission. To this, the court would respond that attack is not always the best form of defence, and a groundless attack unsupported by evidence is doomed to fail. It is simply no answer to the contention that 'You have material that you should never have had, and you should not be allowed to read or rely upon it in breach of the right to privacy' that 'One could reasonably take the view that you're just trying to make it difficult for me to do my job'.

74. A quartet of cases (*Byrne v. Grey* [1988] I.R. 31, *DPP v. Windle* [199] 4 I.R. 280, *Blanchfield v. Harnett* [2002] 3 I.R. 207, and *Cruise v. Judge O'Donnell*[2008] I.R. 230) has been cited before the court in support of the contention that objections to seizure under warrant should not be entertained in advance of substantive proceedings that would allow for admissibility of the same material to be challenged. However, all of those cases sought to assail the unitary integrity of the criminal trial process by reference to some historical act. That is not what is happening here. Moreover, it is no answer to an attempt by the plaintiffs to stop an apprehended imminent breach by the State of their right of privacy that the apprehended breach should be allowed to occur because certain consequences which flow from that breach could be addressed by an objection to the admission to the admissibility of evidence so obtained at any criminal trial which may or may not ensue. Indeed that such a contention should be made by the Commission might perhaps be contended to suggest a possible want of understanding on the part of the Commission as to the profound importance of the right of privacy: the essential objection here is not that the plaintiffs are concerned as to what use might be made of information obtained by way of unwarranted intrusion upon their private affairs; it is that such an unwarranted intrusion ought not to be allowed in the first place and can yet be avoided in a manner that ensures that both sides to these proceedings enjoy the entitlements conferred upon them by law…and no more.

Part 13

Conclusion
A. Overview.

75. The court accepts that, in real life, even a carefully planned and conducted search and seizure process of the kind done by the Commission at the premises of Irish Cement last May will almost certainly, perhaps inevitably, result in some materials being taken away that are not covered by the applicable warrant. There is no point in the court pretending that this reality does not present. The difficulty arising for the Commission is that there is no provision in the Act of 2014 for what is to be done by the Commission or anyone else as regards such material, i.e. as regards material that the Commission takes away but which it was not entitled to take away and which it has no entitlement to possess. The Commission contends that it has the right to go through all the material it has taken away and determine what is the material that it was entitled to take away. The plaintiffs contend, inter alia, that for the Commission to review material which it was not entitled to take away and which it is not now entitled to possess contravenes the right of privacy enjoyed by one or other of them, be it in the form arising under the European Convention on Human Rights or the Constitution, or both. The court agrees. The court notes in passing that this is not a case of what a 'Colonel O'Blimp' might describe as 'rights gone mad'.On the contrary, there is a perfectly sensible and practically operable process already existing in s.33 of the Act of 2014 whereby material that is seized and which is claimed to be legally privileged is vetted impartially with a view to determining whether that privilege has been correctly claimed and thus whether the State should view that material or not. It appears to the court that there is no reason why such a process could not have been voluntarily agreed between the Commission and the plaintiffs in this case. But agreement proved impossible and the matter has come before the court for adjudication; so be it. The court lists below the principal reliefs sought by the plaintiffs and indicates whether or not it is satisfied to grant the relief sought. The court will hear any argument that the parties may have to make as regards the lesser reliefs sought and on the issue of costs.

76. In passing, the court notes for the sake of completeness that the present application, the court's considerations and the scope of this judgment are each and all confined to what might be styled the 'search and seizure régime' operable under the Act of 2014.

B. Specific Reliefs Sought.

77. The court lists below the principal reliefs sought by the plaintiffs and indicates, having regard to all of the foregoing, whether or not it is satisfied to grant the relief sought:

> *(1) a declaration that the Commission has acted ultra vires and contrary to s.37 of the Competition and Consumer Protection Act 2014, and outside the scope of the search warrant of 12th May, 2015, in seizing books, documents and records unrelated to activity in connection with the business of supplying or distributing goods or providing a service at*

the premises of Irish Cement Limited at Platin.

The court is satisfied to grant a declaration that, on the balance of probabilities, it appears that certain materials seized by the Commission during its 'dawn raid' of 15th May last were not covered by the terms of the applicable search warrant and were done without authorisation under s.37 of the Act of 2014.

(2) a declaration in accordance with section 3 of the European Convention on Human Rights Act 2003 that the Commission has acted in contravention of Art.8 of the European Convention on Human Rights.

The court is not satisfied to grant this declaration but considers that were the Commission to proceed as it intends,i.e. to go through all the material it has taken away and determine what is the material that it was entitled to take away, that this would involve such a contravention.

(3) a declaration that the Commission has acted in breach of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

The court is not satisfied to grant this declaration.

(4) a declaration that the Commission has acted in breach of the plaintiffs' right to privacy under Art. 40.3 of the Constitution.

The court is not satisfied to grant this declaration but considers that were the Commission to proceed as it intends,i.e. to go through all the material it has taken away and determine what is the material that it was entitled to take away, that this would involve such a breach.

(5) a declaration that the Commission has acted in breach of the Data Protection Acts 1988 and 2003.

The court is not satisfied to grant this declaration.

(6) an injunction restraining the Commission from accessing, reviewing or making any use whatsoever of any books, documents or records howsoever described which were seized by the Commission on 14th May, 2015, and which do not relate to an activity in connection with the business of supplying or distributing goods or providing a service at the premises of Irish Cement at Platin.

The court has concluded, elsewhere above, what the Commission was entitled by law to do, when conducting the 'dawn raid' at Irish Cement's premises. It was entitled inter alia, to seize (to quote s.37(2)(c) of the Act of 2014) *"any books, documents or records relating to an activity found"* thereat, provided such seizure, etc. was done by an authorised officer of the Commission (to quote s.37(1) of the Act of 2014) *"[f]or the purpose of obtaining any information which may be required in relation to a matter under investigation".* The investigation in question is the (ongoing) investigation into the alleged contravention of competition law by Irish Cement. The *"activity"* in question is not restricted to some activity of Irish Cement but (to quote s.34 of the Act of 2014) embraces *"any activity in connection with the business of supplying or distributing goods or providing a service, or in connection with the organisation or assistance of persons engaged in any such business".* That activity could include, for example, activity of CRH, provided that it otherwise came within the ambit of the search, including the circumscription on seizure, etc. that is imposed by s.37(1). To the extent that the Commission has seized, and it appears on the balance of probabilities to have seized, materials that fall outside the foregoing, the court is satisfied to grant an injunction restraining the Commission from accessing, reviewing or making any use whatsoever of any such material pending any (if any) agreement as might be reached between the parties to those proceedings, to their mutual satisfaction, whereby a s.33-style or other arrangement is established to sift out that material that ought to have been taken from that which was not.

Appendix

The Day of the 'Dawn Raid' – A Summary Chronology
78. On 12th May, 2015, the Commission applied to the District Court, under s.37(3) of the Act of 2014, for a warrant to enter and search the premises of Irish Cement at Platin. The search warrant was obtained on foot of the sworn information of Ms Wang, an authorised officer of the Commission. On 14th May, 2015, officers of the Commission performed an unannounced inspection of the premises of Irish Cement at Platin, County Louth. A summary chronology of the day's events is set out below:

79. 10:00. Three authorised officers of the Commission and two members of An Garda Síochána enter the premises of Irish Cement at Platin, introduce themselves to the receptionist and ask to speak with the most senior staff member then present in the building. She identifies Mr Malone, the Company Secretary, as the most senior staff member present.

80. 10:15. Mr O'Brien, of Arthur Cox, Solicitors (of whom Irish Cement is presently a client), receives a telephone call from Mr Malone informing him that the Commission has commenced an unannounced search at Irish Cement's premises at Platin. Mr O'Brien advises Mr Malone to inform the lead investigator from the Commission that (1) it is Irish Cement's policy to cooperate with the search, but that (2) Irish Cement and its employees will seek to protect their legal rights and that in this regard, Arthur Cox will attend at the Platin premises as soon as possible.

81. 10:20. Mr Plunkett (an authorised officer of the Commission) meets with Mr Phillips (Irish Cement's IT Manager). Mr Plunkett requests the 'home drives' of Messrs Dalton, Bradley, Lynch and Creagh. Mr Plunkett tells Mr Phillips that he (Mr Phillips) is legally obliged to provide the information requested and makes reference to the Act of 2014 in this regard. Mr Plunkett adds that Mr Phillips can be charged personally with a criminal offence if he obstructs or delays the Commission's investigation in any way.

82. 10:50. After Mr Phillips indicates that he cannot directly access e-mail material as it is stored on an off-site storage facility operated by Fujitsu, a data access request is sent to Fujitsu.

83. c.10:20 While Mr O'Brien (Arthur Cox) is driving to ICL's premises he recei-

–12:00. ves a requested call from Mr Fahy, the Commission's lead investigator. Mr Malone (Irish Cement) joins the call. Mr O'Brien advises Mr Fahy that (1) it is Irish Cement's policy to co-operate with the search being done by the Commission, but that (2) Arthur Cox will be present to ensure that the legal rights of Irish Cement and its employees are respected by the Commission as it conducts its search. The issue of Irish Cement's assertion of legal privilege over certain documentation is discussed. It is agreed that there will

be no questioning of individuals other than in relation to the location of documentation until Arthur Cox are present. There is no identification made by Mr Fahy during this call of the individuals whose data the Commission is seeking to seize.

84. After his arrival at Irish Cement's premises, Mr O'Brien (Arthur Cox) has a brief meeting with Mr Malone (Irish Cement). They then meet with Mr Fahy (Commission). At that meeting, Mr O'Brien re-iterates and elaborates on the statements made previously over the phone as to Irish Cement's desire to co-operate with the search, as well as the need for the Commission to respect the legal rights of Irish Cement and its employees in the conduct of the search. Mr O'Brien asks about the scope of the investigation and is informed that it relates to allegations of anti-competitive conduct in the bagged cement market in the State. Mr O'Brien asks for a copy of the search warrant. Mr Fahy (Commission) allows Mr O'Brien briefly to review the search warrant but says that he will not provide a copy of the warrant until the search has ended. Mr O'Brien asks for a copy of the sworn information to which reference is made in the warrant. Mr Fahy refuses this on the basis that it is the Commission's policy not to provide parties with information sworn for the purpose of applying for a search warrant.

85. [Court Note: It was explained to the court at the hearing of the present application, and the court accepts, that there is good reason for this policy. The reason is that the sworn information may contain all manner of information which it is necessary to furnish to a District Judge in order that s/he might properly perform her or his functions under s.37 of the Act of 2014 but which it is not necessary for others, in particular the party whose premises are being searched pursuant to that warrant, to know that the Commission knows. As it happens, the sworn information has since been furnished by the Commission to the plaintiffs in the course of these proceedings.]

86. Mr O'Brien, having noted some manuscript amendments to the search warrant, asks to meet Ms Wang (Commission). She attends briefly at the meeting and explains the amendments to the satisfaction of Mr O'Brien. Ms Wang then leaves and the meeting continues, Mr O'Brien turning to an initial discussion of legal professional privilege and the questioning of individuals. Mr Fahy (Commission) agrees that all issues and concerns regarding the conduct of the search by the Commission's team will be conveyed to Mr Fahy by Mr O'Brien or Mr Ryan, another solicitor from Arthur Cox whose arrival was imminent. Mr O'Brien also states that Irish Cement will seek to retain a copy of all documentation and data seized by the Commission.

87. 12:00. Mr Plunkett obtains access to the material that he requested on arrival and which had to be sourced via Fujitsu.

88. 12:05. At about 12:05, following the arrival of Mr Ryan (Arthur Cox) at Irish Cement's premises, both Mr Ryan and Mr O'Brien (Arthur Cox) attend a meeting with, inter alia, Mr Fahy (Commission), and Mr Malone (Irish Cement). At this meeting the attendees discuss various issues concerning how the search will progress, including the issue of legal privilege, the preparation of an inventory describing the documents seized during the search and Irish Cement's making of a copy of such documentation as is seized. It is useful to quote from Mr Ryan's affidavit evidence in this regard as it makes some assertions that, though undoubtedly done in an entirely proper attempt to best protect his clients' interests, nonetheless sit uneasily with the text of the Act of 2014. Averring as to the substance of the meeting that the court has just described, Mr Ryan states, inter alia:

"As regards the issue of legal privilege, it was agreed that any hard copy documentation over which legal privilege was being claimed would be sealed and the [Commission]…would not have access to the documentation pending agreement by the [Commission]…in respect of the claims of legal privilege or determination of the claims in accordance with section 33 of the Act of 2014 as required. I informed [the Commission officers]…that the electronic data that was being seized contained legally privileged material and I referred to the rights of ICL[Irish Cement] and of the individuals whose documentation was being seized, and the [Commission's] obligations, under section 33 of [the Act of 2014]…with regard to legally privileged material. I stated that in order to identify the legally privileged material, ICL would require a copy of the seized electronic data and that ICL would then engage with the [Commission]…for the purpose of identifying the legally privileged material. I also requested confirmation that, in accordance with the [Commission's] obligations under section 33 of the 2014 Act, the seized electronic data would not be reviewed by the [Commission]…pending a process to be agreed with the Commission for the identification of the legally privileged material. In response, Mr Fahy [Commission] suggested that I discuss the issues arising in relation to the seizure of electronic data with [Mr Plunkett (Commission)]." [Emphasis added].

89. [Court Note: There was no obligation on the Commission under the Act of 2014 to consider or enter into the 'agreement' referred to in the first underlined portion of the above-quoted text, nor even to listen to any proposals in this regard. As to the second underlined portion of the above-quoted text, there is no obligation on the Commission to enter into a form of arrangement whereby it assists in the identification of legally privileged material and there is no obligation on the Commission to provide a confirmation that it will act in accordance with its statutory obligations. As to s.33, the substance of this provision has previously been considered in the main body of this judgment.]

90. c.14:00. Mr Ryan (Arthur Cox) meets with Mr Plunkett (Commission), informs him that Irish Cementis seeking a copy of the seized electronic data, asks Mr Plunkett how he is approaching the seizure of electronic data, and asks how Irish Cement can make a copy of the seized data. Mr Plunkett declines – entirely lawfully – to engage in a discussion as to how he is seizing electronic data. He initially refuses – again entirely lawfully –to facilitate Irish Cement in making a copy of the seized data. Mr Ryan again invokes s.33 of the Act of 2014 – not that this entitled him to any of what he was seeking – and, at this point, the Commission, acting, to borrow a colloquialism, 'from the goodness of its heart' and not pursuant to any legal obligation, agrees that it will permit Irish Cement to make a copy of the seized electronic data. (In fact, the Commission kindly arranged in this regard for an electronic file containing a copy of such electronic information as it copied to be left on the hard-drive of the PC from which such information had been copied).

91. [Court Note: There is doubtless room for argument as to whether the Commission is to be commended for having extended this last-mentioned courtesy, or criticised for treating Irish Cement with 'kid-gloves' when another party, with a less perseverant lawyer or no lawyer at all, might well have been treated differently. Wherever the answer as to that argument lies, Mr Ryan, to borrow again from his affidavit evidence now sought confirmation of Mr Plunkett *"that none of the seized electronic data would be reviewed by the [Commission]…pending a process to be agreed with the [Commission]…for the identification of the legally privileged material",* again not that any such process is required to be agreed. There is a disparity between the affidavit evidence at this point. Mr Ryan states in his affidavit that *"Mr Plunkett provided the confirmation sought",* then immediately adds that *"As averred to in paragraph 34 of the Affidavit of Mr Plunkett, Mr Plunkett stated that Arthur Cox should write to Una Butler [the in-house counsel of the Commission] in relation to this issue".* Mr Plunkett states that "I gave a verbal undertaking to Mr Ryan that the material which was being forensically extracted by me would not be viewed or accessed until Mr Ryan had contacted Ms Butler". Mr Plunkett's evidence seems to tally with that of Mr Fahy (Commission) who avers that *"[Mr] Plunkett did inform Mr Ryan that any electronic evidence would be preserved and that Arthur Cox could write to the Commission identifying the electronic documents over which legal privilege was being seized."* To the extent that anything rides on such disparity as arises in the evidence, the court prefers the evidence of Mr Plunkett, as buttressed by that of Mr Fahy. It just does not seem credible to the court that a member of the IT staff of the Commission would engage in the provision of legal confirmations of the type suggested by Arthur Cox. It seems to the court to be altogether more likely

that Mr Plunkett, who comes across in the entirety of the affidavit evidence before the court as a sensible and competent individual, would, quite properly, have 'bounced' a legal matter to the Commission's in-house lawyer for consideration.]

92. post- Certain events critical to the present application happened after the

14:00. meeting of 12:05 described above. The affidavit evidence of Mr O'Brien (Arthur Cox) provides perhaps the best account of what transpired. He puts these events as having happened after the meeting at 12:05. However, he also intimates that it occurred following the giving of the confirmation that it is claimed Mr Plunkett provided. This suggests that these events must have occurred at or after the time of Mr Ryan's conversation with Mr Plunkett, a conversation that Mr Plunkett firmly fixes as having occurred around 14:00. According to Mr O'Brien:

> *"[S]ubsequent to the meeting at approximately 12.05pm, Richard Ryan [Arthur Cox] and I became aware that the [Commission]…intended to seize the entire contents of Seamus Lynch's crh.com mailbox. I had a brief conversation with Mr Fahy [Commission] in the corridor in respect of this issue….Subsequently Mr Ryan and I met with Mr Fahy in the boardroom in relation to this issue and informed Mr Fahy that Mr Lynch was no longer employed by ICL and was employed by CRH plc. We stated that, as a result, his crh.com mailbox included documents that did not relate to ICL but rather related to CRH plc and/or other subsidiaries of CRH plc and that those documents were outside the scope of the search warrant. The purpose of this discussion was to put Mr Fahy and the [Commission]…on notice of this issue."*

93. 16:00 Mr Plunkett continues making forensic copies of electronic material

> –20:00. from various e-folders maintained on the PCs of certain CRH staff.

94. 20:35. Last of the Commission team leave the CRH premises.