

THE HIGH COURT

2007 973 JR

BETWEEN

**PATRICK DOWLING, PATRICK HILLIARD,
MICHAEL HALTON AND BRONAGH CRONIN**

APPLICANTS

AND

**JUDGE FLANN BRENNAN AND
DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENTS

Judgment of Mr. Justice O’Keeffe delivered on the 11th day of November, 2010

1. This is an application for judicial review in which the following relief is sought:-

(i) In respect of the first named applicant, an order of *certiorari* quashing the Order made by the first named respondent on 25th June, 2007, convicting the applicant of an offence contrary to s. 49(4) and (6)(a) of the Road Traffic Act 1961, as inserted by s. 10 of the Road Traffic Act 1994, as amended, by s. 23 of the Road Traffic Act 2002.

(ii) In respect of the second, third and fourth named applicants, an Order of Prohibition by way of application for judicial review restraining the second named respondent from further prosecution of the second, third and fourth named applicants.

2. In the grounds upon which relief is sought, it is contended:-

(i) The first named respondent erred in law in failing to dismiss the prosecution in defence of the first named applicant’s constitutional rights to be tried in accordance with natural and constitutional justice and in due course of law and in particular his rights to fair procedures and trial and his rights as guaranteed by Article 6 of the European Convention on Human Rights as applicable in Ireland having regard to the non-disclosure of documents relating to the purported ability of the Lion Intoxilyser IRL 6000 (“the Intoxilyser”) to detect mouth alcohol and ambient alcohol and in particular the manufacturer’s failure to disclose any documents including test data or calibration documents or any software or hard copy of software in relation to detection of mouth alcohol and ambient alcohol including the test criteria, test Standard Operating Procedures (SOP) and results of tests carried out by Lion Manufacturing (“Lion”) that showed that the machine is capable of detecting all mouth alcohol that could affect a s. 17 printout and Lion/QSL standard operating procedures relating to the measurement of ambient environment for contaminants and how this is checked during services or any document which made reference to 0.49 micrograms or 0.5 micrograms in relation to tolerance, calibration, specification or otherwise in relation to ambient fail.

(ii) The first named respondent erred in law in failing to dismiss the prosecution in defence of the first named applicant’s constitutional right to be tried in due course of law and in particular his rights to fair procedures and trial having regard to the failure by the prosecution or Lion to disclose software to the defence.

(iii) That by proceeding to convict the first named applicant herein the first named respondent did, in all the circumstances, act in breach and violation of the first named applicant’s rights to fair procedures and/or natural and constitutional justice and the applicant’s rights as guaranteed by Article 6 of the European Convention on Human Rights as applicable in Ireland under the terms of the European Convention on Human Rights Act 2003.

(iv) Without prejudice to the generality of the above claims that in arriving at the said decision to convict the applicant, the first named respondent erred in law and acted in breach and violation of the constitutional rights of the applicant and the rights as guaranteed under the terms of the European Convention on Human Rights in:-

(a) Convicting the applicant in circumstances where the first named applicant was, contrary to law, afforded no reasonable or effective right or opportunity to assail the case made against him.

(b) Failing to provide any or any adequate reasons as to why, in the circumstances of the evidence before him and arguments offered, the first named respondent did determine that the evidence before the first named respondent was sufficient upon which to found a satisfaction beyond reasonable doubt that the applicant was, in fact, guilty of the offence charged.

(v) The first named respondent erred in law and/or irrationally and/or without proper legal basis in convicting the applicant since no reasonable trier of fact could conclude that the statement purported to have been supplied under s. 17 of the Road Traffic Act 1994 was sufficient evidence in the proceedings under the Road Traffic Acts 1961 – 1994 of the facts stated therein (the contrary having been shown) and in particular having regard to:-

(a) The evidence heard by the first named respondent from Christopher Cuffe, Engineer and David Blyth, Head of Calibration at Lion, the manufacturer.

(b) Garda O'Donoghue's evidence of compliance with his statutory obligations did not include any evidence of compliance with S.I. No. 326 of 1999 and in particular that the garda input information into the apparatus referred to in s. 13(1) of the Act of 1994, namely the name and address of the person providing the specimens, the section of the Road Traffic Act 1961, which it was alleged the person contravened and his or her name and number. (This ground was not proceeded with.)

3. In respect of the claims of the second, third and fourth named applicants, it is contended that the second, third and fourth named applicants were to be prosecuted where the second named respondent breached their constitutional rights as guaranteed by Article 6 of the European Convention on Human Rights, having regard to the non-disclosure of documents essentially on the same grounds as set out in respect of the first named applicant.

4. The statement of opposition on behalf of the second named respondent by way of preliminary point claims that the application is prolix and an abuse of the process in that the grounding affidavit is some 99 paragraphs long and is an attempt, in effect, to seek the High Court in judicial review proceedings to act as a court of appeal over the District Court by seeking to turn the affidavit into an unofficial transcript of what occurred. Reliance was placed on the decision of the High Court in *McGonnell v. Attorney General* (Unreported, High Court, 16th September, 2004) as approved by the Supreme Court at [2007] I.R. 400, and it was contended this application was an attempt to mount a collateral attack on such decisions.

5. In respect of the first named applicant the second named respondent claimed the conviction was made within jurisdiction and was based on evidence. It was claimed that the trial judge had a discretion as to what level of disclosure was necessary. It was contended that nothing emerged in evidence in the case to suggest that the reading on which the first named applicant was convicted was in any way defective.

6. It was contended that the trial judge acted within jurisdiction in refusing to order disclosure of the software and that the first named applicant did not establish any sufficient basis as to why he should be entitled to such a disclosure in the context of a summary prosecution.

7. The second named respondent contended that the first named applicant was not denied an opportunity to assail the case made against when in particular a witness from the Medical Bureau of Road Safety ("the Bureau") (Mr. David Reynolds) gave evidence to the court as did a witness from the manufacturer of the Intoxilyser (Mr. David Blyth). It was contended that the first named applicant had every opportunity in such circumstances to convince the court either that this s. 17 reading was inaccurate or that the case should be adjourned for further disclosure to be made.

8. It was contended that there was no failure to give sufficient reasons for the conviction and that the applicant did not express any dissatisfaction with the reasons given and cannot raise this ground *ex post facto* as an additional ground of complaint. It was denied that the first named applicant had rebutted the presumption that the s. 17 statement was correct.

9. In respect of the claims of the second, third and fourth named applicants, the second named respondent denied that there was any breach of their constitutional or convention rights to seek to proceed with the prosecution based on the then current levels of disclosure. It was contended that it was premature to speculate at this stage of the trial in respect of such applicants would be anything other than a fair trial in due course of law. It was contended that in a summary prosecution, it was open to the trial judge to determine that the accused does not require software of the machine in order to properly defend themselves. In so ruling, the trial judge, it was submitted acted within jurisdiction.

Relevant Statutory Provisions

10. Under s. 49(4) of the Road Traffic Act 1961, as amended, by s. 10 of the Road Traffic Act 1994, it is an offence for a person to drive while alcohol is present in his body giving rise to a concentration of alcohol in the breath exceeding 35 micrograms of alcohol per 100 millilitres of breath.

11. Section 49(1)(a)(iv) reads:-

"A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within three hours after so driving or attempting to drive, the concentration of alcohol in his breath will exceed the concentration of 35 micrograms of alcohol per 100 millilitres of breath."

12. Section 13 of the Road Traffic Act 1994 permits a garda to require a person rested for a s. 49 offence to provide two specimens of his breath by exhaling into an apparatus for determining the concentration of alcohol in the breath. Section 13 is as follows:-

"(1) Where a person is arrested under section 49 (8) or 50 (10) of the Principal Act or section 12 (3), or where a person is arrested under section 53 (6), 106 (3A) or 112 (6) of the Principal Act and a member of the Garda Síochána is of opinion that the person has consumed an intoxicant, a member of the Garda Síochána may, at a Garda Síochána station, at his discretion, do either or both of the following –

(a) require the person to provide, by exhaling into an apparatus for determining the concentration of alcohol in the breath, 2 specimens of his breath and may indicate the manner in which he is to comply with the requirement,

(b) require the person either –

(i) to permit a designated doctor to take from the person a specimen of his blood, or

(ii) at the option of the person, to provide for the designated doctor a specimen of his urine,

and if the doctor states in writing that he is unwilling, on medical grounds, to take from the person or be provided by him with the specimen to which the requirement in either of the foregoing subparagraphs related, the member may make a requirement of the person under this paragraph in relation to the specimen other than that to which the first requirement related.

(2) Subject to section 23, a person who refuses or fails to comply forthwith with a requirement under subsection (1)(a) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both."

13. Section 17(2) of the 1994 Act provides that where the apparatus determines that the person may have contravened s. 49(4), he shall be supplied with 2 identical statements, automatically produced by the said apparatus stating the concentration of alcohol in the relevant specimen as determined by the apparatus. Section 21(1) of the 1994 provides that a duly completed statement purporting to have been supplied under s. 17 shall, until the contrary is shown, be sufficient evidence in any proceeding under the Road Traffic Acts 1961 to 1994, the facts stated therein.

14. Section 17(2) reads as follows:-

"Where the apparatus referred to in section 13(1) determines that in respect of the specimen of breath to be taken into account as aforesaid the person may have contravened section 49 (4) or 50 (4) of the Principal Act, he shall be supplied forthwith by a member of the Garda Síochána with 2 identical statements, automatically produced by the said apparatus in the prescribed form and duly completed by the member in the prescribed manner, stating the concentration of alcohol in the said specimen determined by the said apparatus."

15. Section 21(1) reads as follows:-

"A duly completed statement purporting to have been supplied under section 17 shall, until the contrary is shown, be sufficient evidence in any proceedings under the Road Traffic Acts, 1961 to 1994, of the facts stated therein, without proof of any signature on it or that the signatory was the proper person to sign it, and shall, until the contrary is shown, be sufficient evidence of compliance by the member of the Garda Síochána concerned with the requirements imposed on him by or under this Part prior to and in connection with the supply by him pursuant to section 17(2) of such statement."

The Applicant's Evidence

16. The primary grounding affidavit is that of Mr. Paul Moore, Solicitor to the applicants. It extends to 99 paragraphs and is some 28 pages in addition to extensive exhibits.

17. Having referred to the charges brought against the applicants, he said that disclosure made by the State indicated that the prosecution intended to adduce evidence by means of a "section 17" (Road Traffic Act 1994) printout from an Intoxilyser machine situate at Drogheda.

18. He referred to the establishment of the Bureau and its establishment under statute. He said s. 38(3)(d) of the Road Traffic Act 1968 provided that the Bureau may from time to time arrange for research into the method of determining the extent to which alcohol or drugs is or are present in a person's body and may also arrange for the supply and testing of equipment or apparatus for the obtaining or testing of specimens of breath. He said that s. 6 of the Road Traffic Act 1994 ("the 1994 Act") provides that the Bureau may arrange for the supply and testing of apparatus for indicating the presence of alcohol and apparatus for determining the concentration of alcohol in the blood.

19. He said that he developed an interest in the science behind the Intoxilyser and also familiarised himself with the decision of the High Court in *McGonnell v. the Attorney General and the Director of Public Prosecutions*. He retained Mr. Christopher Cuffe, Engineer to work with him in relation to this machine in an attempt on behalf of his clients to refute or verify the manufacturer's (Lion's) claims in relation to what the Intoxilyser could do having regard to the evidence in the High Court case in *McGonnell*.

20. He said that an application for disclosure of information in relation to the Intoxilyser sought by him on behalf of the applicants and was first heard by the first named respondent on 20th January, 2006. He was concerned to access information on how the machine performed two important functions, namely screening of mouth alcohol and air (ambient) alcohol. He referred extensively to the arguments advanced in relation to this application and to the evidence given by Mr. Cuffe in relation to the application. He said the court was informed no publicly available documentation existed in relation to such information. The hearing of this application was adjourned to 10th March, at which Mr. Cuffe was cross examined by Inspector Gannon.

21. Inspector Gannon called as a witness, Mr. Reynolds of the Bureau. The affidavit referred to the extensive evidence given by Mr. Reynolds, which stated that the Home Office carried out mouth alcohol tests and the machine had been approved by the Home Office and that the Bureau carried out tests every six months. He also referred to the practise of reducing the readings by 17.5%. He said that Mr. Reynolds indicated that the Bureau had a procedure for checking the machines capacity to detect mouth alcohol and the category of documents sought in relation to that issue was not relevant. He referred to the evidence given by Mr. Reynolds and the questioning of Mr. Reynolds by counsel on behalf of the applicants.

22. Mr. Moore stated that the first named respondent gave his decision indicating that he accepted Mr. Reynolds's evidence in relation to the independence of the Bureau and that the judge ordered disclosure in one case. This disclosure included the following category of documents by reference to a numbered list of categories of documents (many of which were not pursued at the application or which were otherwise not the subject of the Disclosure Order) prepared by Mr. Cuffe and directed at the ability to detect mouth alcohol and alcohol in the ambient environment. Such documents were described as:-

"17. The Test SOP (Standard Operating Procedures) and results of tests carried out by Lion Manufacturing that showed the machine is capable of detecting all mouth alcohol that could affect a section 17 printout."

22. Lion/OSL Standard Operating Procedures relating to the measurement of ambient environment for contaminants and how this is checked during services."

23. He said that a further hearing in relation to disclosure was held on 2nd March, 2007. He said that counsel for the applicants indicated to the court that the manufacturer of the Intoxilyser had stated that there were "no documents for disclosure" in relation to point 17 and 22 of the Disclosure Order.

24. He said that Mr. Reynolds gave evidence and said that when the order was made the Bureau could deal with certain parts of it but could not deal with other matters including categories 17 and 22. Mr. Reynolds stated he had written to Lion and had been

informed by them that they had no documents to disclose in relation to those two categories. When asked whether Lion or the Bureau ever had documents relating to categories 17 and 22 of the Disclosure Order, he said that Mr. Reynolds replied "*my understanding is that they never existed*". Following detailed submissions which were set out in the affidavit he said that the first named respondent said that he was satisfied that the order had been complied with and that the prosecution could proceed. He also reported the first named respondent as saying that he had never order the disclosure of copies of documents that did not exist and that the prosecution had advised that the documents concerned did not exist.

25. He said that the first named applicant's case was heard by the first named respondent on 25th June, 2007. The first named respondent having decided that there was a case to answer, he said that Mr. Cuffe was called on behalf of the first named applicant. Reference was made in detail to the evidence given by Mr. Cuffe who, *inter alia*, said that since there were no (manufacturers) documents to support the machine's ability to distinguish alcohol in the mouth, it would cause him to doubt the machine. He had been given no calibration evidence and no documents on disclosure. Mr. Cuffe concluded by stating that he had grounds for doubting the reliability of the Intoxilyser mainly the absence of documents and being satisfied that there was no clear and transparent paper trail. Mr. Moore then says that Mr. Cuffe was cross examined by Inspector Fox but no details of the cross examination are given.

26. The recitation of alleged evidence in this manner and the lack of detail of the cross examination by the Inspector and the lack of particular findings on this evidence by the trial judge is most unsatisfactory for this Court in the presentation of this case to this Court.

27. He states that Mr. Blyth gave evidence on behalf of the first named applicant. He was head of UKAS Calibration at Lion. His evidence was that he kept a file in relation to each Intoxilyser 6000 but could not say whether there was any safeguard process within the Lion Intoxilyser which had not been fully disclosed by way of documents provided to the Bureau. He said that Mr. Blyth said that there were some documents relating to the Intoxilyser which he had access to view only, but no authority to disclose to any other party. He said that Mr. Blyth stated in evidence he had not been aware of the disclosure order until that day (that is of the hearing).

28. He stated that Mr. Blyth stated that Lion had approved a Handbook for the maintenance and servicing of the instrument. The Bureau required one annual visit from the company's representative or the local representative and in addition the Bureau decided to undertake six monthly services themselves.

29. It was stated that when Mr. Blyth was asked if there was at any time in existence any documents which showed that the machine was capable of detecting mouth alcohol, he replied he had no documents relating to mouth alcohol. Further details of the questioning of Mr. Blyth are set out in the affidavit extensively. Reference was also made to the evidence which Mr. Blyth gave to the High Court in the *McGonnell* case. Reference was made to the transcript of Mr. Blyth's evidence in the High Court and he was questioned on this. He said Mr. Blyth said he had discussed the request for the provision of the software code by Mr. Moore with his colleague, Dr. Williams and they were categorical that this information would not be disclosed. Mr. Moore stated that Mr. Blyth stated that the Lion would allow an independent forensic scientist to test the instrument but would not allow such forensic scientist to inspect the software code.

30. Evidence was given by the first named applicant that he had 2 or 3 glasses of beer during his shift between 10.30am and 10.30pm.

31. Submissions were then made on behalf of the first named applicant and Inspector Fox.

32. He said that in his judgment, the first named respondent stated he was satisfied beyond doubt that the accused had driven on the night in question and within three hours of driving, the concentration of alcohol in his breath exceeded 35ugs per 100ml and he convicted him.

33. On 13th July, 2007, Mr. Moore applied to the first named respondent to adjourn the cases of the second, third and fourth named applicants pending a decision of the High Court in judicial review proceedings on the grounds that a witness from the manufacturer had given sworn evidence, not only that there are documents in existence which had not been disclosed contrary to the order of the first named respondent, but further that for commercial reasons notwithstanding the fair procedure requirements of this jurisdiction that such documents would not be disclosed. He said reliance was made on the judgment in *McGonnell's* case, *Whelan v. Kirby* and *DPP v. Moore*. The first named respondent refused to accede to such application.

34. Mr. David Reynolds, a Principal Analyst with the Bureau in an affidavit on behalf of the second named respondent stated that he gave evidence on 10th March, 2006 and 2nd March, 2007, in relation to the case. There are two instruments: the Intoxilyser and the Intoximeter which is manufactured in United States. The Intoxilyser is manufactured in the United Kingdom by Lion. The two instruments serve the same purpose but use a different internal method for measuring the level of alcohol in the sample of breath.

35. He said that pursuant to a tender process, Lion supplied some 64 such instruments in Ireland. The Bureau regarded both instruments as being equally reliable.

36. He said that the Bureau had no role in providing any third party with an apparatus to determine the concentration of alcohol in the breath. The Bureau had facilitated Mr. Cuffe to inspect and test the Intoxilyser in Drogheda Garda Station on two occasions and elsewhere in Ireland on thirteen instruments.

37. He said the software code was not part of the disclosure request that the defence had made was not part of the disclosure order that the first named respondent had made. The software code for the Intoxilyser was the intellectual property of the manufacturer. It consisted of a box of A4 papers (like a box of paper for a printer) which is covered in computer code and a CD disc containing the computer code. He said the defence had never explained to the first named respondent what they would do if they received such a box of code or what they would hope to establish from it. Mr. Cuffe, he said had never given evidence on the relevance of the source code or that he would have been in a position to interpret and evaluate the source code.

38. He said that he explained to the court that in all of his experience and in all of the times that Mr. Cuffe tested the instrument in his presence, the instrument never did anything that it was not supposed to in this regard. In respect of ambient alcohol (which is alcohol that may be present in the room in very low quantities caused by the expired breath of a driver) he explained to the court that it would not be possible to generate ethanol vapour concentrations of precisely 0.5ug/100ml and 0.49ug/100ml and to test the instrument in respect of both

39. He said that Mr. Cuffe was never able to produce a result that cast any doubt on the reliability of the Intoxilyser. He said that in cross examination, Mr. Cuffe admitted that he was not an expert and had little or no technical knowledge of the instrument in question. He said that it was a requirement of the Bureau that only instruments approved by the United Kingdom Home Office or an equivalent body in another EU country would be considered for assessment.

40. He said that the Bureau did not specifically test the instrument at the 0.5ug/100ml level and therefore it did not have documentation in relation such testing. He had documents in relation to the observations that the instrument would not display ambient fail at 0.1, 0.2, 0.3 and 0.4 ug/100ml. At levels of 0.6ug/100ml or above, the ambient fail was displayed and the test aborted. He was not asked to produce the documents he had. He said that Lion had advised the Bureau that no Lion documents existed in relation to mouth alcohol and ambient fail tests. He was satisfied that the instrument was operating correctly at the time of the test and that the s. 17 statement was accurate and reliable.

Cross Examination of Mr. Reynolds

41. Mr. Reynolds was cross examined by Mr. D. Kenneally, S.C., on behalf of the applicants. Mr. Reynolds said there was a correspondence between the level of alcohol in the breath and the level of alcohol in the blood. He said that it is accepted that as air travels from the deep lung, there is a concentration gradient from the air, high up in the respiratory system compared to air down low in the deep lung. The intention of the measuring instrument is to ensure that it measures alcohol in air that is expired from deep within the lung, and that it does not take a measurement of air that is from the top part of the lung which may not accurately reflect the concentration of alcohol in the blood. In this jurisdiction the Intoxilyser 600 IRL is the instrument that is used to take evidential breath samples. The instrument works by measuring the alcohol content in the deep lung.

42. In the Section 17 statement, there are two quality control checks referred to as Calibration Check 1 and 2 and there are four blank tests. The blank test is the result of the analysis of the instrument for alcohol that may have been brought into the instrument from the surrounding air. Before the blank test is carried out, a small pump within the instrument switches on and it draws air from outside the instrument into the inside of the instrument. The purpose of that step is to ensure that the previous sample that was brought into the instrument has been completely expelled before the next sample goes, so as to ensure that there is no cross contamination between one sample and the next sample. The forensic integrity of the Intoxilyser depends not alone upon those factors but also that the instrument is properly calibrated.

43. He said that the Bureau carries out tests every six months on the instruments on-site at the garda station. The test essentially centres around generating alcohol vapours at predetermined levels. The instrument is challenged to analyse these vapours and only if the results fall within a certain tolerance of those predetermined concentrations, will it be concluded that the instrument is operating correctly so as to ensure its forensic integrity.

44. Under Section 6 of the 1994, the Bureau has the obligation to supply, approve and test the instrument. He said it was not the function of the Bureau nor would it be proper to try and devise a test to fool the instrument. This was not a scientific concept. The Bureau carries out tests to determine breath levels on acetone and methanol.

45. Prior to the approval of the instrument by the Bureau, it was a requirement that the instrument would have been approved in the United Kingdom to the standard operating in the United Kingdom or any other European jurisdiction. This standard is detailed in a United Kingdom document called "*Guide to Type Approval*". In addition, during calibration by Lion, Lion examines how the instrument responds to four distinct volatiles, to distinguish it from ethanol which is the alcohol that is in drinks consumed by persons.

46. The Bureau has not seen the raw data from the Home Office in respect of tests carried out by the Home Office. He said that the Bureau is relying on a certificate from the United Kingdom Home Office to say that the instrument has been approved by the Home Office in accordance with the "*Guide To Type*". The Bureau had not looked behind the certificate. He knew the specification against which the instrument was tested by the United Kingdom Home Office and the instrument could not be passed by the Home Office unless it complied with such specification.

47. The Bureau in 1999 evaluated and tested three types of instruments; the Intoxilyser, the Intoximeter ECIR and the DATAMASTER. On the basis of the Bureau's tests, the Intoximeter and the Intoxilyser were approved.

48. He said that scientifically the Bureau was satisfied that the instrument (the Intoxilyser) was capable and did in fact produce a breath alcohol result that was reliable. The Bureau regularly checks the safeguards that are within the instrument so as to ensure it continues to operate successfully. That reliance is evidenced firstly by the calibration of the instrument which is carried out by Lion in Wales and if an instrument required calibration, it would be sent back to Wales for that purpose. Lion is accredited by the United Kingdom Accreditation Service. The instrument is properly installed and commissioned in a garda station and this is done by agents of Lion who install the instrument to standards of Lion. The Bureau then tests the instrument. This testing takes some five hours. The Bureau also tests to ensure that the results are not influenced by other substances that may be in the breath. The Bureau also carries out checks to insure that blowing requirements of the instruments were not excessive; namely that it was not too hard to blow into the instrument and to check to ensure that the mouth function is operating correctly. The instruments are checked by the Bureau at six monthly intervals.

49. The calibration check is a result of a test the instrument carries out using a calibration gas which is attached to the instrument. It contains a very discrete amount of ethanol, namely 35 microgrammes per 100mls of air which is alcohol.

50. Before a driver provides the first breath and after the driver has provided the last breath, a small sample of this gas is taken into the instrument and it analyses the gas. If the result is between 32 and 37 microgrammes per 100mls, the machine will allow the analysis to continue. If it records a result outside this range, the instrument will abort the test.

51. He believed a Section 17 statement produces a result indicating the concentration of alcohol in the breath of the driver that is forensically reliable having regard to the calibration, the installation and the commissioning of the instrument, the six month checks by the Bureau and in particular the time of test validation which is carried out when the driver provides a breath specimen.

52. The calibration certificate given by the manufacturer contains the UKAS logo; that the manufacturers who carry out the calibration are accredited by the United Kingdom Accreditation Service. By attending the forensic science laboratory in the United Kingdom, he had satisfied himself that the approach taken was rigorously scientific and proper.

53. In relation to an independent expert testing the machine, the Bureau has both facilitated such experts to test and to be present during testing, provided that what they propose do in the test carries no threat to the instrument. If someone wanted to blow smoke into the instrument to see what effect it would have, the Bureau would say, no, as smoke can damage the instrument and it would

not allow that. Mr. Cuffe had tested the particular instrument in Drogheda on three occasions and the witness was present on those occasions.

54. It is not the function of the Bureau to service or repair the instrument. That is the function of QSL, the agents for Lion in Ireland.

55. The Bureau has the software code for the Intoxilyser. This was supplied to it as part of the specification of the Bureau. There is one software, it is Version 3.01 IRL Build 3 in respect of each machine and this was supplied to it as part of the Bureau's specifications. The Bureau required the software as a contingency or as a fallback in the event that Lion Laboratories ceased as a trading entity. No change has been made to the software since testing went live in 1999. Since 1999, he has not seen any Section 17 statement which caused him to have serious concern that the instrument was doing something that it was not programmed to do. The Bureau never had any need to evaluate the software. He was told by Lion that they would not disclose the software. The Bureau is not permitted by Lion to release the software to any third party. As he understood it, Lion's attitude was that disclosure of the software was not relevant as there had been no Section 17 statement which had indicated in any way that the software was faulty nor had he seen an interfering substance being flagged and yet the test being carried out. He had not seen two results which varied by a significant amount and the test continuing. He had not seen calibration checks in which the result was outside the specification and yet the test continuing. He had not seen anything that would cast doubt on the software. This applied to 14,000 tests per annum and in all in his experience about 90,000 tests.

56. He said that in its contract with Lion, the Bureau was bound by a confidentiality clause which covered the software.

57. He confirmed that he had been informed by Lion that they had no documents to disclose in respect of Items 17 and 22 in the list. Lion told him there were not tests carried out and that they had nothing to disclose. He accepted that. The testing body in the United Kingdom was the Forensic Science Service, the instrument would have been sent to this body for testing. He did not know what test the manufacturer carried out prior to submission of the instruments to the Forensic Science Service.

58. The Bureau never got the internal specifications of the machine from Lion, nor did it ever seek them.

59. He took the view that the software was not covered by the Items set out in the list prepared by Mr. Cuffe.

60. He did not accept that the machine tested and managed itself as to its proper functioning at any given time. A very important point of quality control was the external gas within which the instrument tested itself. This gas is traceable and was not supplied by Lion nor did the Bureau make it. It was supplied by British Oxygen Company, an independent company which was credited to manufacture the gas. Each cylinder came with a certificate of analysis so the Bureau knew the concentration of alcohol in that gas very precisely. He would not accept that the instrument tested itself. It tested itself against a standard that was provided by an outside agency and that standard was certified and traceable.

61. He said that one of the fail-safe systems that was not embedded in the software was the 20 minute period of observation and deprivation which was part of the triple lock safeguards to ensure that what residual alcohol (mouth alcohol) that remained in the mouth did not influence the result.

62. He had not seen any evidence within the Bureau that this instrument was not doing anything that it was not supposed to do nor broke any of the codes that were set for it.

63. He confirmed that Mr. Cuffe had carried out three examinations of this particular Intoxilyser. He was at Drogheda Garda Station for the testing of the instrument. Mr. Cuffe did not raise the issue of software with him to the best of his recollection.

64. In order to test the machine, it does have to be taken apart to look at the various components. It is tested as an entity against the standard to see if it returns a correct result.

65. Dr. Mark Jordan, a Consultant Forensic Engineer, and Mechanical Engineer was cross examined on his affidavit sworn on behalf of the applicants (following Mr. Cuffe's death). He accepted that he was not a chemist and that he had little experience of evidential breath testing. He had not examined the Intoxilyser, the subject matter of these proceedings. He had been requested to give an opinion on the forensic integrity of the instrument. He had been seeking information on the design of the instrument in order to allow him to compile an opinion on the forensic integrity. He had not been supplied with satisfactory information in his opinion as to the design and working of the machine to enable him to give such an opinion. Until he got the requisite details he had abstained from putting the instrument through any engineering tests to establish its forensic integrity.

66. He had been present on one occasion in Ballina when the Bureau carried out its six monthly check on a particular instrument. He had no evidence that the particular machine had ever done anything that it was not supposed to do. He could not give any opinion that there was no flaw in the design or manufacture of the instruments. He agreed that the records as to how the particular machine had performed in the past were relevant but it would not be sufficient in its own right to establish the forensic integrity of the machine. In his opinion, it was a necessary precondition to his examination to have access to the software. It could be disclosed to him on a confidential basis. It was necessary, he said, to have the software in order to determine whether the actual software of the instrument was the same as that in the possession of the Bureau. It was also necessary to see whether or not the fundamental, physical or scientific models embodied in the software were from a coherent body of knowledge and science on which to base the technology. It was also necessary to determine whether or not there was any flaw in the coding, in the software that drives, controls and monitors the instrument and to see if there were any shortcuts taken and to see whether or not there were any circumstances in which the software might return a bad result, a rogue result and one that was not accurate.

The Applicant's Submissions

67. Mr. Kenneally submitted that the central issue was the availability of the software that it was clear from the evidence that it was available. He submitted that the determination by the District Court judge was not one made within jurisdiction and a matter for appeal as opposed to judicial review. In respect of the order for prohibition which was sought in respect of certain of the applicants, it was accepted that such an order could only be sought in exceptional circumstances. He submitted that the presumption of guilt raised by the Section 17 certificate was rebuttable. It followed that he submitted that the entitled to rebut a presumption contained within it an entitlement to have a meaningful opportunity to do so. The applicants accepted that they must show, as a matter of probability that because of the refusal to grant them access to the software in the failure of the manufacturer to retain or make available the documentation there was some injustice, prejudice or real risk of an unfair trial which could not be otherwise avoided and such risk would have to be shown to exist as a matter of probability.

68. The applicants were not seeking to launch an attack on the decision in *McGonnell*.

69. He accepted that in relation to the request for discovery within Category 17 and 22 that he might have been more specific about software at the disclosure hearing. He submitted that whilst the District Court judge may have initially acted within jurisdiction that he took steps outside jurisdiction and that this would give him access to judicial review.

70. He submitted that the application for judicial review in respect of the second, third and fourth applicants was not premature and that the disclosure issue was inevitably to be an issue in their cases. He submitted that it was blatantly clear that the District Court judge would approach the matter with those applicants in the same way as the first applicant.

71. He relied on the decision of Fennelly J. in *People & Anor v. Kelly* [2006] 3 I.R. 115 where the judge stated:-

"The prosecution must disclose to the defence any material of possible relevance to the guilt or innocence of the accused."

72. He also relied on the decision of Carney J. in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60 and referred to the distinction between cases relating to disclosure or non-disclosure and cases relating to lost evidence. He submitted that the prosecution does not have a determining role as to whether or not material is relevant for the purpose of disclosure.

73. He relied on the decision in *Whelan v. Judge Kirby* [2005] 2 I.R. 30 where the court considered the failure to properly consider a request to inspect an Intoxometer constituted a failure to afford the applicant an opportunity to rebut the presumed facts essential to the prosecution case.

74. He relied on the decision of the Supreme Court in *The State (Holland) v. Kennedy* [1977] I.R. 193 where the Supreme Court drew a distinction between a hearing which commenced within jurisdiction and subsequently exceeded this jurisdiction because of an unconstitutionality, or a breach of the requirements of natural justice or a failure to stay within the bounds of the jurisdiction conferred by statute. This decision, it was argued was confirmed by the decision of the Supreme Court in *Sweeney v. Judge Brophy* [1993] 2 I.R. 202, where the court held that *certiorari* is an appropriate remedy where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law.

75. He submitted that the relevance of the software or the necessity of access to the software in order to obtain a fair trial was addressed and this was clear from the affidavits in relation to the hearing of the District Court.

76. He submitted that having regard to the *McGonnell* case, the Intoxilyser as a process was constitutional and its constitutionality is built on a foundation that the applicants have an opportunity to a meaningful inspection and that there is a clear transparent paper trail in this regard. He submitted that the second named respondent had the ability to test and analyse the working effectiveness of the fail-safe procedures because they have the software and an accused person does not have it because of the commercial expediency that arises in this case. He submitted that it was a case of inequality of arms.

The Second Named Respondent's Submissions

77. Mr. Shane Murphy, S.C., submitted that an application for prohibition of a trial can only exceed in exceptional circumstances. He referred to the decision of Kearns J. in *O'Callaghan v. Judges of Dublin Metropolitan District Court* [2004] 2 I.R. 442, where the court held there is an onus of proof on an applicant in judicial review proceedings to place evidence before the court which would enable it to decide as a matter of probability that because of the absence of some particular piece of evidence, some injustice, prejudice or real risk of an unfair trial which cannot otherwise be avoided would follow if an order for prohibition is not made.

78. He submitted that the evidence demonstrated that the Bureau has operated a system where, over a period of ten years, there has been no indication of an incorrect Section 17 printout. Furthermore, the particular machine on the basis of detailed examinations which had been carried out since the case arose had not disclosed any malfunction. Mr. Cuffe carried out three examinations of the machine and the evidence was again that the machine was not malfunctioning. There was also the evidence of the six monthly check that the Bureau carried out. Whilst such test is a snapshot at a particular time it was submitted that it was geared to ensuring that the machine works in the way it was intended to work. He submitted that there was no evidence or real concern of a real risk of a defect which would give rise to a miscarriage of justice and Dr. Jordan had accepted that he had not looked at the instrument itself.

79. He relied on the case of *Director of Public Prosecutions v. McCarthy* (Unreported, High Court, 25th July, 2007) as authority for the principle that disclosure must be based on what the court has referred to as "*commonsense parameters*". This was a decision of the Court of Criminal Appeal and related to a trial on indictment but it was submitted the principles were applicable to the approach to be taken by the District Court judge.

80. It was submitted that the applicant's concerns which arose in this case were of a theoretical or notional concern and not an identified mistake, nor a pattern of erroneous behaviour by the relevant Intoxilyser. It was not sufficient for the applicant as in this case to say that he had a concern or a hypothesis.

81. Having regard to the detailed evidence from Mr. Reynolds about the details of the scientific assessments that had been carried out to date, it was his submission that there was not an evidential foundation sufficient to justify invoking the court's intervention to stop the criminal trial, having regard to the onus of proof.

82. It was submitted that the second, third and fourth named applicants were seeking to stop their trial in circumstances where they did not know what oral evidence would have been adduced against them and how it would deduct to cross examination or what evidence they would have given in their defence, if any.

83. He relied on the decision in *Lennon v. District Judge Clifford* [1992] 1 I.R. 382, the High Court confirmed that it was not available as a Court of Appeal except where it is given such a function by statute and that the scope for challenging the validity of orders made by lower courts by way of judicial review was confined to cases where there is a want of jurisdiction or excess of jurisdiction; bias by interest; or decisions containing an error of law apparent on the face of the record.

84. He submitted that in the *McGonnell* case, issues affecting the efficacy of the process were considered in detail as there was a fundamental challenge to the constitutional validity of the legislation underpinning the entire system.

85. It was submitted that the second named respondent had produced evidence of a system that was rational and purposive and which had safeguards. The system was supervised by an independent statutory body namely the Bureau and all its processes were there to ensure that there was not a careless or arbitrary process but one which had as its purpose the safeguard of fair procedures and the need to protect the accused person.

86. He submitted that there was no right to disclosure in a summary case; it may be ordered in accordance with the principles laid down in the case of *Director of Public Prosecutions v. Doyle* [1994] 2 I.R. 286.

87. He relied on the decision of the High Court in *Kenny v. Judge Coughlan* (Unreported, 8th February, 2008) in which the judge had to address an argument that a speeding conviction should be quashed because inadequate disclosure was made and the applicant was unsuccessful in quashing his conviction on that basis. The court described the fifteen page letter, 154 requests for information and documents as a preposterous exercise in summary proceedings and that the demand for disclosure in terms of the letter was rightly rejected.

88. He submitted that the question of software was an afterthought on the part of the applicants and that Mr. Cuffe had not been dealing with that issue.

89. He submitted that discovery was not available in criminal proceedings and relied on the decision of the Supreme Court in *The People (Director of Public Prosecutions) v. Sweeney* [2001] 4 I.R. 102. This decision, he submitted, was confirmed by the decision of a court of five of the Supreme Court in *D.H. v. Judge Groarke* [2002] 3 I.R. 522.

90. He submitted that the applicant's case was grounded upon an assertion of possibilities and a series of hypotheses but not on something which could satisfy the court on the balance of probability that there is a real risk of an unfair trial.

91. It was submitted that the second named respondent did not have any other documents sought by the applicants. The Bureau may have one category of documents in its possession but has a limitation on how it can produce such information. He submitted that it has not been demonstrated that the respondent had the power to compel either the Bureau or Lion to produce the information.

92. In reply, Mr. Kenneally submitted that the application was not a discovery application but a disclosure application in a criminal trial. If the third parties do not co-operate in the face of a declaration by the court to do so, then he submitted the entitlement to have the trial stopped flowed from that.

93. He submitted that the applicants had not sought an order directly against the third parties, Lion and the Bureau having regard to the line of authorities referred to by the second named respondent.

Conclusions

94. Considerable reliance was placed by the applicants on the Supreme Court decision in *Whelan v. Kirby & Director of Public Prosecutions* [2005] 2 I.R. 30 where the court held that constitutional fairness of procedures required the judge at the least to have entertained an application on behalf of an applicant to have the intoximeter inspected by an independent expert. At p. 43, Geoghegan J. stated:-

"The court at the very least should have entertained and considered the application in the interests of ensuring that the defendants were not unfairly handicapped in their defence. I am reluctant to call such an application a 'Gary Doyle' application, though undoubtedly there are analogous features. A court of summary jurisdiction is a creature of statute and at common law can only make orders permitted by statute. But that common law principle is subject in this jurisdiction to the overriding requirement of fair procedures under the Constitution... There is jurisdiction in the District Court to make any order that would be necessary for the fulfilment of the constitutional obligation of a fair trial and fair procedures."

95. The court indicated that where an inspection application of an intoximeter was granted by the District Court against the Director of Public Prosecutions and if as a consequence of non-cooperation by the Medical Bureau, the court order could not be complied with, it would be open to the District Court to refuse to proceed with the trial.

96. At p. 45, the judge continues as follows:-

"Unless there are exceptional circumstances indicating abuse of the process of the court, constitutional fairness of procedure requires that a pre-hearing application to a judge of the District Court for an order requiring the production of documents and/or a request for inspection of equipment permitted to be used by statute for the purpose of producing a statement of facts deemed to be true unless rebutted and essential to the prosecution case ought to be entertained. It will then be within the discretion of the judge as to whether he or she accedes to the request or not. Nothing that I have said should be taken as suggesting that in any or every circumstance an inspection of an intoximeter should be permitted."

97. In *McGonnell's* case (16th September, 2004), McKechnie J. in the High Court held that the system introduced by Section 13, 17 and 21 of the Road Traffic Act 1994, did not infringe any constitutional or legal rights of the plaintiffs. He said at p. 91:-

"In arriving at this conclusion I am of the view that the following are an adequate representation of, and afford reasonable protection for, the rights of such plaintiffs. These are:-"

(a) the statutory requirement under s. 17(1) of the 1994 Act, of taking the lower reading of both breath specimens,

(b) the 17.5% deduction from this reading: this is to cover, and in my view covers, all areas of relevant uncertainty which have been identified in these cases. Though administrative only, this deduction in my opinion is an essential part of the operating regime and its existence must be taken to have created a legitimate expectation that it will continue. In addition its application does not breach s. 17(1) of the Act of 1994, as per Carney J. in Curry, supra. However, lest there should be any doubt about, its incorporation into statute law would in my opinion be desirable,

(c) the practice of waiting twenty minutes before commencing the cycle,

(d) the self diagnostic tools within both machines, to include the other tolerance levels previously discussed, as well as the two simulator checks in every cycle. According to the evidence the machines are so programmed, that, on error or malfunction, the apparatus will abort, and

(e) the significant assurance offered by Messrs Blyth and Cunliff, Professor Jones and Ms. Leavy, being underpinned by this evidence, as to result accuracy in the machines as there apply to every affected person.

In addition to the above there is one further safeguard which I consider of particular relevance. It is the entitlement of an accused person to seek inspection rights of any machine used to provide a s. 17(2) certificate in respect of him. Given not only the legal force but also the practical consequences of the presumption contained in s. 21(1) of the 1994 Act, it is in my view an important assurance for an accused person to know of his right to have access to a judicial authority for the purposes of seeking inspection facilities in respect of any given machine. When so deciding, the court in question must of course comply with constitutional justice and fair procedures on any such application so made, as it must on the hearing of the section 49 charge itself. In both instances it may vindicate such rights of the defendant in the most appropriate manner available. These observations equally apply to any application in respect of documentation."

98. At p. 13 of the judgment of the Supreme Court [2006] IESC 64, the Chief Justice referred to the review and analysis of the evidence of the various witnesses who gave evidence in the High Court and set out what the trial judge had stated at p. 88 of his judgment in relation to such evidence:-

"I believe that, overall, the defence evidence was particularly strong and that the contrary offered on behalf of the plaintiffs failed to have any significant impact on the core basis of that evidence. Accordingly, this conclusion means that in my opinion the plaintiffs have failed to demonstrate that the apparatus in question is in any way flawed or incapable of complying with design standards. Accordingly, I believe that, in the light of the evidence as tendered, in this particular case, I can only conclude that the results of both specimen one and specimen two, of all the plaintiffs, are an accurate and reliable reflection of the level of concentration of alcohol in each person's breath at the time when the samples were given."

99. The Chief Justice commented that at the hearing of the appeal no real challenge was offered to the factual findings made by the trial judge.

100. At p. 18 of the judgment of the Supreme Court, the Chief Justice said:-

"However as McKechnie J. pointed out in his judgment, it remains open to the appellants, as with any person accused of an offence contrary to Section 49 of the Act 1961, inter alia, to adduce evidence of the amount of alcohol they had consumed, in seeking to show that the relevant apparatus should be considered it having been defective. Furthermore, Geoghegan J. in Whelan v. Kirby [2005] 2 I.R. 30 specifically pointed out that the presumption under the Act of 1994 is rebuttable and expressly acknowledged the entitlement of an accused person to apply to conduct an inspection of the apparatus so as to investigate its reliability. An accused person is further entitled to adduce evidence regarding the manner of operation of the apparatus at the relevant time of the provision of the breath specimen."

101. The court went on to adopt what McKechnie J. stated which is referred to at para. above and continued by stating at p. 18:-

"There are further reasons for concluding that a s. 17 statement should not be seen as tantamount to 'conviction by printout'. A statement under s. 17 relates to the scientific and technical analysis of alcohol in the breath, being one of the elements of an offence contrary to s. 49(4) of the Act of 1994. It must be borne in mind that there are various other proofs which must be satisfied in any prosecution for an offence contrary to s. 49(4) of the Act of 1994 of which viva voce evidence must be given, particularly where the admissibility of a s. 17 statement is challenged."

102. The court then considered proof by way of production of a certification may provide *prima facie* evidence of specific issues of a scientific or technical nature as was considered in the *Re Employment Equality Bill 1996* [1997] 2 I.R. 321 where the court said at p. 382 – 383:-

"Proof by way of certification is an interference with the norm of a trial viva voce. A certificate is an appropriate form of proof when it is proportionate to the ends to be achieved. It is a justifiable method of proof when the process is, for example, of a technical nature and there are other issues before the court."

103. The Chief Justice continued at p. 20:-

"These various interpretations by the courts over the years of the obligations and rights which may arise under different statutory schemes satisfy the court that a reasonable balance has been maintained in the Act of 1994 between the requirement to enable the State to prosecute drunk driving cases effectively whilst at the same time preserving the right of an accused to maintain a defence. The court does not see the scheme as a disproportionate interference with the rights of an accused"

104. At p. 21 the Chief Justice said:-

"The court is satisfied that there is no basis for disturbing the findings of the High Court Judge which means in effect that the internal mechanisms and safeguards associated with the Intoxilyser apparatus and its readings are such as to provide reassurance of the most emphatic nature of the accuracy of the results produced by the Medical Bureau. In the view of this court it can not be any part of the State's obligation as an element of fair procedures, when highly efficient technology is available to it, to provide some corresponding means or technology to an accused whereby he or she can seek to carry out his or her own tests. That would be an absurd application of any 'equality of arms' doctrine."

105. This Court adopts and applies the foregoing passages of the trial judge in the High Court and of the Chief Justice in the Supreme Court.

106. This Court has to consider whether the non-availability of the software in relation to the intoximeter having regard to the facts set out above constitutes a denial of fair procedures in relation to the first named applicant. This Court has had regard to the facts as found by McKechnie J. in the High Court in the *McGonnell* case and his identification of the safeguards provided which have not been rejected by the Supreme Court. This Court has also had regard to the endorsement of the High Court decision by the Supreme Court decision. There is nothing in the evidence adduced to this Court whether on affidavit or on cross examination to suggest that

the findings of the High Court (as approved by the Supreme Court) in relation to the Intoxilyser are in any material way different from those which were set out by McKechnie J. in the High Court. In particular, this Court notes his finding on p. 92 that the machines were so programmed, that, on error or malfunction, the apparatus will abort. Furthermore, there was a specific finding at para. 88 of the High Court judgment that the plaintiffs in that case had failed to demonstrate that the apparatus was in any way flawed or incapable of complying with design standards. No evidence has been adduced to this Court to indicate that the apparatus in question was in any way flawed or incapable of complying with design standards. No evidential basis was laid for such a contention either in the evidence to this Court on affidavit of Dr. Jordan or on cross examination. This Court concludes that any such suggestion, such as made in the submissions to this Court on behalf of the applicants is hypothetical and unsubstantiated. This Court accepts the evidence on affidavit and on cross examination of Mr. Reynolds in relation to the design, programming and reliability of the Intoxilyser. Such evidence confirms and mirrors the evidence in the *McGonnell* case.

107. The court has regard to what was stated by McKechnie J. at para. 111 of his judgment where he referred to the availability of inspection rights in relation to a machine used to provide a s. 17(2) certificate in respect of any given person and noted that the court's observations applied equally to any application in respect of documentation. In this case, the court is satisfied that the second named respondent does not have such documentation in his possession.

108. Applying the Supreme Court decision in the *McGonnell* case and having regard to the evidence of Mr. Reynolds, which I accept, I conclude that the non-availability of the software documentation is not a denial of constitutional justice or fair procedures. This Court is satisfied there are safeguards in the design and operation of the machine to protect an accused persons from obtaining an arbitrary or incorrect reading and as a result not having the opportunity to have a fair trial. This Court therefore dismisses the first named applicant's case on this ground.

109. Without prejudice to this finding, it is necessary to consider the manner and timing of the hearing of the case against the first named applicant. The hearing on 10th March, 2006 resulted in an order for disclosure being made by the District Court in relation to the documents set out in categories 17 and 22. Subsequently by letter of 1st August, 2006, from Mr. Reynolds of the Bureau to Inspector Fox on behalf of the second named respondent, it was stated:-

"Lion advised that there are no documents for disclosure in relation to points 17 and 22."

110. At the hearing of the court on 2nd March, 2007, the court was so informed. Following submissions, the first named respondent said he was satisfied that the order for disclosure had been complied with. The hearing of the first named applicant's case took place on 25th June, 2007. Before that date there had been extensive correspondence between the applicant's solicitor and Mr. Blyth of Lion Laboratories. In the letter of 3rd May, 2007, Mr. Blyth stated that he could say with absolute certainty that the ambient fail trigger level was embedded in the software of the instrument and could not be influenced by any external factors. Mr. Blyth agreed to give evidence at the hearing on behalf of the first named applicant. The grounding affidavit contains some 50 paragraphs of evidence and submissions selectively produced on behalf of the first named applicant in relation to this hearing. It included a statement from Mr. Blyth that Lion was categorical that they would not disclose the software information.

111. The first named respondent at the conclusion stated that he was satisfied beyond any doubt that the accused had driven on the night in question and within three hours of driving concentration of alcohol in his breath exceeded 35ugs per 100ml and he convicted the first named applicant.

112. This Court considers the affidavit of the applicants grounding the application is prolix and unnecessarily lengthy. It even contains an allegation (at para. 67) put to Mr. Blyth that he had stated to the High Court in the *McGonnell* case, a fact which he could not prove and that the High Court in the *McGonnell* case had been misled by his evidence. Such assertions and allegations against one's own witnesses were not relevant for the purposes of this case. Equally, the facts and arguments selectively set out in the affidavit in relation to the hearing are in many respects irrelevant to the presentation of the facts for the purposes of an application for judicial review to this Court.

113. No objection was taken on behalf of the first named applicant to the hearing of the case on the resumed date.

114. It is this Court's conclusion that the manner in which the facts and arguments are set out in the grounding affidavit are more appropriate to the hearing of an appeal rather than judicial review application. The court is also satisfied that the first named applicant proceeded to the hearing of the case without further objection having regard to the earlier finding by the first named respondent that the disclosure order had been complied with. This Court is satisfied that the software in relation to the machine was not covered by categories 17 and 22 which were required to be disclosed. The judge made his decision *bona fide* and decided without objection to proceed with the hearing of the case.

115. This Court in coming to this decision has had regard to the decision of Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193 where at p. 201 he stated:-

"The respondent District Justice undoubtedly had jurisdiction to enter on the hearing of this prosecution. But it does not necessarily follow that a court or a tribunal, vested with powers of a judicial nature, which commences a hearing within jurisdiction will be treated as continuing to act within jurisdiction. For any one of a number of reasons it may exceed jurisdiction and thereby make its decisions liable to be quashed on certiorari. For instance, it may fall into an unconstitutionality, or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction."

116. In *Sweeney v. District Judge Brophy* [1993] 2 I.R. 202, Hardiman J. at p. 211 stated:-

"In my judgment certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. I take this opportunity of emphasising that certiorari is not appropriate to a routine mishap which may befall any trial; the correct remedy in that circumstance is by way of appeal."

117. In hearing the case, this Court is satisfied that the first named respondent acted within jurisdiction throughout and if there was an error on his part (which the court is not satisfied) such an error falls within jurisdiction. In the opinion of this Court, the

proceedings in the District Court were not so fundamentally flawed as to deprive the applicant of a trial in due course of law.

118. Having regard to the conclusions which I have reached, I do not consider that there has been any breach of Article 6.3 of the European Convention on Human Rights. This Court will therefore reject the first named applicant's application having regard to the manner in which the proceedings were heard by the first named respondent in the District Court.

119. If this Court had to consider the ambit of disclosure, which was unnecessary in relation to the conclusions I have arrived at, this Court would have been much influenced by the decision of the Court of Criminal Appeal in *Director of Public Prosecutions v. McCarthy* (Unreported, 25th July, 2007). Whilst this case related to a trial on indictment, the comments of the court were also appropriate to the instant case. In the *McCarthy* case, the court stated:-

"There is no doubt under the modern jurisprudence of our courts that the prosecution are under a duty to disclose to the defence any material held which may be relevant to the case which could help the defence or damage the prosecution and that if there is such material in the possession of the prosecution they are under a constitutional duty to make that available to the defence..."

The Court is satisfied, however, that the obligations of disclosure are not limitless nor are they to be assessed in a vacuum or upon a purely theoretical or notional basis. Nor is a conviction to be regarded as unsafe per se simply because there has been a partial failure by the prosecution to meet the obligations of disclosure. It is a question of degree in every case having regard to the nature and importance of the material in question...

The Court is of the view that a failure of disclosure must be shown to have been important, as distinct from technical or trivial, if a conviction is to be regarded as unsafe. To put it another this Court must engage with the facts of this case to see if the omission disadvantaged the defence in such a way as to render the trial unfair or the jury verdict unsafe in the particular circumstances of the individual case. There is a two part consideration: was there a failure in the first instance and secondly if so did it materially effect the outcome of the case in the particular circumstances?"

120. The foregoing decision is also of relevance having regard to the extensive ambit of disclosure which counsel for the applicants indicated would be required if full disclosure were to be made.

121. There is also the application of the second, third and fourth named applicants. This Court accepts the principles set out by Denham J. in *D.C. v. Director of Public Prosecutions* [2005] 4 I.R. 281 at 283 where it was stated:-

"Such an application [for the prohibition of a trial] may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the respondent an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. The respondent having taken such a decision, the courts are slow to intervene... However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.

In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial, the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial.

It is this exceptional jurisdiction which the applicant wishes to invoke. Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity."

122. In this Court's opinion, the foregoing principles are applicable. This Court is not satisfied that the second, third and fourth named applicants have established they face a real or serious risk of an unfair trial. I will accordingly dismiss their application.