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Judgment

Title:	CRH Plc, Irish Cement Ltd & ors -v- The Competition and Consumer Protection Commission
Neutral Citation:	[2017] IESC 34
Supreme Court Record Number:	65/2016
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Date of Delivery:	29/05/2017
Court:	Supreme Court
Composition of Court:	Denham C.J., MacMenamin J., Laffoy J., Dunne J., Charleton J.
Judgment by:	MacMenamin J.
Status:	Approved
Result:	Appeal dismissed

Judgments by	Link to Judgment	Concurring
MacMenamin J.	Link	Denham C.J., Dunne J.
Laffoy J.	Link	Denham C.J., Dunne J.
Charleton J.	Link	Denham C.J., Dunne J.

THE SUPREME COURT

Denham C.J.
MacMenamin J.
Laffoy J.

Dunne J.
Charleton J.

[Appeal No. AP:IE:2006:00065]

BETWEEN:
CRH PLC., IRISH CEMENT LIMITED AND SEAMUS LYNCH
RESPONDENTS/PLAINTIFFS

V.

COMPETITION & CONSUMER PROTECTION COMMISSION
APPELLANT/DEFENDANT

Judgment of Mr. Justice John MacMenamin dated the 29th day of May, 2017

1. For the reasons set out in this decision, I would affirm the decision of the High Court and dismiss this appeal.

Facts
2. A little after 10 a.m. on the 14th May, 2015, three officials from the Competition & Consumer Protection Commission (CCPC), and two members of An Garda Siochana, arrived unannounced at the second named respondent's headquarters at Platin, County Meath. That respondent, Irish Cement Limited (ICL), is itself a large company, associated with the first named respondent, CRH Plc. ("CRH"), which is the largest home-based enterprise based in Ireland. Both companies operate in the building, construction and materials sector. CRH's activities are worldwide however.

3. The CCPC officials were acting on foot of extensive powers said to be contained in the Competition & Consumer Protection Act, 2014. They demanded access to the home drives of five named ICL employees. They told other ICL employees that lack of co-operation with this demand could result in criminal prosecutions. After telephone conversations with the company's lawyers, the employees indicated they would co-operate, although protecting their rights. One of the five "persons of interest", Seamus Lynch, was formerly ICL's Managing Director. The officials demanded access to all of Mr. Lynch's email account. ICL's solicitors arrived. There were protracted discussions about the scope of the search. Although ICL's solicitors from Arthur Cox were briefly shown the search warrant, they were not allowed to retain it at that point, and were only given a copy of it at the end of the inspection. The lawyers were not shown the sworn information upon which the warrant was based. The information submitted to the District Court contained a general outline of the nature of the complaints; the warrant did not. In the absence of any specific information regarding the scope of the investigation, the lawyers were unable to make any meaningful observations to the CCPC officials as it took place. A level of agreement was reached in relation to the assertion of legal privilege. The CCPC gave an undertaking that it would not review any such matter it seized, unless and until there was a mutual arrangement as to how to sift through the material taken. But there was no such agreement regarding the tracts of other material also taken. Later, the CCPC asserted that, subject to legal privilege, it was permitted under the law, and would, review *all* the material it had seized.

The Sworn Information

4. The search took place on foot of sworn information to the District Court, which set out that the CCPC's investigation began in May, 2014, that is, one year before the dawn raid. Three complainants made allegations to the CCPC's statutory predecessor, the Competition Authority, to the effect that ICL was using exclusive purchasing arrangements, rebates, or other inducements to distributors of bagged cement, and that these measures had the effect of excluding competitors from the Irish market. The allegations concerned only ICL's activities within the State, and not elsewhere. One of the CCPC officials centrally involved, Ms. Haiyan Wang, deposed that she herself had been involved in the investigation since July, 2014; other evidence shows that a second official, James Plunkett, a highly qualified I.T. Manager and Consultant with the CCPC was involved in the investigation as and from February, 2015, two or three months before the search. Ms. Wang set out, in the information, that, on her review of witness statements, copy email communications, and other data provided by the third parties, she had formed the opinion that the ICL had engaged in anti-competitive activity in a period between January, 2011 and the 12th May, 2015.

5. Obviously, this search had been long pre-planned. The search and entry on ICL's premises did not arise out of some emergency situation, or at a time there was some threatened or imminent risk of the destruction of evidence. The warrant itself was couched in broad and unspecific terms.

Application for Search Warrant

6. The CCPC applied for the search warrant to the District Court on the 12th May, 2015. The application was made pursuant to the then recently enacted s.37(3) of the Competition & Consumer Protection Act, 2014 ("the Act"). As well as establishing the CCPC as a new statutory agency, this Act granted extended powers of entry, search, seizure and retention of material in the case of premises where, in the view of a District Court judge, there were reasonable grounds for concluding that there was to be found evidence of, or relating to, an offence contrary to the Competition Act of 2002. This, the new Act's parent statute of 2002, defines a series of anti-competitive activities, not only as civil wrongs, but as criminal offences. The District judge granted the application, based on the sworn information.

The Contents of the Search Warrant

7. The salient parts of the search warrant read:

> *"Whereas from the information on oath and in writing sworn this day before me, a judge of the District Court, by **Haiyan Wang**, an authorised officer of the Competition & Consumer Protection Commission, **I am satisfied** that there are reasonable grounds for believing that information necessary for the exercise by the Competition & Consumer Protection Commission of its **functions** under the Competition & Consumer Protection Act, 2014, is to be found in the place comprising the premises of Irish Cement Limited at Platin, Drogheda, County Meath (the term "place" to be construed in accordance with s.34 of the Competition & Consumer Protection Act, 2014).*
>
> ***I hereby issue**, pursuant to s.37(3) of the Competition & Consumer Protection Act, 2014, a warrant to **William Fahy**, authorised officer of the Competition & Consumer Protection Commission, authorising him (accompanied by such other authorised officers or members of An Garda Siochana, or both, as provided for in sub-section (5) of s.35 of the Competition & Consumer Protection Act, 2014), at any time or times within one month from this date, being the date of issue of the warrant, on production, if so requested of the warrant, to enter and search the said place (including any building or part thereof, and any vehicle, whether mechanically propelled or not), comprising the premises of Irish Cement*

> *Limited at Platin, Drogheda, County Meath, using reasonable force where necessary, and* ***exercise all or any of the powers conferred on an authorised officer under s.37*** *of the Competition & Consumer Protection Act, 2014, in the course of that entry and search.*
>
> *Date (and signature)"* (Emphasis added)

As will be explained in more detail later, searches under this Act are, to a large extent, *sui generis*. The procedures considered here differ from other search warrant procedures, *inter alia*, by reason of the relatively narrow scope of the investigation, ease in identifying irrelevant material, methodology of search, involving electronic data, which is often susceptible to keyword search, and the specific nature of the offences under investigation. The context and considerations at issue differ, therefore, from other categories of criminal offence, where an investigation may occur in quite different circumstances, as to time, urgency, necessity and proportionality. By contrast, searches under this Act can be much more focused. It is in *this* context that this Court must consider whether this incursion into constitutional and ECHR rights was justified and proportionate. A search warrant is a document which permits the legal incursion into the property, privacy or personal rights of a citizen, or business entity, as defined by law. This warrant did not convey any information about the nature, timing, and location of the offences alleged or suspected. It did not identify any person as being involved in such activities, or disclose any basis for a reasonable suspicion that a criminal offence had been committed. The warrant simply stated, on its face, that there were reasonable grounds for believing that there was information necessary for the CCPC officials to exercise "functions" and "all or any of their powers" as conferred on them under the Act of 2014. These were not simply technical deficiencies, but went to the core of the jurisdiction involved. The purpose of such a warrant is to require a person, who is the subject matter of the search, to do something they would not otherwise be obliged to do. But, the recipient is entitled to know what the warrant *actually* entails. A reader of this warrant would be unable to know what actual limitations were placed on the scope of the warrant. It was, in that sense, free of any limits, or any identification as to what might be searched for, or which employees' data or material might be searched. The ICL's lawyers were placed at a significant disadvantage as a result.

The "Dawn Raid"

8. The request for the "*home drives*" of the five ICL employees was made at 10.20 a.m. The only reasonable inference is that the "persons of interest" had been identified beforehand, although they were not named in the search warrant. During the search, ICL's I.T. Manager, Mr. Dary Philips, was warned that he was under a legal duty to provide any information lawfully requested for the purpose of the search. Mr. Philips told the officials he could not directly access this email data, as it was stored on an offsite facility operated by Fujitsu. ICL made a data access request to that firm.

9. During the day-long search, it was agreed that Arthur Cox would write to the CCPC's in-house counsel regarding their invocation of legal privilege, and the CCPC officials undertook that the material which was, by then, being forensically extracted, would not be viewed or accessed until there had been further communication between the lawyers and the CCPC's in-house counsel. There were similar arrangements regarding books and papers which had also been seized. The lawyers made no objection in principle to the downloaded material being taken away to the CCPC's offices for later perusal, subject to agreement being reached on what might be reviewed.

The Third Named Respondent's Employment Status

10. In fact, it transpired that, at the time of the raid, Mr. Seamus Lynch was no longer an ICL employee. Between the 3rd June, 2008 and the 6th June, 2011, and from the 1st June, 2013, he had indeed been ICL's Managing Director. But by the time of the search,

he was, strictly speaking, he was no longer an ICL officer, as he had been appointed Managing Director for Ireland and Spain of what is called CRH's 'Heavy Side West' Division. An issue arose during the search as to whether the scope of the search allowed the CCPC to seize any electronic data which went beyond the time parameters of Mr. Lynch's employment as Managing Director of ICL.

11. The relevant provisions of the Act of 2014 will be set out in greater detail later in this judgment. However, I am satisfied that, *prima facie*, the wording of s.34 which sets out the "activity" and "place" which may be searched, and s.37(2) of the Act, which deals with 'activities' and the category of persons who may be searched, when viewed in isolation, would permit the search of any premises occupied by a former director, manager or staff member of an undertaking under investigation. (See paras. 41 and 42 of this judgment). Insofar as ICL's lawyers argued to the contrary, both at the time of the search and later in these proceedings, I would reject that submission as having no substance. But there are antecedent questions. These relate to whether, even from its very inception, the entry, search, seizure and retention procedures were lawful. The sworn information was not disclosed to the lawyers. The search warrant was unspecific, and did not allow the lawyers to make any other meaningful observations about the scope of the search and seizure on the day. But there were further difficulties.

A Central Issue

12. One central issue in this case is quite simple. It is whether the search-procedure, particularly the seizure of the entirety of Mr. Lynch's email account, was conducted in a manner not only consistent with the words of s.37 of the Act, but also the respondents' constitutional and Convention rights? The actual wording of s.37, (set out in para. 42 of this judgment) is not the only test of legality. The procedure adopted must be measured against the constitutional rights at stake, especially that of privacy. The material seized only belonged to the respondents. It also belonged to other persons or business entities. It contained information private to them. The CCPC officials were entitled to operate within s.37 of the Act - if they acted in a proportionate manner, having regard to the constitutional and Convention rights involved. As relevance will not always be obvious, there will always be a degree of latitude in such a search. But, the CCPC itself later accepted that it was "highly probable" that non-relevant data and material were seized. It is entirely unsurprising, therefore, that, when the entirety of Mr. Lynch's mailbox was downloaded, it contained much material which the CCPC later conceded in its defence to the proceedings was, to quote the CCPC's own later words "*to a high degree of probability*", irrelevant to its investigation. Yet, the appellant took no steps, either prior to or during the search, to prevent this happening. The vast amount of material seized is described later.

13. The CCPC's officers made archive copies of the entirety of Mr. Lynch's email files, and associated network files. This included correspondence with CRH subsidiaries in Spain, The Netherlands and Belgium. The CCPC do not make any claim that these CRH subsidiaries, or CRH Plc. itself, were involved in these complaints regarding ICL's alleged anti-competitive activities. It is not suggested that the activities under investigation involved cross-border anti-competitive activities, or affected other member states of the E.U.

Correspondence

14. I preface the analysis which follows with an observation, lest it be thought I am critical of the CCPC's lawyers. This would be an entirely wrong perception. It is clear that the CCPC had access to legal advice and representation of the highest calibre throughout these proceedings. After the search, there was detailed correspondence between the parties' lawyers. As well as making proposals regarding review of the legally privileged material, ICL's solicitors suggested a review process, whereby irrelevant data, which the CCPC retained, should be identified and returned. The lawyers proposed that all the

material seized should be reviewed by an independent third party lawyer. Such a procedure is, in fact, provided for by s.33 of the Act of 2014, but only the case where legal privilege is claimed. The Act does not make any similar provision for a timely segregation or return of "third party", as opposed to legally privileged, material. Relying on its reading of the Act of 2014, the CCPC refused to engage with ICL's lawyers on their proposal. In fact, in a letter dated the 10th September, 2015, it continued to maintain that, apart from documentation over which legal privilege might be claimed, it was entitled to, and would, review *all* materials which had been seized at ICL's premises. This rigid stance was subsequently refined on a number of occasions, but only, one might surmise, after receiving prudent legal advice, at or before the time these proceedings were initiated.

The Scope of the Seizure and Retention

15. On the day of the search, ICL lawyers were given a memory-stick containing all the material downloaded. This allowed them to set out some proposed parameters for addressing the question of legal privilege. But they did not then have the sworn information. Thus, the exchange was somewhat unsatisfactory and inconclusive. But the correspondence reveals something else; that is, the sheer extent of the material seized. ICL's lawyers asserted in one letter that what was actually downloaded and taken away amounted to 96 gigabytes, or, in other words, 380,000 computer files. The CCPC did not dispute this estimate. It will be recollected that this was in a context where there were just three complainants concerning these alleged anti-competitive activities concerning the sale of bagged cement in Ireland. The CCPC's rationale for taking such an extraordinarily large quantity of material remains unclear and contradictory.

16. In suggesting a process for sifting through the material for legal privilege, the lawyers (and it appears the CCPC), envisaged that the rate of progress for that process would be 50,000 files every three weeks. A simple act of multiplication, were it appropriate, might indicate that this process, even for dealing with legal privilege alone, might take many months. How long any further third party "relevance" sorting process might take, is open to speculation. It is hard to avoid the conclusion that such a review might take years, rather than months.

Legal Proceedings

17. The negotiations by correspondence were inconclusive. The respondents' legal proceedings were launched on the 12th November, 2015. There was an interlocutory legal application during that month, which, one assumes, led to a court direction that there was to be an early trial. The CCPC, properly, provided an undertaking to Court not to examine Mr. Seamus Lynch's email account, in the meantime. The sworn information was provided on the 24th November, 2015. The appellant had refused to provide this earlier, citing "policy reasons". This step was the first of a number of subsequent refinements of the CCPC's stance. In the legal proceedings, the respondents sought declarations to the effect that the CCPC had acted *ultra vires* s.37 of the Act, claiming that there had been an unwarranted invasion of the respondents' privacy rights under the Constitution and Article 8 ECHR.

A Nuance

18. As a next step, the CCPC's Defence, served on the 14th December, 2015, contained a slight nuancing of its legal position. It was there that the CCPC accepted that "*as a matter of high probability*" not all of Mr. Lynch's emails related to the activity under consideration.

19. The High Court hearing was conducted largely on the basis of affidavit evidence, although Mr. Lynch was briefly examined and cross-examined. Some of the material elicited in cross-examination involved matters which had no relevance at all to the allegations and complaints. Counsel for the respondents criticise the fact that some of the

material which emerged at the High Court hearing was confidential. In fairness, I think this emanated naturally in the course of the cross-examination, and for no other reason. What emerged was of little consequence commercially.

A Further Adjustment of the CCPC's Position

20. The High Court hearing took place on the 8th, 9th and 15th March, 2016. Mr. Harry O'Rahilly, one of the CCPC case officers assigned to the investigation, swore one of the replying affidavits. This referred to hard-copy material seized during the course of the search. This first affidavit, obviously, pre-dated the hearing itself. But, on the last day of the High Court hearing, that is the 15th March, 2016, Mr. O'Rahilly swore a second affidavit, which, in hindsight, is very significant. It contained a further adjustment in the CCPC's position. There, for the first time, the appellant conceded that the non-legally privileged data it had seized and retained would *not* be subject to a document-by-document review; but rather that the CCPC itself would arrange a keyword search, to ensure that only such documents falling within the identified search terms would be reviewed. On this basis, only documents which were responsive to the keywords would to be made "visible" to the authorised officers. This significant change to the CCPC's legal position came 10 months after the dawn raid. Even then, there was no indication as to what the actual keywords would be. There was no suggestion that ICL's lawyers could either attend at, observe, or engage in the process. Any decision as to the relevance of the documentation was to be made only by the CCPC itself. It is interesting to contrast this proposal in the light of the near-contemporaneously developing ECtHR jurisprudence. In these ECHR decisions, outlined later in this judgment, there is discussion of what is meant by what is called "tangible" judicial supervision of documents and data, designed to assess whether such material was privileged or irrelevant. The Convention case law envisages that a supervisory judge should himself/herself be assured, if necessary by way of systematic check, to ensure that there has been a proper safeguarding of the Article 8 Convention privacy rights involved. The process the CCPC proposed, even late in the day, certainly did not involve an independent "tangible", or item by item, process under independent judicial supervision.

The High Court Judgment and this Appeal

21. In the High Court judgment, [2016] IEHC 162 (Unreported, High Court, 5th April, 2016), Barrett J. found that the CCPC had acted *ultra vires* in seizing Mr. Lynch's entire email account, containing material unrelated to the investigation. He held this conduct was contrary to s.37 of the Act, and outside the scope of the search warrant. The court found that, were the CCPC to engage in a review of all the material, it would not only constitute a breach of the respondents' right to privacy, as recognised by the Constitution, but would also contravene s.3 of the ECHR Act, 2003, because it constituted a contravention of the respondents' Article 8 ECHR privacy rights. The trial court granted declarations to that effect; as well as an injunction restraining such review. The court also made findings under s.8 of the Data Protection Act, which are briefly dealt with later in this judgment.

22. The CCPC applied for leave to appeal directly to this Court without proceeding to the Court of Appeal. Such 'leap frog' appeals are permitted on matters of general public importance, or in the interests of justice, when there are circumstances of urgency. This Court acceded to the application. The appellant's written application-form is significant in light of its previous stance that it was entitled to review <u>all</u> the seized data and material. In the application for leave, the CCPC again slightly nuanced its stance by accepting that all such search warrants are limited in their scope to the seizure of material that is relevant to matters under investigation.

An Additional Alteration of the CCPC's Position

23. The CCPC's position was further clarified in another way during the appeal before this Court. On inquiry, its counsel told the Court that the appellant was still in the process of

devising a code or protocol, regarding disposal of irrelevant material. This appeal was heard in February, 2017, some years after the enactment of the Act of 2014. By inference, therefore, it seems no protocol had by then been devised, or implemented. Whether the appellant's predecessor, the Competition Authority, had such a protocol is not known. Counsel informed this Court that the CCPC would engage in a process of rendering irrelevant material "invisible" on computer screens, by resorting to the keyword search. But, it follows from this that there was no code of practice in being at the time of the raid; and, therefore, no laid-down procedure for dealing with irrelevant, non-legally privileged, data. In fact, the Act of 2014 does not provide for any such statutory safeguards after search and seizure. Nor does it make provision for any 'tangible', supervised process to identify irrelevant material. The Act does not provide for a set time limit for the return of such documentation either.

24. A further point arises in the application for leave. There, the CCPC took exception to the fact that one of the consequences of the High Court judgment was that it would "*erroneously*" require it to put in place a system for the review of information by a party, other than itself, to deal with irrelevant materials. The Act of 2014 contains no such provision. Thus, the CCPC said, then, that to carry out such a review would be *ultra vires* the Act of 2014. It is not easy to reconcile this statement, relying strictly on *vires*, with the subsequent adjustments in the CCPC's stance, when the remedial procedure it ultimately proposed through Mr. O'Rahilly were not provided for in the Act of 2014 either.

25. All the alterations in the CCPC's stance are significant. They are to be seen in the context of the constitutional and Convention issues which fall to be decided. Taken together, they carry with them a question as to whether the *prior* conduct of the CCPC was constitutionally proportionate and lawful in executing the search. When viewed together and cumulatively, the alterations, while perhaps not determinative on the issue of proportionally, are, at least, clear signposts. The concessions are to be seen in light of the respondents' submissions in the High Court, relying, *inter alia*, on the evolving jurisprudence of the European Court of Human Rights. As indicated earlier, Chambers of that Court have closely analysed and precisely identified the nature of the safeguards which are required in this field to protect the ECHR Article 8 rights to privacy and defence in this area. These rights belong both to individuals and corporate entities.

26. Mr. O'Rahilly's second affidavit is particularly important, as it particularly touches on a number of issues raised both in the ECtHR and also ECJ jurisprudence. Among these contrasts are: the absence of prior arrangements for an on-site keyword search; and the delay of 10 months in making any proposal regarding such a search. In fact, the keyword concession is impossible to reconcile with one of the earlier main planks in the Defence, which was the strong assertion that a very broad form of search and seizure is *always* required in cases of this type. This took the form of an affidavit from Detective Sergeant Joseph McLoughlin, to the effect that the process is to be compared to the search in an 'ordinary' criminal investigation. This analogy is unconvincing. In the case now under consideration, much of the material was contained in digital form, which is readily susceptible to a keyword search. The circumstances of the Convention case law, recorded later in this judgment, shows this directly. Mr. O'Rahilly's second affidavit also undermines the proposition that such a vast quantity of material had to be seized, as it could not possibly all have been within the scope of the investigation. A focused keyword search is not hard to organise by those suitably qualified. The affidavit is, frankly, entirely inconsistent with the CCPC's earlier testimony, which sought to compare the search procedure with what are said to be "commonplace" police procedures. In police searches, the distinction between what is of patent relevance, and latent relevance to an investigation will often be less clear. Such other investigators, by their very nature, must enjoy a significantly wider latitude, especially in circumstances where relevance of material, of whatever form, may not be immediately apparent.

An Additional Consequence
27. In filing Mr. O'Rahilly's affidavit, the CCPC also tacitly accepted, for the first time, that there was an onus upon *it* to engage in a process of sifting through the data and destroying that which was not relevant. But, critically, the statutory body reserved to itself the role of arbiter as to relevance or irrelevance. How the CCPC proposal was to be implemented is unclear; it would be difficult for CCPC officials, charged with such a task, to disregard, and then entirely forget, everything that they reviewed. The CCPC did not propose any "tangible" process to be carried out, either independently, or under judicial supervision.

28. The officials, obviously, did not use a keyword procedure at that time of this search. The CCPC correctly point out the ICL lawyers did not object to the downloaded material being taken away, subject to conditions regarding legal privilege. But the lawyers were not to know, then, that there would be a total refusal to engage with them in relation to the other, 'non-relevant' material. The pre-search procedure was not, therefore, a focused one, in the sense of identifying any specific email data by reference to the time, place or identity of the writers, or addressees. Neither was there any such post-search procedure. The search was obviously pre-planned. This is all in marked contrast to the incremental and proportionate approach adopted in this category of case under E.U. law by the European Commission's inspectors, also outlined later in this judgment, (see Para. 92, et seq and para. 109 to 111). It also differs from that adopted by other Competition authorities, in other member states such as Portugal, as also described below. (see paras. 101 - 103).

The *Vires* Questions
29. By the time of Mr. O'Rahilly's supplemental affidavit, sworn and filed on the 15th March, 2016, the CCPC had been in possession of all this material for 10 months. The facts of this case, therefore, raise significant issues as to the legality of the retention of the material, and whether, on *any* basis, the very large quantity of downloaded material seized could, even potentially, have come within the scope of the investigation. This, in turn, raises the question of proportionality, both in the context of constitutional and Convention rights. The question of whether the procedures adopted by the CCPC were disproportionate is to be determined by the Court having regarding to whether rational, necessary, means were adopted to achieve the statutory objectives in question. It is also necessary to consider whether any 'retrospective' court orders can now remedy an excessive use of statutory powers, if so found. The CCPC justify the downloading and removal they carried out on the basis that it was not opposed, and that it was administratively convenient. But these considerations are not apt criteria for determining legality.

Inapt Comparisons
30. The comparison with other forms of search is worth considering in more detail. In this appeal, counsel for the appellant lay emphasis on the wording of s.37, and, as outlined, sought to make comparisons to separate forms of search and seizure used in other areas of criminal law. But there the investigating gardaí are not in a position to immediately determine relevance. What is latently relevant may later become patently relevant for example, by assessing whether the material seized and analysed corroborates or contradicts a suspect's account of events.

31. But what is in question here is not the seizure, in some emergency circumstance or otherwise, of documentation or a personal computer, an iphone, or a gun or explosives, used in the planning or commission of a serious crime, whether it be, for example, child pornography, murder or terrorism. There, the scope of legitimate seizure will obviously be much wider, especially, but not confined to, events proximate to the crime. Such wider scope is necessary under the Constitution to protect public rights, the common good, and the investigation of crime. This case does not concern the search of a house, or a

warehouse, where the police suspect stolen property, or a murder weapon, are to be found. It does not involve, either, the form of analysis which may be necessary in an investigation of crimes where evidence is come across by happenstance. On occasion the gardaí may simply come across material by chance in the course of investigating another matter, or have a suspicion of the whereabouts of evidence, but no means of more precise identification of where the evidence may be found. There, a broader form of search will be legitimate. There is a balance between the necessity to vindicate the common good, and the principle that all organs of the State are presumed to, and must act in accordance with the Constitution.

32. By contrast, what is in question here is much more confined; that is, allegations that on some occasion, or occasions, within identified time-parameters, certain, presumably identified, individuals allegedly engaged in anti-competitive activities. Analogies with more serious types of crime where the scope must be broader or where this is an urgent or pressing need for other searches are not appropriate. One cannot, either therefore, convincingly rely on comparisons with situations where DNA evidence is found on long 'retained' evidence, or the possibility that, by analysing some material long-held in garda custody, some new forensic technique may emerge to solve an old case, or show inconsistencies between suspects' verbal statements, and other evidence drawn from seized material. The situation is not comparable, therefore, with one where there may be inconsistencies between where a suspect says he was located, and where his phone records show him to have actually been. This was not that type of investigation. The context is different. The evidential scope in a prosecution for anti-competitive activity is more precise and focused, as can be seen from Mr. O'Rahilly's second affidavit. Such evidence might consist of whether person 'A' acted with person 'B', so as to fix prices, or engage in unlawful marketing or rebate arrangements; evidence as to market conditions; and, thereafter, expert testimony analysing the potential effect of impugned activities on the relevant market. Here, the CCPC had before it material, some of it subsequently reduced to writing in the sworn information placed before the District Court. As the sworn information sets out, the CCPC had been provided with emails from complainants, and other material allowing for a focused investigation of the type described earlier. From the information received, the time-parameters, beginning at the earliest in 2011, and continuing up to 2015, were clear. The 'broad search' contention has been undermined by the Mr. O'Rahilly's own subsequent affidavit evidence. When the CCPC seized all of Mr. Lynch's email account, it must have been aware that it would, inevitably, take large quantities of material well outside the scope of its investigation. Yet, it did not take any sufficient steps to avoid such an event.

The Background

33. It can be safely said that the respondents to this appeal do not fall within the description of many other complainants in the corpus of 'search and seizure' jurisprudence. The respondents are rather unlikely avatars in the human rights field. But, in fact, what is in question here is a matter of legal principle, which, potentially, touches on the rights of more people or entities than simply the respondents.

34. Since the 17th Century, the common law courts have played an important role in the supervision of powers of search and seizure by the executive. In the past, in Britain, Ireland, and elsewhere, agents of the executive arm of the crown sought to deploy sweeping powers of "general search", in the pursuit of felons, in the retrieval of stolen property, and in the collection of revenues and taxes. These powers were also sometimes used to suppress political dissent, or hostile press commentary. The exercise of such draconian powers in British Colonial North America was one of the triggers, or 'sparks', of the Revolution of 1776. Having listened to James Otis' fiery submission in Paxton's case, against "writs of assistance", which permitted customs officers to enter and search any premises they wished, John Adams wrote "*There and then the child independence was born.*" The Fourth Amendment to the United States Constitution, against this historical background, prohibits unreasonable searches and seizures, unless by warrant, identifying

the persons to be searched, and the things to be seized.

35. This Court has been referred to the landmark English decision of *Entick v. Carrington* [1766] 19 St Tr 1030, (1765) 95 ER 807. The case contains echoes of the issues raised in this appeal. John Entick was suspected by the British government of involvement in publishing what was then perceived as seditious material. Halifax, the Secretary of State, himself issued a search warrant and sent King's Messengers to search for such material at Entick's London home. In the subsequent civil claim for damages inflicted on his home and property, Entick's lawyers pleaded that the messengers "read over", "pried into", and "examined", all his papers, and without any regard to the potential relevance to the investigation, then carried them away, removing a vast amount of material and property, and causing John Entick substantial pecuniary damage. He sued. In the Court of Common Pleas the Messengers claimed that they had acted "*within the statute*". Camden, Chief Justice of the Common Pleas, held against Carrington, the leader of these Messengers. He found that the warrant itself was illegal and void. It had not been issued on lawful authority. There was no power in the common law to carry out a search of this type. The judge commented on the right to privacy of one's papers. Then, the law report, at p. 814, par 286, describes Camden C.J. interrupting counsel's address by posing an important rhetorical question, as relevant to the instant case as to *Entick's*:

> *"… suppose a justice of peace issues a warrant to search a house for stolen goods, and directs it to four of his servants, who search and find no stolen goods, but seize **all** the books and papers of the owners of the house, whether in such a case would the justice of the peace, his officers, or servants, be within the statute?".* (Emphasis added)

It is necessary to emphasise the judge referred to "all" the books and papers. He was not only looking to what was permitted by the statute. As we would now see it, he was asking what was permitted under the Constitution. In *Entick* the court held the search was illegal by virtue of excessive use of powers. Not even a search warrant, even if it had purportedly been issued reflecting the words of a statutory power, could render the search process lawful, because of the arbitrary and indiscriminate nature of its execution, which was not permitted by the common law, or indeed by the statute.

36. Precisely the same themes underlie our own jurisprudence in this area; that of other countries governed by the rule of law; and by decisions of the Court of Justice of the European Union; and those of the European Court of Human Rights.

37. The constitutional and ECHR right to privacy is of central importance in the digital age in which we now live. The Charter of Fundamental Rights contains protection for private and family life and personal data. (Articles 7 and 8). It so happens that the allegations here concern what is called "white collar crime". Large companies such as ICL and CRH plc do not easily attract public sympathy. They make vast sums of money, and make some people very wealthy. But, just as in *Entick*, the issue here is, precisely, whether the CCPC officers can rely "*on the words of the statute*" in intruding upon the respondents' rights to privacy in this way. These questions are to be tested now by resort to proportionality, and against the protections of the Constitution and Article 8 ECHR. The financial circumstances or social status of the respondents are not a relevant consideration. It is appropriate now to consider the context of the statute.

The Legislation

38. The Act of 2014 supplements, and in some areas replaces, earlier legislative provisions. A conviction based on a breach of the Act of 2002, which defines the relevant anti-competitive offences, has serious consequences. That Act has both a civil and criminal dimension. As to the latter, individuals convicted on indictment are liable to a fine not exceeding €5 million, or 10% of the turnover of the individual in the financial year ending in the 12 months prior to conviction, as well as imprisonment not exceeding 10

years. (See s.8(1)(b)(ii) Competition Act, 2002; as amended by s.2(b)(i) & (ii) of the Competition (Amendment) Act, 2012). The Act of 2014, and its parent legislation, therefore, are not simply, "administrative measures", as described in some of the ECtHR jurisprudence, but, rather, provide for serious criminal sanctions on conviction. (See, by contrast, *Bernh Larsen Holding A.S. & Others v. Norway* (App. No. 24117/08 [2013] ECHR, and para. 102 of this judgment).

The CCPC's Powers and Functions

39. It is now necessary to analyse the relevant provisions of the Act, and the backdrop against which it should be interpreted. The CCPC was brought into existence pursuant to s.9 of the Act of 2014. The Act merged the Competition Authority with other consumer bodies. The new CCPC was empowered to carry out investigations under s.18. Under s.25(1) of the Act, individual persons who are members of the CCPC, or those engaged in any other capacity by it, were prohibited from disclosing confidential information obtained in the course of investigations. An official or other person found to be in contravention of this provision is punishable by a fine, or imprisonment for a period not exceeding 6 months. However, the section does allow for authorised disclosures to be made to a range of bodies, including An Garda Siochana, the Revenue Commissioners, or any other prescribed person, including any other Minister of the Government, after consultation with the relevant Minister. The High Court judge considered this provision as providing for a rather "*leaky*" duty of confidentiality ([2016] IEHC 162 at pars 22-38). I think this is somewhat unfair. But, he went on to emphasise ICL's main concern, which was that the CCPC had, by then, had in its possession, for some considerable time, material to which it had no legal entitlement, and which it had no right to consider. This is the main issue to be determined later, in the light of the statute, properly construed.

Section 33 of the Act of 2014: The Proposal for an Analogous Procedure

40. There is no doubt that parts of the Act of 2014, especially s.33, are intended to reflect decisions of the ECtHR on the issue of the rights of a defence under Article 6 ECHR, and privacy rights under Article 8 ECHR. One must bear in mind that there is a significant distinction as to how criminal investigations are carried out in the diverse civil and common law jurisdictions which constitute the membership of the Council of Europe. Among these distinctions lie the questions of how and when judicial supervision of investigations takes place. It is an area where approaches diverge very significantly. Section 33 of the Act of 2014 deals with legal privilege. It provides that nothing in the Act, or in the legislation generally, shall compel the disclosure of privileged material by any person, or authorise the unlawful taking of such material. Section 33(2) and (3) arose in the correspondence from the solicitors in this case. Section 33(2) provides that the disclosure of information may be compelled, and possession of it taken, pursuant to the Act, notwithstanding an apprehension that the legal information may be legally privileged. However, the section then provides that the confidentiality of the information may be maintained, pending a determination of the High Court as to whether the information is, actually, privileged. The provision provides for an innovative procedure in Irish law, whereby, under judicial supervision, potentially legally privileged material may be assessed or considered by an independent person with suitable legal qualifications, possessing both the requisite level of experience and independence from any interests falling to be determined. Such individual may examine the information, and then prepare a report for the High Court, with a view to assisting or facilitating the court in determining whether or not the information is privileged. (See s.33(1) to (5) of the Act). This allows for a form of, what is called, "tangible examination". (See Goffinet & Bontinck, "The Tangible Examination of Inspections and Seizures after the ECHR *Vinci* Judgment, 2016, Journal of Economic Competition Law and Practice, (2016) 7 (4): 243-253). As indicated earlier, ICL's lawyers proposed an analogous procedure for assessing third party, or irrelevant correspondence. The CCPC refused, and made the point that such a procedure was not provided for in the Act. The High Court judge proposed an analogous procedure in the case of non-legally privileged third party data. At one level, one cannot argue with the attractions of the proposal; but the Act of 2014 does not allow for any such

procedure. The CCPC said, correctly, such a procedure would be *ultra vires*. While a court may seek to interpret legislation in a manner consistent with the Constitution, or the ECHR, it cannot legislate. That is a matter for the Oireachtas.

Section 34 of the Act

41. Section 34 of the Act defines "*activity*" as including "*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*". The term "*place*" has the same meaning as contained in s.29 of the Offences Against the State Act, 1939, as inserted by s.1 of the Criminal Justice (Search Warrants) Act, 2012. Thus, "*place*" includes:

> *"(a) A dwelling or part thereof;*
>
> *(b) A building or a part thereof …"*

The term "*records*" includes not only records in writing, but:

> *"(a) Discs, tapes, sound-tracks, or other devices in which information, sounds or signals are embodies, so as to be capable (with or without the aid of some other instrument) of being reproduced in legible or audible form;*
>
> *(b) Films, tapes, or other devices in which visual images are embodied so as to be capable, with or without the aid of some other instrument) of being reproduced in visual form. …"*

The term "*tape*" includes a disc, magnetic tape, or soundtrack.

Thus, taken in isolation from the other issues discussed in this judgment, a lawfully *focused* search in the building and of the *relevant* parts of Mr. Lynch's email data would have been permissible. But this is not what occurred.

Section 37 of the Act

42. The application of the statutory powers of entry, search, seizure and retention are fundamental issues in this case. All legislation must be interpreted in accordance with the Constitution and the rights therein contained. Section 37 of the Act sets out powers of authorised officers acting in relation to investigations under the parent Act of 2002, which, in turn, sets out the substantive offences. When considered in its entirety, and having regard to its context, the section is broad in its scope. Insofar as directly relevant to this case, it provides:

> *"37(1) For the purpose of obtaining **any** information which may be required in relation to a **matter under investigation** under the Act of 2002 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.*
>
> *(2) The powers mentioned in **subsection (1)** are the following:*
>
> > *(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;*

(b) to enter, if necessary by reasonable force, and search any place occupied by a director, manager or any member of staff of an undertaking that carries on an activity or of an association of undertakings that carry on activities, being, in either case, a place in respect of which there are reasonable grounds to believe books, documents or records relating to the carrying on of that activity or those activities are being kept in it;

(c) to seize and retain any books, documents or records relating to an activity found at any place referred to in paragraph (a) or (b) 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 of or extracts from any such books, documents or records, including in the case of information in a non-legible form, copies of or extracts from such information in a permanent legible form;
(f) to require a person mentioned in paragraph (d) to give to the authorised officer any information he or she may require in regard to the persons carrying on the activity referred to in paragraph (a) (including in particular, in the case of an unincorporated body of persons, information in regard to the membership thereof and its committee of management or other controlling authority) or employed in connection therewith;

(g) to require a person mentioned in paragraph (d) to give to the authorised officer any other information which the officer may reasonably require in regard to the activity referred to in paragraph (a).

> *(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 authorising an authorised officer (accompanied by such other authorised officers or members of An Garda Síochána or both as provided for in subsection (5) of section 35) at any time or times within one month from the date of 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."* (Emphasis added)

43. While it is unnecessary to set out the remainder of this section in full, suffice it to say, it contains further investigative powers. These allow for the arrest and detention of persons under investigation, the recording of interviews with suspects, the utilisation of such recordings at trial of an accused, and may limit access to such recordings to the person interviewed, or his lawyer, unless authorised by a court. The provision also sets out a series of protections for authorised officers in conducting interviews of suspects, the intent of which is, apparently, to render such officers immune from prosecution, even if they are in breach of regulations which would govern members of An Garda Siochana conducting similar types of interview in other types of criminal investigation. The section provides that the breach of such regulations shall not affect the admissibility of evidence obtained thereby. It contains provisions regarding the admissibility of evidence. It is unnecessary to consider them further for this appeal.

44. It is necessary to deal next with one, apparently peripheral, provision in a little more detail. The Act provides, at sub-section (13), that "*Section 9 of the Criminal Law Act, 1976 shall apply in relation to a search carried out by an authorised officer pursuant to a warrant issued under subsection (3) as it applies to a search carried out by a member of An Garda Síochána in the course of exercising his or her powers under that Act."* Such powers require careful scrutiny.

45. While during the High Court hearing, counsel on behalf of the CCPC conceded that there was no invocation of s.37(13) in this case, it is nonetheless relevant to point out that s.9 of the Act of 1976 allows members of An Garda Siochana, prison officers and members of the defence forces, to seize and retain any material that they believe to be evidence of any criminal offence, while conducting an investigation into a quite separate offence.

46. The reference to s.9 of the Criminal Law Act, 1976 touches on the issue of the persons on whom the onus lies to segregate material taken? It provides that, when material is seized, whether or not it is evidence of the offence under investigation, it may be retained, and thereafter may be subject to the provisions of the Police (Property) Act, 1897. Section 1 of the 1897 Act, in turn, places an onus *on a claimant* to make a claim for property held by the police within 6 months of such seizure, absent which, orders may be made for the disposal of the property. There, the onus is on the "claimant". Here, the CCPC appears to have accepted a different onus, that is, one which, to a limited degree, fell on itself. Mr. O'Rahilly's affidavit has already been considered. The CCPC proposed they would conduct a keyword search.

47. To summarise the position, therefore, s.33 of the Act does provide for a mechanism whereby, under judicial supervision, there can be a determination of whether or not material obtained on foot of a search is legally privileged, but in no other relevant situation. Section 37 provides for a form of judicial procedure prior to entry, search, seizure or retention, in that it is necessary for an information to be sworn before a District judge. Consequently, there must be appropriate evidence before that judge to allow or authorise the issuing of a search warrant. But there are distinctions between the systems of investigation in different countries. The Act, in this distinct area of law, does not contain any statutory provision concerning "tangible" prior judicial supervision, to further

focus the search power, at that stage of an investigation, nor does it provide for any form of judicial supervision requiring a "tangible", item-by-item search of materials actually seized, either *ex ante* or *post facto*, and thereafter retained, in order to determine the relevance of that non-privileged material.

48. As pointed out in chapter 2.03 et. seq. of the recent text book "Modern Irish Competition Law", (Andrews, Gorecki, and McFadden, Wolters Kluver, 2015), under the Competition Act, 2002, the CCPC's statutory predecessors could retain documents and records seized, but only for a period stipulated by law. Section 45(6) of the Competition Act, 2002, provided that such books, documents or records which had been seized or obtained under that Act might be "*retained for a period of 6 months, or such longer period as may be permitted by a judge of the District Court, or if within that period there are commenced any proceedings to which those books, documents or records are relevant, until the conclusion of those proceedings.*" Section 45(7) of the Act of 2002 provided that, when an officer intended to retain such books, documents, or records for a period longer than 14 days after they were seized or obtained, such officer was obliged, within that period, or such longer period as might be agreed, to furnish a copy of the books, documents or records to the person "*who it appears to the Authority or officer is, but for the exercise of the powers under this section, entitled to possession of them".* The 14 day period was subsequently amended to 35 days. (cf. Section 7(1)(a) Competition Act, 2012). Section 45(6) was then repealed by s.76 of the Investment Funds, Companies & Miscellaneous Provisions Act, 2005. As a consequence, the CCPC no longer had to seek permission from the District Court, from time to time, to retain materials seized during a search. Section 45 of the Act of 2002, as amended, was repealed in its entirety by s. 7(1)(c) of the Act of 2014. Now, it would appear that evidence seized can be retained for such a period from the date of seizure as appears "*reasonable*". (s.37(13) of the Act of 2014). But the CCPC submits that it, and it alone, has the power to engage in the sorting, sifting and to determine relevance, without any input from anyone else. Any other procedure, it contends, is *ultra vires*.

49. The broad range of these s.37 powers and duties may be contrasted not only with the "predecessor" legislation of 2002, but also those powers and duties contained in legislation in the neighbouring jurisdiction. This Court was referred to the United Kingdom Criminal Justice & Police Act, 2001, as an illustration. In contrast to s.37of the Irish Act of 2014, this U.K. Act contained a number of provisions regarding duties of those who seize, as to the return or retention of seized property.

50. It is true that the material in the instant case is, in one sense, what is termed "*mixed*", in the sense that parts of it emanated from ICL itself, but other parts of the date originated from other sources, including the foreign-based companies identified. This is not the respondents' fault. There was no intention to "intermingle" the sources with those of other companies. (See, by contrast, the situation described at para. 107 in this judgment). The CCPC's present submission might suggest that an onus lies upon ICL to sort through the memory stick provided, and make submissions on what is relevant and what is not. It is hard to reconcile this entirely with the proposal, albeit narrow, which the CCPC made in Mr. O'Rahilly's second affidavit. This was to the effect that the officials would carry out the keyword search. It is certainly not possible to reconcile such a solution with the position which the CCPC adopted immediately after the seizure, to the effect that it, and it alone, had the right to review all the seized third party material.

The High Court judgment considered in more detail

51. This judgment turns next to a further analysis of the High Court judge's observations, and then addresses relevant case law. It must be emphasised that there is no challenge in this appeal to the constitutionality of s.37 of the Act of 2014.

52. The judge described the lacuna in the legislation regarding non-legally privileged

material as giving rise to a legal *terra incognita*. But, in my view, this lacuna could not be addressed in the creative manner he suggested: this would be to trespass outside the terms of the Act itself.

53. Having covered much of the factual terrain traversed in this judgment, the High Court found that CCPC's intention, of itself segregating relevant from irrelevant material amounted to a contravention of fundamental human rights. But I do not think the judge was entitled to infer, as I think he did, that the CCPC had exercised all "*due care*" in conducting the dawn raid within the terms of the search warrant issued from the District Court; nor was he entitled to infer that the seizure by the CCPC was not the result of some calculated and deliberate 'over-reaching grasp', but rather a near, if not absolute, inevitability arising from any search and seizure process. This was not a jury trial, nor a full scale plenary hearing. These inferences were drawn only on the basis of a hearing conducted very largely on the affidavit evidence, where the oral testimony was only from Mr. Seamus Lynch. In my view, the limited nature of the High Court hearing did not allow for any inference either on these issues, or on the credibility of testimony in these proceedings heard only on the basis of affidavit evidence.

The Constitutional Right of Privacy

54. The right to privacy is an increasingly important constitutional value in an age where privacy is challenged. The Court is here dealing with the right of these corporate respondents. What follows is to be seen in that context only. Privacy has a core element, and a "penumbra". There are, undoubtedly, areas where the countervailing requirements of the common good will come strongly into play. A proportionality balance is necessary. In assessing proportionality, there must, of course, be a test against requirements of the Constitution and the ECHR. But in this, the right is no different from the enumerated fundamental rights elsewhere explicitly recognised in the Constitution. In other situations, questions of the common good may tilt the balance in another way.

55. This appeal involves a balance of constitutional and legal rights. First, there is the question of whether, in ostensibly acting within the words of s.37, the CCPC, in fact, acted with due regard to the respondents' constitutional right to privacy in carrying out this search and seizure. The un-enumerated constitutional right of privacy, deriving from Article 40.3 of the Constitution, was first recognised by this Court, in the context of marriage, in *McGee v. The Attorney General* [1974] IR 284. (See the valuable Delaney and Carolan, The Right to Privacy 2008, Thompson, Round Hall, and the jurisprudence and scholarly writing stretching as far back as Warren & Brandeis. The Right to Privacy (1890) 4 Harv. L.R. 19. There is a helpful and full footnote in The Law of Torts, 4th Ed. McMahon & Binchy, Bloomsbury 2013, p.1403). The right is not unqualified. Its exercise is to be harmonised with, and may be restricted by, the constitutional rights of others, the requirements of the common good, and the requirements of public order and morality. (*Kennedy v. Ireland* [1987] I.R. 587). The protection of public order and the common good, require that the crime of anti-competitive activity, when identified, should be investigated and punished. It is not a victimless crime. It effects the rights of citizens as consumers, and thereby the common good. This is one of the considerations in the balance to be maintained. What is in issue are the means to the end.

56. The judgment of O'Higgins C.J. in *Norris v. AG* [1984] IR 36 at 64 recognises the existence of the right, albeit subject to limitations. It has been developed and further defined in subsequent case law. This has arisen in among other areas, unlawful phone tapping; journalists watching and besetting a rape victim; the unnecessary disclosure of an individual's financial circumstances; and a garda leak to the media about an impending raid on a solicitor's premises. (*Kennedy v. Ireland* [1987] I.R. 587; *X v. Flynn*, 19th May, 1994, High Court, Unreported, Costello J.; *In Re Article 26 of the Employment Equality Bill 1996* [1997] 2 IR 321; *Hanahoe v. Hussey* [1998] 3 IR 69).

57. Henchy J. observed in Norris [1984] IR 36 at 71, the right is to be viewed "*having regard to the purposive Christian ethos of the Constitution, particularly as set out in the preamble"* and deriving from the democratic nature of the State. It involves a complex of elements, varying in nature, purpose and range, each necessarily being a facet of the citizen's core individuality, within the constitutional order. The degree of protection imparted to the right to privacy may vary, as it bears on a range of human experience from the most intimate sphere of life to those areas where there is an interaction with others, or areas or spheres where the common good may be engaged, thereby justifying intrusion by the State, or its organs. (See *Bernstein v. Bester* [1996] (4) BCLR 449 (S.A.), quoted in *Caldwell v. Mahon* [2007] I.R. 542 at 548). But the constitutional right cannot be reduced to nothingness, or submerged entirely in common good interests or duties.

58. I do not subscribe to the view that the degree of judicial recognition for legal professional privilege is, in some sense, of a higher 'order' than that of the constitutional right of privacy. The rights and interests involved are not, in fact, in conflict in this case. What arises is, rather, the fact that the Act does address and provides procedures for protecting legal privilege, but does not address the privacy rights of the respondents or others. Legal professional privilege is, of course, at minimum, a fundamental condition on which the administration of law rests. What follows is in no sense to "downgrade" the concept. But it has not yet been given constitutional recognition, at the same level as privacy in national law. True, the concept may have its origin in the constitutional right of access to the courts, or to legal representation. The European Court of Human Rights has observed that an encroachment on professional secrecy may have repercussions on the administration of justice, and hence on the rights guaranteed by Article 6 ECHR. (*S v. Switzerland* [1992] 14 EEHR 670, App. No.'s 12629/87 and 13965/88; *Niemietz v. Germany* [1993] 16 EEHR 97, App. No. 13710/88). But the concept has not been recognised as a fundamental right identified in our Constitution. (See also *AM&S Europe Limited v. Commission* [1983] 1 All ER 705 at 721, Case 155/79). It is very likely to fall within Articles 7, 8 and 11 of the Charter (privacy, personal data and communication without interference by public authorities). Privacy may be subject to limitation. But, legal professional privilege may also be limited. There are a number of circumstances which readily come to mind where there may be limitations upon it. One such situation might be were a lawyer, in ostensibly privileged circumstances, become aware of the imminent commission of a serious crime.

59. The case law now discussed establishes the appropriateness of the procedures employed in this area; shows that corporate entities enjoy the right to privacy, sets out that, in appropriate cases, unlawfully obtained evidence can be ruled inadmissible, and held that, in one case, an action for damages for misfeasance in public office in the execution of a warrant, arose in circumstances where the circumstances created a "media circus". (*Hanahoe v. Hussey* [1998] 3 IR 69). The facts of *Hanahoe* are, of course, very distinct from those in the instant case and need not be considered.

Collateral Attack?

60. I pause here to draw a distinction; whether, and in what circumstances, a 'collateral attack', by declaratory proceeding, on a criminal conviction, or conviction under appeal, could be possible, or appropriate, is a quite different matter from the factual situation in this case. So too is the question of any such challenge when a criminal prosecution is actively in train. I reserve my opinion on these questions to an appropriate case, if one ever arises.

The Right of Corporate Entities to Privacy

61. The fact that a corporate entity is entitled to assert the right to privacy in separate proceedings was recognised by McKechnie J. in the High Court, on the facts arising in *Competition Authority v. Irish Dental Association* [2005] 3 I.R. 208. The right itself did

not appear to be seriously in dispute in this case. McKechnie J. held that a warrant authorising a search of a defendant's premises was invalid, because it erroneously described the Dental Association as having been engaged in the business of selling, supplying or distributing "motor vehicles". Thus, the warrant fundamentally mis-stated the business activity, and was not, therefore, a lawful justification for the obtaining of documentary evidence. Applying the then current jurisprudence, the High Court held that the search of the defendant's premises, on foot of the defective warrant, had constituted a "deliberate and conscious" violation of the Association's constitutional right to privacy. As a consequence, the judge held that the court had no discretion to receive the evidence obtained by the Competition Authority on foot of that search. (See *DPP v. O'Brien* [1965] I.R. 142; *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110). The fact that the exclusionary law on admissibility of evidence may have subsequently evolved to a limited degree since that decision, does not in any way derogate from the duty of the courts carefully to examine warrants, and other procedures, to ensure that constitutional rights are fully vindicated. (See *DPP v. JC* [2015] IESC 31). Rather, the contrary is true.

62. McKechnie J. ([2005] 3 I.R. 208 at 223-227), referred in the course of his judgment to the authority of *Kennedy v. Law Society of Ireland (No. 3)* [2002] 2 IR 458), which concerned a search carried out by the Law Society of a solicitor's premises. He pointed out the uniqueness of the procedure engaged in that case, involving a solicitor *qua* member of the Law Society. But, he explained, what was in question in the *Dental Association* case was not some administrative or disciplinary matter, but rather (as here) a search involving potential criminal sanctions, which was quite different from the supervisory role of a professional body over its members who practiced in the context of the public. In fact, as he explained, no constitutional right was identified in *Kennedy*. (c.f. pp.223 - 227 of the Report).

63. In *Digital Rights Ireland Limited v. Minister for Communications & Others* [2010] 3 IR 251, again McKechnie J. drew on E.U. case law, and held that the right to privacy must extend to a company, as a legal entity, separate and distinct from the members of that company. Thus, he held, a company was entitled to constitutional rights, where appropriate, including the right to privacy. (c.f. pp.274-277 of the Report).

64. But against this, there are the public rights to investigate crime and misconduct affecting public interests, and the common good. (cf., for example, *Kane v. Governor of Mountjoy Prison* [1988] I.R. 787, and the case law cited in Delaney and Carolan, pp. 62 onwards). In *Idah v. DPP* [2014] IECCA 3, the Court of Criminal Appeal held that, in the context of electronic surveillance, and in the context of constitutional and ECHR rights, there could be no doubt that the State might lawfully make incursions into the right to privacy, and that such incursions may be lawful where the State was seeking to provide evidence regarding arrestable offences, the prevention of suspected arrestable offences, and the safeguarding of the State against subversive or terrorist threats. However, that court went on to point out (at par. 37), that such permissive law should be sufficiently clear in its terms, at least insofar as to give individuals an adequate indication as to the circumstances in which public authorities were entitled to engage in such conduct, and to say that the State must, by its laws, provide necessary safeguards for the rights of individuals potentially affected; thus an incursion into a constitutional right by an organ of the State must be sanctioned by law.

65. The gardaí, of course, have a duty to seek out, obtain and preserve all relevant evidence, whether patent or latent, as in *Braddish v. DPP* [2001] 3 IR 127. This does not diminish the duty of CCPC, however, to act in a proportionate way in gathering evidence; accepting, as one must, that there must be some latitude, and that, inevitably, extraneous material may be gathered up and retained in the course of such searches and investigations.

66. But the fact that s.37 is broad in its terms, does not entitle the CCPC to adopt constitutionally disproportionate means in order to achieve apparently lawful ends. It is necessary, therefore, to assess and balance the aim of the statutory measure against the harm to the respondents caused by what can only be seen as an extraordinarily over-broad application of the section, seen in the context of the factors identified earlier in this judgment. (See *Heaney v. Ireland* [1994] 3 I.R. 593, at 607/608/609).

67. A careful proportionality analysis is necessary of this statutory measure. That is so as to ensure that it does not encroach into a constitutional right more than is rational, necessary, essential, or proportionate to the lawful objective which it is designed to achieve. The scrutiny should be more careful still in these circumstances where, on its face, the provisions permitting the impairment of the right do not allow for any balancing mechanism regarding material seized. Just as in the case of other rights protected under the Constitution, the duty of the courts is to protect the right in question here from "*unjust attack*", and, as also in the case of the property right, to measure the validity of the application of the measure against the doctrine of proportionality. The State, or its organs, again exercising their public duties are entitled to a substantial latitude; the extent of such allowance is to be measured in the light of the extent of the encroachment in the context in which this search and seizure took place, the nature of the alleged offence, and the factors identified earlier in this judgment.

68. Section 37 cannot be interpreted in such a broad manner so as, in its application, to allow for an unwarranted interference in rights enjoyed by any individual or corporate entity. To permit a disproportionate interference would constitute, in the words of the Constitution, an "*unjust attack*" on the right.

The Extent of Material Seized

69. In the course of lengthy correspondence with the CCPC after the search, the respondents' solicitors wrote that what was downloaded amounted to over 380,000 computer files, or 96 gigabytes. The CCPC did not subsequently dispute that estimate. It is not hard, therefore, to see why counsel for the respondents referred in his submissions to the CCPC's procedure as being metaphorically tantamount to "*bottom trawling*", that is, the deep-sea fishing procedure involving huge trawl-nets being dragged along the seabed and capturing all form of marine life in an indiscriminate manner. The potential length and complexity of the envisaged review procedure of the material is telling on this question.

70. In these circumstances, where the facts are so clear, the doctrine of proportionality must apply to procedures such as those envisaged by s.37. (cf. the judgments of the majority in *Meadows v. MJELR* [2010] 2 IR 701). The CCPC will have acted *ultra vires* if the necessarily implied constitutional limitation of jurisdiction unduly encroached upon the CCPC's rights. (cf. Henchy J. in *Keegan v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 at 658). Here the degree of incursion impaired the right far more than is necessary. The dis-proportionality between means and ends in this search is very marked indeed. It cannot be rationalised by analogies which do not relate to this case. There is, beyond question, a most substantial disparity between the quantity of material seized, and the end sought to be achieved. No exceptional circumstances have been cited, or referred to, which might justify the nature, extent and scope of the CCPC's actions in this search, seizure and detention. It is necessary to analyse this in more detail.

The Extent and Continuation of the Incursion

71. The function of a warrant is to properly communicate to all the persons concerned what his/her obligations are. (See the obiter observations of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Jagutis* [2013] 2 I.R. 250, at 265). The warrant here did not assist in limiting the encroachment. (See Walsh on Criminal Procedures, 2nd Edition, Thompson Reuters, 2016, 10-82 et.seq.). Of course, circumstances may arise where, for example, owing to urgency, or pressing need, or the

circumstances of the case, the gardai, or other authorities, must act quickly in order to prevent crime, to apprehend suspects, or to protect evidence. This is not such a case.

72. As outlined earlier, even by the 8th October, 2015, ICL's lawyers still did not have access to the sworn information. It was made available only on 24th November, 2015, after the legal proceedings began. For the reasons outlined earlier, one cannot envisage any meaningful basis upon which the lawyers representing ICL could, in the interim period, have made any assessment as to the relevance of the material which had been downloaded and retained. This is true, even having regard to the fact that they had been given a copy of the data taken. It is impossible, too, to envisage how a third party process could have operated.

73. Concern regarding the extent and continuity of the incursion is rendered still more acute in light of the rigid stance adopted by the CCPC, when in its Defence it responded to a plea in the Statement of Claim that the warrant had been applied in a disproportionate manner. The CCPC contended that the proceedings were misconceived, insofar as they are predicated "*on the assumption that the extent or scope of the defendant's powers of seizure, retention, extraction or copying of data, is limited by the search warrant*". It then went on to plead "*No such limitation is apparent on the face of the said search warrant".* This was undoubtedly true.

74. The appellants' various subsequent iterations of legal position represent, in a sense, a skilfully conducted phased retreat into a form of "*ex post facto"* proportionality, constitutionality and Convention compliance. To my mind, it cannot be countenanced in this case. The extent of the unlawfulness does not lend itself to remediation, even by order of a court. The duty of the courts is to prefer a constitutional construction *and application* of this section to one which would be unconstitutional. To permit the Act to be applied in the broad simply "*textual*" fashion, as now suggested by the CCPC, would, in my view, in fact, be to countenance an unconstitutional and *ultra vires* interpretation of the section. (See *East Donegal Co-Operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317, at 343). This is because such interpretation and application would permit dis-proportionality, and arbitrariness. All the facts point to an unnecessary, irrational, incursion which went well beyond what should have been the objective sought to be achieved. The position is, rather, almost analogous to one where the constitutional rights of a citizen are invaded in a general search without limitation, or where a citizen's right to liberty and bodily integrity are the subject matter of unlawful encroachment by the use of disproportionate force in an arrest.

75. I do not accept that the CCPC's procedure in this case was a necessary and inevitable collateral consequence of carrying out this search, seizure and retention. It is true that s.37 of the Act is cast in very broad terms. But, the manner in which it was applied in this case was, to my mind, to encroach unduly on the respondents' constitutional right to privacy, and, incidentally, their constitutional rights to private property, and rights to confidentiality. The Act does not contain pre and post-search safeguards of the constitutional right to privacy or confidentiality. The fact that the section is phrased in broad terms did not require that the search warrant should be in the form it took. Neither the terms of s.37, nor the contents of the warrant, require that the constitutional right to privacy should, in some sense, "accommodate" only the statutory provisions regarding legal privilege, which are to be found present in the Act of 2014; but which contains no protection of the rights of third parties. Rather, the converse must be true. It is the Act which must be measured against the constitutional right, nor the converse.

76. In my view, this disproportionate 21st Century search and seizure cannot now be given the guise of legality by resort to the "words of the statute", any more than a rather similar procedure, with similar defects, in the mid-18th Century. One cannot rely simply on 'the words' of legislation, without some proportionality test, as provided for under the

overarching protections provided by the Constitution. What occurred here was not commonplace police procedure. In certain areas of the law there may be a temptation or desire for a certain "demonstration effect", in the interests of deterrence, but all procedures must be governed by law.

77. It would not be surprising, if in the very different circumstances of a search following on serious crime, substantial extraneous and irrelevant material might be seized. But there comes a point where the elements necessary for comparison with other situations in the criminal sphere break down. If the principle of proportionality is not applied in this case, even with a significant degree of latitude, the words of the statute could, under the guise of legality, almost become tantamount to a power of "general search". The CCPC was simply never entitled to have in its possession this vast quantity of irrelevant or extraneous material. It was not entitled to engage in this form of entry, search and seizure and retention, where it was highly probable that such amounts of material would be seized. In my view, the procedure adopted renders the search, and its fruits, null and void.

Conclusions on the Constitutional Issue

78. Even allowing for every permissible degree of latitude, I am unable to conclude that the deficiencies in the search and seizure here can be retrospectively validated. To my mind, the search was void from the outset, and in the course of its execution. I conclude, therefore, that the search warrant, and all that followed it, was *ultra vires* s.37. An *intra vires* outcome would have required that the principle of proportionality be observed. This could have been achieved by a truly focused pre-search procedure permitting an affected party a clear opportunity to make observations, or, alternatively, an effective post-search procedure for the same purpose. The orders I would propose are set out in the conclusion of this judgment.

The European Convention on Human Rights

79. The jurisprudence of the European Court of Human Rights in this area is very well developed and focused. The analysis which follows overlaps to a degree with what Laffoy J. has carefully analysed in her judgment. I agree with her analysis. The jurisprudence is, of course, to be seen in the context of the diverse systems of national law described in the judgments. But the general principle which emerges is that, in the circumstances which arise in areas such as competition law, and tax law, the courts must strike a particular form of balance between the Convention right and State's competing interests and duties. Particular forms of protection are deemed necessary for ECHR compliance

80. Article 8 of the European Convention on Human Rights addresses the right to respect for private and family life, in these terms:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence."*

The balancing considerations are set out thereafter:

> *"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law* ***and is necessary in a democratic society*** *in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."* (Emphasis added)

81. The Article protects the right to be free of unlawful searches. It goes without saying that a lawful search may be necessary in a democratic society, in the interests of the economic wellbeing of the country, or for the detection or prevention of disorder or crime. Also, such procedures may be permissible in the protection of the rights and freedoms of others, as the jurisprudence shows. But, an incursion into the right to privacy, as here, which is arbitrary or disproportionate, and which cannot be justified on any rational

grounds, will breach Article 8. This judgment now sets out ECtHR judgments in this area of the law. The jurisprudence of the Court has extended Article 8 rights to limited companies and corporations.

82. Our courts, of course recognise the application of the Convention through the established case law of the ECtHR, and the principles therein, as identified in *JMcD v PL* [2009] IESC 81, [2010] 2 IR 199 (see also *JMcD v. L.E* [2010] IESC 48). The clear line of jurisprudence in this area is most helpfully seen in a number of recent decisions cited to this Court. These include *Delta Pekarny v. Czech Republic* [2014] ECHR 1014 (App. No. 97/11) (2nd January, 2015), and *Vinci Construction & Others v. France* (Application No. 63629/10, and 60567/10, 2nd July, 2015). As Chamber judgments, alternative language versions of some of these decisions delivered in French are not available. However, the unofficial translations, insofar as can be checked, do convey the sense of the judgments, and the state of the jurisprudence. The decisions now referred to only refer to searches in this area of the law. Other considerations obviously may arise elsewhere. The attention of the Court has also been drawn to the recent decision of the Court in *Janssen Cilag S.A.S. v. France*, Application No. 33931/12.

Delta Pekárny

83. In *Delta Pekárny v. Czech Republic* (App. No. 97/11, delivered on the 2nd January, 2015), the ECtHR had to deal with an investigative administrative procedure, initiated by the Czech Competition Authority on the applicant. The applicant company's claim was that the authorities had read certain emails that the addressees had marked as private; and that inspecting officers had infringed the right to respect for private life and correspondence. This search involved "third party" rights therefore. In dealing with the Convention heading of what is, under Article 8.2, "*necessary in a democratic society*", the ECtHR reiterated that legislation and practice on the subject must offer adequate and sufficient safeguards against abuses (Para. 83). It pointed out that, in circumstances where domestic law permitted searches of this type without a court warrant, the court must be particularly vigilant, notwithstanding the margin of appreciation that a contracting state might have. Thus, the court held that in cases that involved the protection of individuals against arbitrary arrangements by public authorities affecting rights safeguarded by Article 8, the absence of a search warrant may be compensated for by what it called an *effective* judicial review carried out *ex post facto*. The ECtHR noted that the notification which provided the basis of the search in that case only briefly stated the subject matter of the inspection, and did not detail the facts, or the items on which the allegations of anti-competitive practices were based. Although the case is not identical to this appeal, on its facts, the strong thematic resemblances are clear. The ECtHR went on to re-affirm that, in such circumstances, the absence of a search warrant might be counter-balanced by an *ex post facto* judicial review of the lawfulness and necessity of the investigative measure, but that such review would have to be effective in the particular circumstances of the case in question. The term judicial review is in this context, something of a linguistic "false friend". It means a great deal more than might be first understood by the term. The court explained that, in practice, this would mean that the persons in question were able to obtain an "effective judicial review", in both fact and law, of the measure in dispute and of its conduct; and that, when an operation that is judged to be unlawful has already taken place, the available remedies must provide appropriate redress to the person in question. (cf. Para 87 of the judgment). (See *Ravon & Others v. France*, No. 18497/03, paragraph 28, 21st February, 2008; *Societe Canal Plus & Others*, paragraph 40).

84. The ECtHR went on to point out that, in the circumstances of that case, the effective review of the lawfulness and necessity of the inspection in question was all the more necessary, because at no point prior to such inspection had the documents that the authority expected to discover in the applicant's premises been specified.

85. What is held to be necessary for Convention compliance, therefore, is that, either before or after the search procedure, there be in place an *effective* judicial review *in both*

fact and law. Even the existence of a search warrant will not, in itself, be necessarily a sufficient protection to rule out an adverse finding under Article 8. In *Saint Paul Luxembourg SA v Luxembourg* [2013] ECHR 340, the ECtHR had held that there had been a violation of Article 8(1), even where the search warrant was in accordance with law, and pursued a legitimate aim; but that less intrusive means than that of a search warrant could have been used to establish the identity of an individual. The pre-search procedure must be practically effective, whether it be judicial or otherwise. The Court held that the exceptions provided for in Article 8(1) were to be interpreted narrowly. (*Posevini v. Bulgaria* [2017] ECHR 80, 19th January, 2017). In *Delta Pekarny*, therefore, ECtHR was critical of the fact that there was no focus of this type provided for in Czech law. In the instant case, the Act of 2014 does not provide for any form of judicial *review of the type envisaged,* in the case of third party privacy rights. Each of the passages referred to directly touch on the CCPC procedure adopted in this case. The ECtHR emphasised the absence of any prior specification of the documents sought. The court considered that, without the prior authorisation of a judge, or an effective *ex post facto* review, of the need for the measure in dispute and regulation governing the possible destruction of the copies contained; the procedural safeguards were not sufficient to prevent the risk of abuse of power by the Competition Authority.

86. The court held that the absence of such safeguards was sufficient for it to conclude that the *ex post facto* judicial review did not provide the applicant with sufficient safeguards against arbitrariness, so that the interference with its rights could not be considered to be proportionate to the legitimate purpose sought. (cf. *Delta Pekárny v. Czech Republic,* para. 93)

Vinci

87. In *Vinci*, the court's views on what is needed for Convention compliance are also made clear. Both the applicant company, and another company, alleged a breach of their right to an effective remedy, and of their right to respect for their home, private life and secrecy of correspondence, in particular, rights of confidentiality of communications between lawyer and client, as a result of searches and seizures carried out at their premises.

88. The case is again to be seen against the background of the judicial role in investigations prescribed by French law. In an application made on the 3rd October, 2007, the French Competition Authorities requested authorisation from a Regional Court of Paris, to carry out searches and seizures in the premises of several companies, including the applicants', on the basis of provisions of the French Commercial Code. This was part of an investigation into anti-competitive agreements and practices, prohibited under that code. The judge, (juge des libertés et de la détention) (J.L.D.), gave a fifteen page statement of reasons setting out the evidential elements produced by the applicant authority after the search, and concluded that the documentation had been lawfully obtained. On the basis of these elements, the JLD found that there were indications of the existence of prohibited practices within the meaning of the Commercial Code. The judge then limited the scope of the search and seizure warrant to the premises of the targeted companies, and to their activity within the scope of construction and renovation of health establishments. Pursuant to a letter rogatory, the regional court of Nanterre was tasked with monitoring the searches of the premises. Police officers were appointed to assist in the searches carried out by the competition offices. Numerous documents, and computer files, and all the emails of certain employees of the applicant companies, were seized.

89. Before the JLD, the applicants submitted that the searches had been undifferentiated, and mass-seizures carried out, in respect of several thousand computer documents, and of several employees' emails; that a large number of the documents seized had no connection with the investigation, or were protected by the privilege of confidentiality between lawyer and client. They submitted these seizures were undertaken without a

sufficiently precise inventory of the seized documents being drawn up. The applicants maintained they were unable to take note of the content of the documents before these were seized and, therefore, could not raise any objections to their seizure. They demanded that the searches and seizure be declared void, and failing that, that the unduly seized documents be returned. The 'JLD' dismissed all these requests. The matter was appealed to the Court of Cassation, which rejected the applicants' appeals.

90. On application to it, the ECtHR pointed out (at para. 17), that the jurisprudence of the Court of Cassation was that the seizing authority may only take documents that related to the act specified in the order authorising home searches and seizures, and documents that were useful in part in proving the said acts. Otherwise the seized documents must be returned (para. 17).

Discussion of 'E.U. Procedure' in *Vinci*

91. In its decision in *Vinci*, the ECtHR took the opportunity of considering in detail the European Commission practice on inspections and seizures, pursuant to Article 20(4) of E.U. Regulation No. 1/2003. It pointed out that E.U. Commission investigators initially check on-site computer data, and emails, during the inspection, which could last several days. They would point out items of interest as they went along, and will give a copy of all the seized paper documents to the company that had been searched, following completion of the inspection. The company representatives could object to the seizure of documents which were likely to be covered by client and lawyer confidentiality, subject to them providing appropriate proof accompanied by useful elements in support of their claim. It is true that in the instant case, the ICL lawyers were given a memory stick copy of all the documents. But until they received the sworn information they had no significant information regarding the scope of the inquiry. There was no indication that any submissions would be accepted, or considered, in any sense.

92. In *Vinci*, the ECtHR explained that the EU Commission Competition Authorities investigated in the following manner. First, the officials extracted the electronic data from any medium, and made a copy which is stored on a server on which files are indexed. At the inspection site, the investigators then searched for files *using keywords on dedicated computers or laptops*. The data forming part of the investigation was finally extracted, and stored in an encrypted medium (such as a USB stick or hard disk), a copy of which is left with the company, together with a detailed inventory. At the end of the investigation, the inspector's computer equipment was completely wiped clean. If the document search has not been completed, the inspectors make a copy of the data which remained to be investigated, and placed it in a sealed envelope. The company's representatives then attended the opening of the envelope and make their objections known at the time. No issue arises in this appeal regarding documents which investigators "came across" in the investigation. It is unnecessary to address that situation.

93. In relation to Article 8, the ECtHR pointed out, (at paragraph 63), that according to its well established case law, searches and seizures carried out on business premises infringed the rights protected by Article 8 of the Convention (authorities cited). More specifically, the search for, and seizure of, electronic data amount to an infringement of the right to respect for "private life" and for "correspondence" within the meaning of these provisions. (cf. para 63).

94. In dealing with the question of "*necessity*" in a democratic society, the court noted, just as it did in *Societe Canal Plus & Others*, that home searches carried out at the Applicants' premises were intended to look for evidence of anti-competitive practices of which the applicants were suspected, and therefore did not, in themselves, appear disproportionate with regard to the requirements of Article 8 of the Convention. (cf. para. 74). The court repeated its finding that the domestic procedure in question provided certain safeguards, and on this point referred to what it had said in the judgment in

Societe Canal Plus & Others (paragraphs referred to). But, the court then observed that the question again raised more specifically by this case was whether these safeguards were not actually and effectively applied, particularly in view of the large number of computer documents and emails that were seized, and of the greater requirement of respect for the confidentiality of correspondence between lawyer and client. (cf. para. 75).

95. Again, the close similarities to the instant case are obvious. For Article 8 compliance, therefore, "actual and effective" assessment to protect the rights engaged are necessary. Having pointed out that the ECtHR accepted the government's submission that the investigators restricted their searches only to seizing items which had a connection with the subject of their investigations, the ECtHR did not accept the applicants' argument that they were unable to identify the documents seized when the operations were completed. It noted that a detailed inventory had been provided.

96. However, the ECtHR went on to point out that, during the execution of the operations, the applicants were unable to take note of the content of the seized documents, or discuss the need for them to be seized. However, in the court's opinion, unless the lawyers were disadvantaged, that is, unless they were able to prevent the seizure of documents that were unrelated to the investigation, or those that were, in principle, protected by the confidentiality of the lawyer and client relationship, there was no detriment. The court held that the applicants had been able to ensure that the lawfulness of the seizures could be actually and effectively reviewed *after* they took place. An appeal, such as one available pursuant to Article L.450.4 of the French Commercial Code should, if appropriate, enable them to obtain restitution of the relevant documents, or the assurance that these have been completely erased in the case of computer files. Neither s.37 of the Act, nor even the CCPC's proposals, contained such assurances or independent verification of what is the ECtHR sees as a judicial task, or, at least, one to be carried out under judicial supervision.

97. The court considered that it was for the judge who is considering the relevancy or confidentiality to determine what will happen to those documents after reviewing their proportionality and to order the restitution, as appropriate. However, it found, in that instance, that while the applicants exercised their right of appeal to the JLD, the latter, contemplating the possibility that the documents retained by the investigators may include correspondence from a lawyer, was content to assess the lawfulness of the context in which the items were seized without undertaking the necessary examination. The ECtHR found that the seizure carried out at the applicants' premises were, in the circumstances of this case, disproportionate to the purpose, and that there had been a breach of Article 8 of the Convention. (cf. para. 79, 80 and 81).

98. It is hardly necessary to re-emphasise that the similarities between the appeal before this Court, and these two cases are very marked.

Janssen Cilag v. France

99. Just prior to this Court delivering judgment, the appellant sought leave to refer the decision of the ECtHR in *Janssen Cilag v. France*, Application 22931/12. At first sight it might appear that this recent decision might favour the appellant, but I am satisfied this is not so. In fact, if anything, it make the principles rather more clear, because of the proportionate manner in which the French courts applied the by then Article 8 compliant applicable law. It is necessary to set out the facts in a little more detail, in order to identify the important distinguishing features of that decision.

100. The application was brought against France, concerning the administration of competition law in that country. The reference to a JLD may be seen in the same light of those in the previous decisions. Pursuant to an order of a JLD, agents of the French Competition Authorities carried inspections of the applicant's premises. These searches

were carried out in pursuance of Article L.450/4 of the French Commercial Code. The search was carried out by seventeen agents of the French Competition Authority, and six police officers. The applicant company appointed five representatives for the purposes of the search. Additionally, three lawyers were appointed by the applicant company to monitor the conduct of that search and investigation. The court judgment records that "numerous" documents and computer files were seized.

101. The applicant company subsequently challenged the search before the First President of the Court of Appeal of Versailles. Two employees intervened in that procedure, requesting that all personal information contained in the seized files be deleted.

102. The Deputy First President of that court, applying what can only be now characterised as tangible and effective post-search procedures, annulled the seizure of three files in respect of which, neither the inventory, nor the report made by the investigation authorities, provided a means of checking that the files contained documents relating to the authorisation granted by the JLD. It will be seen, therefore, that the French court considered that an onus lay upon the authorities to justify possession of each item seized in the light of the JLD's authority. The Deputy First President found that the balance of the search was lawful.

103. The French court's decision included findings to the effect that the search included part only of a mailbox containing elements falling within the search. This was sufficient for the search to be valid in its entirety. The fact of seizure of documents extraneous to the search did not render the search invalid in its entirety; in that a DVD containing all the documents seized had been placed under seal, and given to the applicants; and that there was, therefore, an absence of any identification of a protected document. The ECtHR pointed out that the applicant had not specified the number of protected documents taken in hardcopy, even though this could have constituted evidence of a failure by the authority, both in the discharge of the duty of loyalty, and the alleged lack of proportion between the means deployed and the necessary protection of fundamental rights. As such, it was for the applicant and the interested parties to identify the documents which they considered to be protected by the secrecy of private correspondence, legal professional privilege, or to be outside the scope of the authorisation, and thereafter request their return from the authorities. The French judge, therefore, confirmed to the authority his agreement to the return of irrelevant documents.

104. In its decision in *Janssen Cilag*, the ECtHR held that, like *Vinci*, the search in question had been "in accordance with law", that is, as permitted by French domestic law. Thus, the search was, in accordance with the first limb of Article 8, that is, "necessitated by law". In the course of its judgment, the ECtHR emphasised that the search resulted from a "reasoned order by a court", and that the judge designated by the First President of the Appeal Court, had not only "effectively" examined the applicant's allegations, but also expressly pointed out the absence of any precise identification by the applicant of a protected document, or even an indication as to the number of protected documents in hardcopy, even though this could have provided an indication of a failing on the part of the authority in discharging its duty of loyalty, and in the alleged disproportion between the means implemented, and necessary protection of fundamental rights.

105. In distinguishing the case from *Vinci*, therefore, the court observed that the domestic judge had declared that the seizure of three files was invalid, and had undertaken an effective review of proportionality as required by the provisions of Article 8 of the Convention. It held the applicant had not referred the court to any allegation that documents which it had precisely identified were wrongly seized. The court noted that it was open to the applicant to identify documents in dispute, in order to then claim their

restitution by the authority, and that the French judge had noted his consent to this.

106. The court also pointed out that the application in question was brought under Article L.450/4 of the French Commercial Code, which allowed for the restitution, where appropriate, of the relevant documents, or the guarantee that they would be deleted in full in the case of copies of computer files. Thus, it followed, that the safeguards had been practically and effectively applied, and were not just theoretical and illusory. I do not read the decision as in any way altering the fundamental principles established in *Vinci*. These included: the existence of effective and actual ex ante and post facto review of the material seized by a judge; this was based on the revised provision of the French Commercial Code, which provided for such safeguards; the courts finding that the protections afforded under law were not theoretical and illusory; the fact that the applicants had not made any concrete assertion that the search, taken as a whole, had been disproportionate, despite the opportunity for making such assertion; and the fact that the lawyers, retained for that purpose by the applicant, had been able to discuss with the authorities the relevance of documentation and material actually to be seized on site. It is clear that the lawyers had been in a position to engage in meaningful discussions. Each of these considerations were absent in this appeal.

Sérvulo

107. Although not referred to in argument, it is instructive to consider the summary of a further recent judgment of a chamber of the Court of Human Rights, where, by contrast, again it held there had been *no* breach of Article 8. It is to be considered against the background of the national law, and the system of investigation therein provided for. Again only a summary is available, and there is no English version of the judgment. In *Sérvulo & Associados - Sociedade de Advogados, RI v. Portugal* (App. No. 27013/10), the Court of Human Rights held, by a majority, that there had been no violation of Article 8 in the search of a law firm's offices, and seizure of computer files and email messages, during an investigation into suspected corruption, and money laundering.

108. The ECtHR noted that the applicants had been present during the search operation, together with a representative of the Bar Association. An investigating judge had overseen the operation, and an official report had been drawn up afterwards. The court noted that the investigating judge had exercised a supervisory role before, during and after the operation. The court found that, notwithstanding the scope of the search and seizure warrants, the safeguards afforded to the applicants against abuse, arbitrariness, and breaches of legal professional secrecy, had been adequate and sufficient. Hence, the search and seizure operations had not amounted to disproportionate interference with the applicants' right to respect for their private and family life, in view of the legitimate aim pursued.

109. The ECtHR jurisprudence makes clear that, for Convention compliance, the level of specificity in the warrant may vary from case to case, depending on the type of offence suspected, the circumstances in which the warrant was issued, the manner and circumstances in which the warrant was issued, and the question of proportionality to the aim pursued. It is self-evident that the scales of proportionality required to be calibrated in accordance with a range of criteria, but which vary in accordance with range, relevance, both patent or latent, scope and purpose.

Earlier Authorities

110. These decisions are cited in detail, because of their direct relevance. They follow on from an earlier line of authorities, including *Niemietz v. Germany* [1993] 16 EEHR 97, App. No. 13710/88), where the Court of Human Rights recognised that there was no reason, in principle, why the understanding of the notion of private life under Article 8 should be taken as excluding activities of a professional or business nature. (para. 29). While the case concerned the question of legal privilege, it touched directly on this case,

in that it also deals with a search which was excessively broad. Thus, the ECtHR held that the search in question was not "*necessary*" in a democratic society, and that the measure complained of was not proportionate to the aims, because it had been in broad terms, and without limitation.

111. In *Société Colas Est v. France*, Application No. 37971/97, ,(2004) 39 EHRR 17 the Court of Human Rights affirmed that the rights guaranteed by Article 8 might be construed as including the right to respect for a company's registered offices, branches, or other business premises (para. 41). While the search carried out therein was for the purpose of detecting anti-competitive activity, and therefore justifiable on those grounds. But there had been no judicial supervision prior to the search. The procedure itself involved taking numerous documents, in various company head offices. The court concluded this was an invasion of the company's "home". The court observed that the exceptions provided for in paragraph 2 of Article 8 were to be interpreted narrowly, and the need for them in a given case must be convincingly established. (See *Funke v. France; Cremieux v. France; Miailhe v. France (No. 1)* (A-256-A, 256-B and 256-C); *Niemietz v. Germany* [1993] 16 EHRR 97 at par 55). The court held that, having regard to the want of prior judicial supervision, or authorisation, the wide powers enjoyed by the authorities, which gave them exclusive competence to determine the expediency, number, length and scale of inspections, meant that the impugned operations could not be regarded as strictly proportionate to the legitimate aims pursued. Here the CCPC claimed a similar exclusive competence in identifying and defining materiality in this category of material and data. This would not be in accordance with ECtHR jurisprudence.

112. In *Robathin v. Austria*, App. No. 30457/06, [2012] ECHR 1370 at pars 44 and 47, the Court of Human Rights laid particular emphasis on the question as to whether the scope of a search warrant had been reasonably limited, and that a search which explored data extraneous to the investigation, without justification, had gone beyond what was necessary to achieve the legitimate aim, as a consequence of which there had been a violation of Article 8 of the Convention.

113. It is true that in *Bernh Larsen Holding A.S. & Others v. Norway* (App. No. 24117/08 [2013] ECHR 220, the court held (at paras. 161 and 174), and in the circumstances of that case, that the impugned Norwegian tax legislation was supported by relevant and sufficient reasons. The court held that there was no reason to doubt that the tax authorities in Norway had acted within their margin of appreciation and struck a fair balance between privacy rights and the public interest in ensuring efficiency. However, *Bernh Larsen* is to be seen in light of the fact that the search and seizure involved was not carried out under criminal law. (para. 173). The consequences of the tax subjects' refusal to co-operate were exclusively "administrative". Moreover, the measure had, in part, been made necessary by the applicant company's own choice to opt for "*mixed archives*", a shared server with other companies, making the task of separation of user areas and identification of documents more difficult. The nature of the mixed archives in this case is quite different.

114. The dissenting opinion of Judge Laffranque and Judge Berro-Lefevre expresses concern, as in the courts established case law, regarding "*adequate protection against arbitrary interference*". The judges referred to their view as supported in, for example, *Petri Sallinen v. Finland* [2005] ECHR 50882/99, 27th September, 2005, at par. 90, in which the ECtHR stated that "*Search and seizure represents a serious interference with private life, home and correspondence, and must accordingly be based on a "law" that is particularly precise. It is essential to have clear and detailed rules on the subject*."

C.J.E.U. Jurisprudence

115. The jurisprudence of the Court of Justice of the European Union is to be viewed in light of the guarantees contained in the Charter in Article 7, (respect for private and

family life, including one's communications); Article 8, (the right to protection of personal data concerning oneself), and the right under Article 17 to private property. I am not convinced, however, that it can be said that the issues arising here come within the range or scope of E.U. law. (C.f. Articles 51 and 52 of the Charter). Even if they did, resort to EU laws, it is not necessary for the resolution of this case.

116. Insofar as the jurisprudence is helpfully illustrative, Case C-583/13 P *Deutsche Bahn A.G. v. European Commission*, 18th June, 2015, set outs the issues well. In that judgment the CJEU points to the presence under E.U. law of post-seizure judicial review, as a balance, in circumstances where there might be no prior judicial authorisation of search and seizure. (paras. 32 to 33). The court notes the manner in which E.U. law discounts the use of fortuitously found evidence, although it may be used for further investigation. (paras. 58 and 59).

117. The judgment of the General Court in *Nexans S.A. v. European Commission*, referred to by my colleague, Charleton J., merits consideration on its facts. In the judgment of the General Court delivered on the 14th November, 2012 (Case T135/09), the central issue was not only the downloading of data, but the absence of any sufficient safeguards. In Nexans, the E.U. Commission's search was different from that here. The inspection took place by prior arrangement, in the presence of lawyers. The downloading took place using software which "*indexed that information overnight*" (par. 8). The EU Commission inspectors removed data in circumstances where there had, in fact, been interference with the inspection and where relevant material had been deleted during the search. The applicants' legal representatives were present when the clearly identified and focused data was opened from a sealed envelope on another date. The procedure deployed by the EU inspectors took place in circumstances where to refuse downloading would not have led to any penalty. (para. 126). The judgment of the Court of Justice on appeal did not alter any of these factual findings. The marked contrast between the approach adopted by the E.U. inspectors, and the approach in the present instance, does not require emphasis. It is, of course, important to point out that the principles cited hinge on what was held to be necessary in a democratic society, the interests of national security, the economic wellbeing of the country, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights of others. The weight to be placed on each consideration will vary from case to case and category to category of law. In my view, there is no option but to find there has been a breach of Article 8 ECHR, based on the principles outlined, and the precise nature of the safeguards stated to be required.

Data Protection

118. I agree with Charleton J., for the reasons set out in his judgment, that the provisions of the Data Protection Act do not arise. I would uphold the appeal on that ground, and set aside the order of the High Court in that regard. In any event, again, I do not think that resort to E.U. law is necessary for the proper determination of this case.

Conclusion

119. This was an investigation, where there must be a significant degree of latitude for investigators in the search. The constitutional proportionality test applicable arises in that context. The evidence of the disproportionate intrusion into the Constitution and ECHR rights engaged is cogent and clear. It must be accepted that the degree of specificity in a warrant may vary in accordance with the circumstances in which the warrant is issued, the type of crime involved, the degree of urgency, and the nature of the investigation required. In this case there are the following: first, the relatively specific nature of the background material available to the CCPC, some of it apparently for a year pre-search. This was, at least partially, reflected in the sworn information, but not in the search warrant. There was, then, the unspecific and, apparently unlimited nature of the search warrant itself, including the absence of identification of any reasonably suspected offence or suspected persons. The ICL employees, or their advisors were not enabled to ascertain

anything useful as to the scope or purpose of the projected entry and search. The sworn information was made available only on the 24th November, 2015, thereby preventing any meaningful observations from the legal advisors, until after the legal proceedings commenced. Even then, there was no indication that submissions would be considered or independently adjudicated upon. There was the acceptance in the Defence as to the "high probability" that the search involved seizure of irrelevant material to which the CCPC had no entitlement. The important "keyword concession", on the last day of the High Court hearing, did nothing to avoid the reasonable inference that such a focused form of search could have been arranged for the day of the search. This alteration in position was accompanied by an acknowledgement, for the first time, that some partial duty devolved upon the CCPC to sort through the seized data. But all this is to be seen in the absence of any effective pre or post-search tangible checking process, for irrelevant documentation, to be conducted under judicial supervision, as set out in ECtHR jurisprudence. There was no evidence of pressing need, or urgency, or risk that evidence might be destroyed. The dis-proportionality of the procedure in this case is also confirmed by the extraordinary quantity of material apparently seized, and to be seen in light of the fact that the CCPC has, at all times, maintained that it alone should be the arbiter of what was relevant to its investigation.

120. The order proposed here is not to be understood as requiring that, in entirely different situations, the identification of any one or two of these factors, either alone or together, will necessarily render a search warrant null and void by reason of dis-proportionality in either the constitutional or ECHR sense. Cases must be decided on their own facts. It is the cumulative effect of these many factors which is critical to the constitutional finding in this case, where the established jurisprudence, although valuable, is not directly on point with the facts of this case. For a finding of *ultra vires* under the Constitution, the evidence would have to be very clear, and measured against the rights, duties and interests engaged, and the degree of latitude which necessarily arises. Here the evidence is both cogent and clear. The nature of the procedure, and the subsequent timing of the various alterations in the CCPC's position shows the extent of the original incursion. I would hold the procedures were, are, and remain, *ultra vires*. What was obtained, in purported compliance with the words of s.37 of the Act of 2014, was in breach of the respondents' constitutional and ECHR right to privacy. It was not compatible with the precise requirements of Article 8 ECHR, as applied in the jurisprudence, even having regard to the margin of appreciation to be applied. The facts and circumstances are very different from those which might apply in other categories of case.

Proposed Order

121. The CCPC have appealed the decision of the High Court. For the reasons set out in this judgment, I would dismiss this appeal. I would grant a declaration that the appellant acted *ultra vires* s.37 of the Act of 2014, in breach of the respondents' constitutional right to privacy, and in breach of their rights, under Article 8 of the European Convention on Human Rights. It follows that the appellants did not act in accordance with s.3(1) of the European Convention on Human Rights Act, 2003, which provides that organs of the State shall perform their functions under s.37 of the Act "*in a manner compatible with the State's obligations under the Convention provisions"*. I would grant an injunction restraining the appellants from reviewing or examining any of the material, or any of the data, which were the fruits of this unlawful search.

Judgment of Ms. Justice Laffoy delivered on 29th day of May, 2017

Introduction

1. In this judgment I propose addressing one discrete aspect of the issues which arise on this appeal, namely, the invocation by the respondents, as Plaintiffs in the High Court of

Article 8 of the European Convention on Human Rights ("the Convention") and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ("the Charter"). In particular, I propose considering the manner in which this aspect was dealt with in the judgment of the High Court delivered by Barrett J. ("the trial judge") on 5th April, 2016 ([2016] I.E.H.C. 162), as a pathway to considering the submissions made by both parties in this Court. As the context of the dispute between the parties is an inspection conducted by the appellant ("the Commission") pursuant to the statutory provisions contained in the Competition and Consumer Protection Act 2014 ("the Act of 2014") conferring powers on the Commission for the purpose of obtaining information which may be required in relation to a matter under investigation under the Competition Act 2002 ("the Act of 2002"), for the reason which will be explained later, it is necessary to consider recent relevant case law of the Courts of the European Union cited by the parties on the appeal in some depth. Further, as s. 3 of the European Convention on Human Rights Act 2003 ("the Act of 2003") mandates that every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions, it is also necessary to consider recent jurisprudence of the European Court of Human Rights ("ECtHR") cited by the parties in some depth.

The claims in the proceedings based on the Convention and the Charter

2. The action under appeal was a plenary action in which the respondents were plaintiffs and the Commission was defendant. For convenience, hereafter the respondents will be collectively referred to as "the Respondents" and individually they will be referred to as "CRH", "ICL", and "Mr. Lynch". The action was heard in the High Court on affidavit evidence, some of which appears initially to have been filed in the context of an application by the Respondents for an interlocutory injunction, which was disposed of by an undertaking given by the Commission when that application came before the High Court on the 24th November, 2015. However, Mr. Lynch was cross-examined on behalf of the Commission in the course of the trial. Relying on the factual basis of the proceedings and the content of the relevant statutory provisions as set out in the judgments of Charleton J. and MacMenamin J., it is sufficient for present purposes to summarise the Respondents' invocation of the Convention and the Charter by reference to paragraph 25 of the statement of claim delivered by the Respondents and, in particular, the particulars set out in sub-paras. (f), (i), (j) and (l) thereof. The Respondents, as plaintiffs, claimed that the Commission had acted, and was continuing to act, in breach of the Respondents' rights under Article 8 of the Convention and Article 7 and 8 of the Charter, particularising the breaches as follows:

> "(f) Seizing electronic files within [Mr.] Lynch's 'crh.com' e-mail account which are unrelated to the business and activity of ICL but rather are connected to roles held, past and present, in CRH . . .
>
> (i) Seizing documentation the property of CRH . . . and its subsidiaries which said company was not the subject of the Search Warrant.
>
> (j) Unlawfully interfering with the private life, correspondence and/or home of CRH . . . contrary to Article 8 of the Convention, Articles 7 and 8 of the Charter and Article 40.3 of the Constitution. . . .
>
> (l) Seizing personal e-mails and unlawfully interfering with the private life, correspondence and/or home of [Mr.] Lynch contrary to Article 8 of the Convention, Articles 7 and 8 of the Charter and Article 40.3 of the Constitution."

3. The specific reliefs arising from those allegations, apart from the allegations of breach of Article 40.3 of the Constitution, which the Respondents claimed were:

> (a) a declaration in accordance with s. 3 of the Act of 2003 that the

Commission had acted in contravention of Article 8 of the Convention; and

(b) a declaration that the Commission had acted in breach of Articles 7 and 8 of the Charter.

The Respondents also sought injunctive relief in the following terms:

> "An injunction restraining the [Commission] from assessing, 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 [ICL] at Platin, Drogheda, County Meath."

While the Respondents also sought damages pursuant to s. 3(2) of the Act of 2003, in reality, that remedy was not pursued, because, as the trial judge recorded in the judgment (at para. 33), the Respondents had indicated that it was "issues of principle" that concerned them most and they were far more interested in securing a declaration in the terms set out at (a) above than damages.

4. In its defence the Commission expressly denied that the copying or extraction of the relevant information was contrary to Article 8 of the Convention or Articles 7 and 8 of the Charter.

The judgment of the High Court in relation to those claims

Search/seizure

5. Having stated that what he described as the "dawn raid", in other words, the unannounced inspection, at the premises of ICL at Platin was done pursuant to s. 37 of the Act of 2014, the trial judge (at para. 10 *et seq*.) construed subs. (1) to (3) of s. 37. The trial judge recorded (at para. 2) that the search warrant issued on 12th May, 2015 authorised one or more authorised officers of the Commission to enter and search those premises and to exercise all or any of the powers conferred on an authorised officer under s. 37 of the Act of 2014. The trial judge then observed (at para. 20) that, 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, suggesting that at this point one "enters *terra incognita* (or near-*incognita*)". He pointed out that there is nothing in the Act of 2014 to indicate what ought to be done as regards such material. Before considering the application of Article 8 of the Convention, the trial judge (at para. 23) considered s. 33 of the Act of 2014, which in broad terms saves privileged legal material from seizure or compulsory disclosure, setting out the reason for so doing as that -

> ". . . the process it establishes in respect of legally privileged material informs the type of process that the [Respondents] 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."

The Convention

6. The consideration by the trial judge of the application of the Convention to the Respondents' claims was premised on the Commission having seized material that it had no power to seize, which was logical given the sensible approach adopted by the Commission in its defence. While the Commission stated that, by reason of not having examined the same, it was a stranger to the contents of the e-mail files of Mr. Lynch and, in particular, was a stranger to the plea in the Respondents' statement of claim that a significant portion of the documents in question do not relate to any activity in connection with the business of supplying or distributing goods or providing a service at the premises

of ICL at Platin, the Commission pleaded (at para. 1 of its Defence):

> "For the purpose of these proceedings, however, the [Commission] accepts that as a matter of high probability not all of the e-mails of [Mr. Lynch] will relate to the activity aforesaid."

The trial judge's analysis of the application of the Convention to the circumstances under consideration was immediately preceded by the following statement (at para. 27):

> "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 [Respondents] claim, that certain of their respective fundamental rights stand to be contravened."

7. There follows a comprehensive analysis by the trial judge of the application of the Convention and authorities of the ECtHR to the circumstances before him, the starting point being Article 8, which the Respondents invoke and which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others."

8. The trial judge recorded that it was accepted by all of the parties that the "dawn raid" on the premises at Platin and the copying of records found there can constitute an interference by a public authority with the private life of one or more of the Respondents, so that what he had to determine was whether such interference as had occurred had been done (1) in accordance with law, and (2) is necessary in a democratic society. He then considered those issues by reference to seven decisions of the ECtHR.

9. To put his approach in perspective, it is appropriate to refer to the earliest decision of the ECtHR to which the trial judge referred, that is to say, *Olsson v. Sweden (No 1)* (App. No. 10465/83, 24th March, 1988) ("the *Olsson* case"), although the parties did not attach particular significance to it on the appeal. Having quoted from the judgment as to the meaning of "in accordance with law" in Article 8, the trial judge stated (at para. 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. . . . Where the court does consider a difficulty to arise, . . . 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 [Respondents] 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."

By way of explanation of the last sentence in that quotation, the trial judge had earlier characterised s. 25, which imposes obligations on members of the Commission, its

authorised officers and staff in relation to confidential information, as the "leakiest of sieves". The objective of quoting the passage from the judgment of the trial judge just quoted is to demonstrate where he considered a difficulty to arise under Article 8 of the Convention in relation to the application of s. 37 to the factual position. It is the absence of guidance as to what is to be done after seizure in relation to material which the Commission was not authorised to seize, which he considered to be the source of the difficulty. Later, in his judgment, he made the same point, having quoted from the judgment in the *Olsson* case on the meaning of "necessary in a democratic society" in Article 8.

10. The trial judge reiterated that same point as being the difficulty he perceived to exist in relation to the application of s. 37 following his consideration of the subsequent decisions of the ECtHR to which he referred, namely:

> (a) *Niemetz v. Germany* (1993) 16 EHRR 97, which concerned the search of a lawyer's office.
>
> (b) *Societé Colas v. France* (2004) 39 EHRR 17, which, although, involving a search in a competition law context, the trial judge considered not to be especially pertinent, although he reiterated the difficulty in this case as he perceived it by reference to the decision of the ECtHR in the *Olsson* case, both in the context of what "in accordance with law" means and what is "necessary in a democratic society" under Article 8.
>
> (c) *Robathin v. Austria* (App. No. 30457/06, 3rd July, 2012), ("the *Robathin* case"), which arose from search and seizure of electronic data at a lawyer's office.
>
> (d) *Bernh Larsen Holding AS and others v. Norway* [2013] ECHR 24117/08. ("the *Bernh Larsen* case").
>
> (e) *Delta Pekárny v. Czech Republic* (App. No. 97/11, 2nd October, 2014) ("the *Delta Pekárny* case")
>
> (f) *Vinci Construction v. France* (App. Nos. 63629/10 and 60567/10, 2nd April, 2015) ("the *Vinci* case").

11. In his consideration of all of the foregoing authorities, the trial judge rationalised his concern that there was a breach of Article 8 by reference to what, adopting his phraseology, might be called the *terra incognita* point. With reference to the *Robathin* case, he explicitly found that there was no "general search" in this case of the type which had been condemned by the ECtHR in that case. Indeed, he implicitly accepted that the Commission takes a measured approach to the searches it conducts, "in line with relevant standards adopted by major jurisdictions such as the United Kingdom and the United States". However, he reiterated his concern arising from the *terra incognita* point, posing (at para. 45) the following rhetorical question:

> "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?"

12. Having considered the *Bernh Larsen* case, the trial judge, in essence, returned to the *terra incognita* point, although without using that terminology. Once again (at para. 48) he identified the difficulty as "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". He went on to outline the respective positions of the parties in the High Court as follows:

> "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 [Respondents] 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."

That last sentence, in my view, may be regarded as the *ratio decidendi* of the trial judge's decision on the Article 8 issue. Later, in giving an overview of his conclusions (at para. 75), the trial judge, in essence, reiterated those respective positions and his concurrence with the Respondents' position.

13. The trial judge's commentary following his consideration of the decision in the *Delta Pekárny* case gives additional insight into his thinking. Having stated that the ECtHR had found that the contested inspection in that case had infringed the right to inviolability of the business premises in question, because the inspection was not open to effective prior or subsequent oversight, he stated (at para. 50) that there is certainly effective prior judicial oversight in this case, although questioning the availability of subsequent judicial oversight. He referred to the financial cost of the proceedings before him as "being enormous and certainly beyond the reach of many, if not most, people who would be subject to a 'dawn raid'". Having stated that "a purportedly general remedy that is available to the privileged few and not the less privileged many" is not an effective remedy, the trial judge went on to state (at para. 50):

> "Moreover, as will be seen from the reliefs that the court grants later below, while the [Respondents] 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 [Respondents] in these proceedings."

Later in the judgment, having considered the decision of the ECtHR in the *Vinci* case, and having referred to the Commission's contention that the High Court, by way of the application then before it, "was satisfying the requirement as to effective post-search oversight which the European Court of Human Rights apprehends in [the *Vinci* case]", the trial judge (at para. 55) referred to what he had already stated in the context of his consideration of the *Delta Pekárny* case on why, in his view, "there is not, in truth, effective and available post-'raid' judicial oversight".

The Charter

14. Turning to the invocation of the Charter by the Respondents, the trial judge disposed of the arguments advanced by the Respondents that their rights under the Charter would be violated, if the Commission should get to review documents in its possession but which it was not entitled to possess, on the basis that Article 51 of the Charter provides that the provisions of the Charter "are addressed to the . . . Member States only when they are implementing Union law". Further, he expressed the view (at para. 56) that, in this case, s. 37 is not to be viewed "as a statutory provision that is implementing European Union law". He concluded that no argument as to the contravention of the Charter could succeed.

Reliefs granted by the High Court

15. In relation to the manner in which the trial judge addressed the reliefs which the Respondents had sought, the position is as follows in relation to the specific reliefs outlined earlier. No declaration was made that the Commission had been in breach of Articles 7 or 8 of the Charter. As regards the declaration sought that, in accordance with

s. 3 of the Act of 2003, the Commission had acted in contravention of Article 8, the trial judge stated as follows (at para. 77):

> "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."

As regards the claim for injunctive relief, the trial judge reiterated his views as to what the Commission was entitled by law to do when conducting the "dawn raid" at the premises at Platin by reference to the provisions of s. 37. He then stated (at para. 77):

> "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."

Earlier, the trial judge, in giving an overview of his conclusions, had stated (at para. 75):

> ". . . 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 [Respondents] in this case."

The relevant provisions of the order of the High Court appealed against

16. The conclusions of the trial judge were incorporated in an order of the High Court made on 26th April, 2016 and perfected on 6th May, 2016. So far as is relevant to the issues being considered in this judgment, the curial part of the order which reflects the conclusions which have been outlined above contain the following:

> (a) a declaration that "were the [Commission] to access, review or make us of the Electronic Documents, this would involve: in accordance with s. 3 of the [Act of 2003], a contravention of Article 8 of the [Convention] . . .";
>
> (b) an order that the Commission "be restrained from accessing, reviewing or making any use whatsoever of the Electronic Documents".

The order of the High Court did not record that the declaration sought by the Respondents that the Commission had acted in breach of Articles 7 and 8 of the Charter had not been granted.

The appeal

17. The Commission was granted leave to appeal pursuant to Article 34.5.4° of the Constitution directly from the High Court to this Court on all grounds identified in section 6 of the application for leave by a determination dated 27th June, 2016 ([2016] I.E.S.C.D.E.T. 86). The ground relevant to the remaining issue which is being considered in this judgment is that the High Court erred in holding that there would be a contravention of the right to privacy under Article 8 of the Convention "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". The order which the Commission seeks is an order setting aside the judgment and order of the High Court.

18. The Respondents did not seek leave to cross-appeal in relation to the decision of the trial judge that a declaration sought that the Commission had acted in breach of Articles 7

and 8 of the Charter should not be granted, nor did they seek leave to cross-appeal the limited nature of the declaratory and injunctive reliefs granted by him in relation to the application of Article 8 of the Convention. Accordingly, this judgment will address whether the trial judge was correct in granting the relief he granted on the basis that there would be a contravention of the right to privacy under Article 8 of the Convention in the particular future circumstance he identified and to which the reliefs he granted were tailored, which will be referred to as the Article 8 issue.

Analysis of/discussion on respective positions of the parties on the appeal on the Article 8 issue

Convention: the approach of the Commission

19. On the appeal, the Commission argued that the High Court erred in finding a breach of the right to privacy in Article 8 of the Convention. That argument was preceded by the Commission's submission that the High Court erred in failing to give a full and proper interpretation of s. 37 of the Act of 2014. In those submissions, the Commission referred to the numerous occasions on which the trial judge characterised the absence of any explicit regulation of the manner in which relevant material was to be disentangled from irrelevant material seized as *terra incognita*. It was suggested that the trial judge considered that absence as being some kind of legislative oversight, whereas, it was suggested, he should have appreciated that such absence was due to such regulated procedure not being legally required. In order to put that argument in context, it is appropriate to record that it was preceded by consideration of two further grounds on which the Commission alleged the trial judge erred, which reflected the Commission's perspective as to the principal issues which fall to be determined on the appeal. The first is the correct interpretation of s. 37 of the Act of 2014, arising from the Commission's contention that the trial judge erred in law in failing to give a full and proper interpretation of s. 37. The second is whether, as contended on behalf of the Commission, the trial judge erred in considering that a process similar to that provided for in s. 33 in relation to privileged legal material ought to be deployed to distinguish relevant material from irrelevant material.

20. In submitting that the trial judge erred in finding that it had been in breach of Article 8, the Commission makes it clear that it is not contending that the Respondents do not have a legitimate interest in the confidentiality and privacy of communications, nor is it contended that the search and seizure of the e-mail account of Mr. Lynch did not amount to an interference with any established rights to privacy. The position of the Commission is that the trial judge failed to properly apply to the Commission, as a public authority, the criteria which arise from Article 8(2), which has been quoted earlier. Underlying that is the contention that the trial judge was wrong in his interpretation of s. 37 in apparently concluding, incorrectly, that the search and seizure was not in accordance with law. More relevant for present purposes is the Commission's reading of the trial judge's judgment as concluding that the search and seizure was disproportionate, which view, it is submitted, is not supported by the authorities. It is submitted that different levels of interference with rights under Article 8 of the Convention are tolerated and considered lawful, depending on whether the interference is with private or commercial interests, and whether it is in relation to individuals or undertakings. In the factual scenario in this case, it is submitted that a higher level of interference is lawful as regards the rights of CRH and ICL, which are undertakings, as compared to the rights of Mr. Lynch. However, the Commission emphasises that, although Mr. Lynch is an individual, he was acting in a commercial capacity rather than a private one and, as such, a higher level of interference with his rights under Article 8 is tolerated than if he were acting in a private capacity. It is suggested that the trial judge failed to apply the important distinction between interference with business premises, business transactions and undertakings, on the one hand, and private premises, private communications and individuals, on the other hand, a

greater level of legitimate interference being tolerated in relation to the former.

Convention: the approach of the Respondents

21. One aspect of the factual background which emerges as being of particular significance to the submissions being made on behalf of the Respondents is the manner in which, on 14th May, 2015, the Commission accessed and removed electronic files being the property of CRH and of Mr. Lynch (being his 'crh.com' e-mail account). The relevant data was stored offsite in a data centre which was hosted by Fujitsu (Ireland) Limited ("Fujitsu"). ICL co-operated with the Commission, which was given access to e-mail files and associated network files of various employees of CRH and ICL, including Mr. Lynch. Access was given via ICL's network access and the data was copied on to the ICL computers at Platin. Subsequently, forensic copies of the electronic material which became available were made by the Commission. The Respondents' position is that the copying of material the property of CRH and of Mr. Lynch, which the Commission compelled to be brought on to the premises at Platin, was an interference with the private life, correspondence and home of CRH and of Mr. Lynch.

22. Further, counsel for the Respondents contend that the manner in which the Commission obtained access to material owned by Mr. Lynch and CRH which was irrelevant to the investigation it was conducting was not consistent with s. 3 of the Act of 2003 and Article 8. It is contended that the Commission compelled the transfer of the e-mails from Fujitsu to ICL without any search, following which the e-mails were copied en masse, including e-mails which were not relevant to the investigation the subject of the search warrant, which materials are variously referred to as "irrelevant" or as "out of scope". Those e-mails were then removed by the Commission from ICL's premises to be searched by it at a later stage. Arising from the foregoing facts, the real issue is identified by counsel for the Respondents as being whether the Commission was authorised to do what it did, pointing to a range of matters which affect that issue: that what was proposed by the Commission was an unfettered review of the out of scope material; that there is no judicial remedy; and that there is no protection in relation to the out of scope material other than such as is afforded by s. 25 of the Act of 2014. Those matters, it is suggested, also all go to the issue of proportionality.

23. It is implicit in the submissions made on behalf of the Respondents that this Court should not get comfort from an averment in an affidavit of James Plunkett, the ICT Manager of the Commission, which was sworn on 29th January, 2016, to the effect that the approach adopted by the Commission through its digital forensic seizure of data and examinations is guided by that set out in a document entitled "*ACPO Good Practice Guide for Digital Evidence*" published in March 2012 by the Association of Chief Police Officers in the United Kingdom. In particular, the Court's attention was drawn to the fact that the document in question refers to the search and seizure of "bulk items", which is subject to the provisions of a statute in force in the United Kingdom, the Criminal Justice & Police Act 2001, with particular reference to ss. 50(1) and (2) of that Act. The Court's attention was also drawn to the fact that s. 50 is a provision which creates additional powers of seizure in the United Kingdom legislation, of which there is no analogue here in the Act of 2014 or other legislation, as is the case in relation to certain other aspects of the United Kingdom legislation adverted to by counsel for the Respondents. The Respondents' position is that, in the absence of such legislative powers in this jurisdiction, the Commission did not have power to do what it did at Platin on 14th May, 2015 and what it did was not in accordance with law.

24. In elaborating on that proposition, counsel for the Respondents drew the Court's attention to some of those additional powers contained in the United Kingdom legislation. First, for those additional powers, including the power to remove material from the premises, to apply in the United Kingdom, there is a requirement in s. 50(2)(c) that "in all

the circumstances it is not reasonably practicable for seizable property to be separated, on those premises, from that in which it is comprised". Secondly, subs. (3) of s. 50 outlines the factors to be taken into account in considering whether or not the "reasonably practicable" test has been met. Finally, s. 53 imposes duties on the searcher, including the following: to carry out the initial examination as soon as reasonably practicable after the seizure; until such initial examination, to ensure that the seized property is kept separate from anything seized under any other power; to have due regard to the desirability of allowing the person from whom it was seized, or a person with an interest in the property, an opportunity to be present or represented at the examination; and to ensure that the property which it is not entitled to retain is returned as soon as reasonably practicable after the examination of all the seized property has been completed. On the hearing of the appeal, it was suggested on behalf of the Respondents that, even if the Act of 2014 contained provisions equivalent to ss. 50 and 53, they would not have assisted the Commission in that it could not be demonstrated that it was not reasonably practicable during the search at Platin to sift the seizable material from the out of scope material. It is appropriate to observe that this position appears to represent a shift in approach on the part of the Respondents, having regard to the fact that it was averred in an affidavit sworn on 10th February, 2006 by Richard Ryan (Mr. Ryan), a solicitor in Arthur Cox, the solicitors representing the Respondents, who was present at the inspection at the premises in Platin, that "it would have been impractical to carry out a review . . . during the search" of data outside the scope of the search warrant, and also having regard to the position adopted in the letter dated 31st August, 2015 from Arthur Cox referred to later. Accordingly, little weight can be attached to that suggestion.

25. Another factual circumstance which it is suggested goes to the issue of proportionality in this case is that it was at a very late stage in the judicial process that it was first suggested by the Commission that the data seized would not be the subject of a document by document review but that instead it would be subject to a word search to ensure that only documents falling within the search terms are reviewed. This suggestion was made in the second affidavit sworn by Harry O'Rahilly, an authorised officer of the Commission, on 15th March, 2016, the third day of the hearing in the High Court. That approach, it is now suggested on behalf of the Respondents, could have been adopted on the site at Platin in a planned search inspection. Another suggestion made on behalf of the Commission on the hearing of the appeal, that following the word search the out of scope data could be made invisible to the authorised officers, came at an even later stage in the judicial process. Neither suggestion has been pursued by the Commission.

26. That shift in position of the Commission prompts one to ask what was the kernel of the dispute between the parties when the plenary proceedings were initiated and what is the position now. The Respondents co-operated with the Commission in the course of the inspection and did not resist the removal by the Commission of the electronic data removed from the premises of ICL at Platin on 14th May, 2015. Moreover, the Respondents have always acknowledged that much of the electronic data which was seized on that occasion came within the scope of the search warrant. On the other hand, as has been recorded earlier (in para. 6), for the purposes of these proceedings, the Commission accepts that as a matter of high probability not all of the e-mails of Mr. Lynch will relate to the activity under investigation and, thus, are outside the scope of the search warrant. From the outset the Respondents' objective was to save the electronic data seized by the Commission which was unrelated to the activity under investigation from inspection by the Commission. How it sought to achieve that objective will be considered later. That is still its objective. It is against that background that the application of Article 8 of the Convention and the jurisprudence of the ECtHR and the CJEU to the Respondents' claim against the Commission will be considered. In short, the factual underlay and the respective positions adopted by the parties have narrowed the Article 8 issue considerably.

Judgments of the ECtHR

27. In relation to the authorities relied on by the trial judge, the Commission attaches most significance to the decision of the ECtHR in the *Bernh Larsen* case, whereas the Respondents rely on the decisions in the *Delta Pekárny* case and the *Vinci* case and also on two decisions of the Court of Justice of the European Union.

28. On 3rd May, 2017, the day before judgments were to be delivered by the Court on this appeal, this Court was informed by the solicitor for the Commission of a recent decision of the ECtHR: *Janssen Cilag SAS v. France* (Application No. 33931/12) (the *Janssen* case), in which judgment was delivered on 21st March, 2017 by a committee of the ECtHR composed of three judges. It was suggested on behalf of the Commission that it was appropriate to draw this Court's attention to that decision having regard to its subject matter and to the consideration by this Court of previous case law of the ECtHR, in particular, the decision in the Vinci case. The Court heard submissions from counsel for the Commission and counsel for the Respondents in relation to the *Janssen* decision on 4th May, 2017. Since then, the Court has received an unofficial translation of the judgment in the Janssen case, which will be considered.

Bernh Larsen

29. The Commission contends that the trial judge was wrong to conclude that the decision in the *Bernh Larsen* case did not sufficiently support the Commission's case that there was no violation of Article 8. In particular, the Commission seeks to demonstrate that there is a material similarity between the facts here and the facts in the Bernh Larsen case, where the public authority in question, a Norwegian tax authority, sought access to and the taking of a full copy of all data contained on a server, which was owned by a separate company and on which several other companies saved their data, which necessarily involved copying materials belonging to other companies, including confidential information, private materials belonging to employees of Bernh Larsen and other companies, and much irrelevant material. The purpose of the search and copying was to find out if Bernh Larsen was in possession of documents that were necessary for a tax audit. In its judgment (at para. 132) the ECtHR accepted the finding of the Norwegian Supreme Court that the archives at issue were not clearly separated but were so-called "mixed archives", so that it could reasonably have been foreseen that the tax authorities should not have had to rely on the tax subjects' own indications of where to find the relevant material, but should have been able to access all data on the server in order to appraise the matter for themselves. In the light of that, it was stated (at para. 133) that the national authorities' and courts' interpretation and application of the relevant statutory provision "as a provision authorising the taking of a backup copy of the server with a view to inspection at the tax authorities' premises were reasonably foreseeable by the applicant companies in the circumstances". The ECtHR then stated (at para. 134) that it was:

> ". . . satisfied that the law in question was accessible and also sufficiently precise and foreseeable to meet the quality requirement in accordance with the autonomous notion of 'lawfulness' under para 2 of art 8."

30. The Commission submits that, by analogy, what it suggests is the proper interpretation of s. 37 is accessible, precise and reasonably foreseeable. On that interpretation, it is submitted that it is clear that the power to search and seize records in the investigation being conducted was circumscribed in accordance with its provisions and the Commission did not have an unfettered discretion. The similarity in this case to the facts in the *Bernh Larsen* case, which the Commission by implication identifies is that, at the time of the search, Mr. Lynch, as an employee of CRH and as, or having been, an employee of ICL, and holding one e-mail account in which materials relating to both roles were stored, as well as private e-mails, held an e-mail account which constituted a

"mixed" record. That being the case, it is submitted that it should have been reasonably foreseeable that the Commission, having formed the opinion that there were reasonable grounds for believing that the e-mail account during the relevant period contained information which, in the words of s. 37(1), "may be required in relation to" matters under investigation by it, should have access to the record to obtain the information relative to the investigation. Paraphrasing the terminology used by the ECtHR in the *Bernh Larsen* case (at para. 132), it is submitted that the Commission should not have had to rely on the Respondents' indications of where to find the relevant material, but should have been able to access the relevant data in the "mixed record" in order to appraise the matter for itself.

31. The position of the Respondents in relation to the Commission's reliance on the decision of the ECtHR in the *Bernh Larsen* case is that it is distinguishable on a number of bases. Most importantly, the only penalties at issue in the *Bernh Larsen* case were administrative and it did not concern, as here, a search and seizure with potential criminal consequences. This distinction was specifically highlighted in the judgment of the ECtHR (at para. 173) where it was observed that -

> ". . . the nature of the interference complained of was not of the same seriousness and degree as is ordinarily the case of search and seizure carried out under criminal law, the type of measures considered by the Court in a number of previous cases (see, for instance, the following cases cited above: . . . *Niemietz; Societé Colas Est;* . . . and also *Robathin v. Austria* . . .)".

Counsel for the Respondents also point to distinguishing features outlined in the commentary on the *Bernh Larsen* case in a recent academic article (de Jong &Wesseling "EU competition authorities' powers to gather and inspect digital evidence - striking a new balance", (2016) 37(8) E.C.L.R. 325-334), where the authors state (at p. 331):

> "In *Bernh Larsen Holding*, the ECtHR ruled that the taking of a mirror copy of a computer server is a particularly far-reaching interference with the principle of proportionality. For this interference to be lawful it will need to be accompanied by effective and adequate safeguards against abuse. In *Bernh Larsen Holding* this was the case: the authorities followed the sealed envelope-procedure when securing digital data, the company had a right to complain and a representative of the company was invited for the review of the data by the authority."

None of those safeguards are present in this case. Nor is a further safeguard, which was present in the *Bernh Larsen* case and to which counsel for the Respondents point as distinguishing it from this case, and which is identified by the ECtHR (at para. 171), where it is stated:

> "[A]fter the review had been completed, the copy would either be deleted or destroyed and all traces of the contents would be deleted from the tax authorities' computers and storage devices".

In the light of all of the foregoing distinguishing features, it is submitted that it is not the case that the decision in the *Bernh Larsen* case can be regarded as being authority for the position of the Commission that there has not been a violation of Article 8 in this case. That submission is correct. Having regard to what happened during and following the inspection at Platin, effective and adequate steps were not taken to safeguard the Respondents, in particular, Mr. Lynch and CRH, from abusive interference with their Article 8 rights.

32. It is appropriate to record that, in general, the response of the Commission to the suggestion by the Respondents that the law here lacks effective and adequate safeguards is that s. 37 provides a substantial degree of judicial oversight in requiring that, before an inspection, a warrant be issued by the District Court on foot of evidence on affidavit, and by the judge of the District Court being empowered to specify which of the statutory powers may be exercised in the course of the search. In addition, issues in relation to the validity of the warrant or to the legality of the search conducted pursuant to the warrant

are matters which may be the subject of a subsequent legal challenge, and such challenge could be by way of judicial review, or by way of plenary action, as happened in this case, or could be raised in any subsequent trial. It is suggested that the fact of the existence of a review procedure means that there is sufficient oversight and it is irrelevant that the parties seeking to avail of it would require significant resources.

Delta Pekárny

33. While, in support of their contention that there has been a breach of the Respondents' Article 8 rights, the Respondents contend that their argument is supported by all of the authorities cited in the judgment of the High Court, as noted earlier, they attach most significance to the two most recent decisions of the ECtHR cited by the trial judge: the *Delta Pekárny* case and the *Vinci* case. There is no official English translation of either of those judgments and this Court is relying on an unofficial translation in relation to each.

34. The claim in the *Delta Pekárny* case arose from the imposition by the National Competition Authority in the Czech Republic of a fine on Delta Pekárny for obstructing an investigation being carried out by it, for not allowing it to examine all the electronic data of a business nature in its premises, and for obstructing the inspection of documents which *Delta Pekárny* contended were private correspondence and unrelated to the subject of the administrative procedure. It is convenient, before outlining the Commission's view on the relevance of this decision of the ECtHR, to quote from the last three paragraphs of the majority judgment (paras. 92 to 94), where it was stated:

"92. It is true that the inspection in dispute was conducted in the presence of the Applicant's representatives . . ., that the Authority was not allowed to seize documents and was only given copies . . . and that its officers were bound by the obligation of confidentiality . . .. However, the Court considers that without prior authorisation of a judge, an effective review *ex post facto* of the need for the measure in dispute and regulation governing the possible destruction of the copies obtained . . ., these procedural safeguards were not sufficient to prevent the risk of abuse of power by the Competition Authority . . ..

93. These elements are sufficient for the Court to conclude that, as happened in this case, the judicial review *ex post facto* did not provide the Applicant with sufficient safeguards against arbitrariness, so that the interference with its rights cannot be considered to be proportionate to the legitimate purpose sought.

94. There has therefore been an infringement of Article 8 of the Convention."

35. Counsel for the Commission seek to distinguish the *Delta Pekárny* case on the basis that the principal ground upon which the ECtHR found that the Czech Competition Authority's search of a company's premises was unlawful was that the inspection had been based, not on a formal decision which would have been the subject to judicial supervision, but merely on a general reference to the relevant statutory provisions. It is suggested that a further ground was that there was no *ex post facto* judicial review. It is in this context that it is submitted by the Commission that, insofar as the trial judge held that the review of the search and seizure conducted by the Commission did not constitute effective *ex post facto* judicial review, the judgment of the High Court is fundamentally flawed because, as recorded earlier in para. 32, the position of the Commission is that there is a judicial procedure in this jurisdiction for reviewing search and seizure decisions.

Vinci

36. In the *Vinci* case the relevant French Competition Authority did obtain a decision from a French court authorising it to carry out certain searches and seizures at the premises of

several companies in connection with an investigation into prohibited anti-competitive agreements and practices. The premises of the applicant companies were searched approximately three weeks later and numerous documents and computer files and all e-mails of certain employees of the applicant companies were seized. The applicant companies pursued proceedings at national level, first in the court which had authorised the searches, for an order that the searches and seizures were invalid, pointing out that the seizures were undifferentiated and mass seizures carried out in respect of several thousand computer documents and of several employees' e-mails. A large number of the seized documents it was contended had no connection with the investigation or were protected by the privilege of confidentiality between lawyer and client. Further, it was contended that the seizures were undertaken without a sufficiently precise inventory of seized documents being drawn up. That application was dismissed and an appeal to the Court of Cassation was rejected.

37. The Respondents' position is that the specific interest of the decision in the *Vinci* case for present purpose lies mostly in the finding by the ECtHR of a violation of Article 8 of the Convention due to the seizure by the French Competition Authority of the entire e-mail inboxes of the persons concerned. It is true that the ECtHR did conclude that, in accordance with its case law, the measures in question constituted an infringement of the rights guaranteed by Article 8 of the Convention. However, the infringement was in accordance with law. The interference was both in the interest of "the economic wellbeing of the country" and "preventing crime". That narrowed the application of the relevant principles down to whether the infringement appeared to be proportionate and might be considered necessary to the pursuit of those objectives. The ECtHR concluded that the searches "in themselves" did not appear disproportionate with regard to the requirements of Article 8, but identified the question raised more specifically by the case as relating to the safeguards provided in the national law and formulated the question as follows (at para. 75):

> ". . . whether these safeguards were not theoretically and unrealistically applied, but actually and effectively applied, particularly in view of the large number of computer documents and e-mails that were seized, and the greater requirement of respect for the confidentiality of correspondence between lawyer and client."

In addressing that question, the ECtHR rejected many of the arguments advanced on behalf of the applicant companies. For instance, it concluded (at para. 76) that the seizures could not be considered "mass and undifferentiated". However it went on to note that it had found that the seizures were carried out in respect of a large number of computer documents, including all professional e-mails of some of the applicants' employees. It noted that the fact that those documents and e-mails included files and information protected by the confidentiality of the lawyer and client relationship was not in dispute and that the French Competition Authority had indicated that it did not object to the restitution of items protected by professional secrecy. Of course, in this case, because of the protection afforded by s. 33 of the Act of 2014 in relation to legal professional privilege, the Respondents do not have to rely on such a concession being made by the Commission.

38. For present purposes, the core of the decision of the ECtHR is to be found in para. 78 of the judgment, where it stated:

> "The Court then observed that, during the conduct of the operations, the Applicants were unable to take note of the content of the seized documents or to discuss the need for them to be seized. However, in the Court's opinion, unless they were able to prevent the seizure of documents that were unrelated to the investigation or those that were in principle protected by the confidentiality of the lawyer and client relationship, the Applicants

> had to be able to ensure that the lawfulness of the seizures could be actually and effectively reviewed after they took place. An appeal such as the one available pursuant [to the French Code], should, if appropriate enable them to obtain restitution of the relevant documents or the assurance that these have been [completely] erased, in the case of computer files."

From the perspective of the Respondents, the reference to "the seizure of documents that were unrelated to the investigation" is of particular significance, the Respondents' case being that the Commission seized documents belonging to CRH and to Mr. Lynch that were unrelated to the investigation which the Commission was conducting and in respect of which the search warrant had been issued.

39. The ECtHR then went on to identify the flaw in the French legal process which led to the conclusion that there had been a breach of Article 8. While the applicant companies had exercised their right of appeal to the French court which had authorised the French Competition Authority to conduct the searches and seizures in issue, it was stated (at para. 79) that that court -

> ". . . contemplating the possibility that the documents retained by the investigators may include correspondence from a lawyer, was content to assess the lawfulness of the context in which the items were seized, without undertaking the necessary examination."

What the judge should have done was outlined in general terms in the preceding sentence, where it was stated:

> ". . . the court considers that it is for the judge who is considering the reasoned allegations that precisely identified documents have been seized despite the lack of connection with the investigation or that they are protected by confidentiality of the lawyer - client relationship, to determine what will happen to these documents after reviewing their proportionality and to order their restitution, as appropriate."

It was on that basis that the Court found that the seizures carried out at the applicant companies' premises were, in the circumstances of the case, disproportionate to the purpose and that there had been a breach of Article 8 of the Convention. While the issue raised by the applicant companies in the *Vinci* case concerned the seizure of information covered by legal professional privilege, as is clear from paras. 78 and 79 of its judgment, the ECtHR regarded the seizure of material unconnected to the investigation as requiring safeguards similar to those required in relation to the seizure of legally privileged material in order to meet the proportionality requirement of Article 8.

40. It is interesting to note that in the judgment in the *Vinci* case the ECtHR, in addition to considering the domestic law in France, considered European Union law and practice. On European Union law, it considered the practice of the EU Commission on inspections and seizures ordered pursuant to Article 20(4) of Regulation No. 1/2003, referred to later. Of particular relevance for present purposes is that it quoted (at para. 27) from a judgment of the General Court of the European Union dated 14th November, 2012 in Case T - 140/09, which, although it is not named in the translation of the judgment before this Court, was *Prysmian and Prysmian Cavi e Sistemi Energia v. The Commission* (the *Prysmian* case). The portion of the ruling of the General Court quoted, referred to as being points 62 and 63, is obviously replicated in the judgment of the General Court, which was delivered on the same day, in the *Nexans* case referred to later, where it is stated:

> "64. . . . when the [EU] Commission carries out an inspection at the premises of an undertaking under Article 20(4) of Regulation No. 1/2003, it is required to restrict its searches to the activities of that undertaking relating to the sectors indicated in the decision ordering the inspection and accordingly, once it has found, after examination, that a document or other item of information does not relate to those activities, to refrain from using

that document or item of information for the purposes of its investigation.

> 65. . . . if the [EU] Commission were not subject to that restriction it would in practice be able, every time it had indicia suggesting that an undertaking has infringed the competition rules in a specific field of its activities, to carry out an inspection covering all those activities, with the ultimate aim of detecting any infringement of those rules which might have been committed by that undertaking. That is incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society."

41. Further, in considering the practice of the EU Commission on inspections, the ECtHR referred to and summarised the content of a revised note published on 18th March, 2013 by the EU Commission entitled "Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No. 1/2003" as to how the investigations of the EU Commission should proceed, which will be referred to as "the Explanatory Note" when considered later.

42. The references by the ECtHR to the judgment of the General Court in the *Prysmian* case and to the Explanatory Note highlight the connection between the jurisprudence of the courts of the European Union and the ECtHR in relation to searches and, in particular, searches and seizures in the context of the application of competition law. Counsel for the Commission put before this Court a document entitled "ECN Recommendation on the power to collect digital evidence, including by forensic means", which will be referred to as "the ECN Recommendation" when considered later. "ECN" is an abbreviation of the European Competition Network. A disclaimer at the foot of the document makes it clear that it does not create any legal rights or obligations or give rise to legitimate expectations on the part of any undertaking or third party. Nonetheless, its importance is that it highlights the connection between the jurisprudence of the two regimes, the Convention, and EU law, and also with the relevant national law. In paragraph 6 it is stated:

> "The exercise of the powers outlined in this Recommendation should be in accordance with the general principles of EU law (such as the principle of proportionality, respect for the rights of defence and legal certainty), the rules and principles of international law, as well as the observance of fundamental rights, including those enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights where applicable. Such safeguards should also include the respect of the relevant legislation and case law on Legal Professional Privilege and the processing of personal data, as interpreted under the law of the respective ECN jurisdiction."

While the ECN Recommendation (at para. 9) emphasises the importance that the effectiveness and efficiency of the procedures for gathering digital evidence is ensured and, in particular, the desirability of a National Competition Authority having a "continued inspection procedure", nothing in it regulates the rights and obligations of the Commission to the Respondents or vice versa in the circumstances of this case. It does, however, provide guidance.

43. The interpretation by counsel for the Commission of the judgment of the ECtHR in the *Vinci* case, based on the last sentence in para. 78 of the judgment quoted earlier, is that the ECtHR concluded that, if the remedy under the French Code had been properly applied by the judge, there would have been no problem, but it was not so applied. It is commented that, significantly, the judgment of the ECtHR says nothing whatsoever about whether a national authority is empowered to undertake the preliminary step of the seizure and review of documents, in circumstances where that search and seizure is an absolutely necessary step in the process of seizing and reviewing records containing

information which may be required in relation to the matter under investigation by that authority. As I understand it, that observation embodies the assumption that the national authority is so empowered and that it may then either facilitate the recovery or the deletion of the documents in question, which it is suggested was anticipated by the ECtHR in *Vinci*, presumably, by reference to the last sentence in para. 78. If that amounts to a concession on the part of the Commission very little weight can be attached to it, as the Commission, as will be demonstrated later, unequivocally rejected the process proposed by the solicitors for the Respondents for identifying the unrelated digital material which had been seized by it and the various steps proposed to protect the right of privacy of CRH and Mr. Lynch under Article 8.

Janssen

44. The similarity between *Janssen* and *Vinci* is that in both cases the inspections and seizures at the premises of the relevant applicants were authorised by a French court, in particular, pursuant to Article L. 450 - 4 of the French Commercial Code. Approximately two weeks after the search of the premises of Janssen by the French Competition Authority, it applied to a different French court for the inspections and seizures to be declared invalid. In the unofficial translation of the judgment of the ECtHR that was provided to the Court the ECtHR recorded (at para. 6) that the French court annulled the seizure of three files in respect of which neither the inventory nor the report drawn up by the investigators provided a means for checking that the files contained documents relating to the authorisation which had been granted. In paragraph 7 of the judgment, the ECtHR outlined a factual scenario to which counsel for the Commission attach significance. It is stated:

> "However, the judge declared the remainder of the inspections and seizures lawful. Concerning the seizure of documents covered by the secrecy of correspondence, the Court held as follows: that the sole fact that part only of a mailbox may contain elements falling within the scope of the court authorisation is sufficient for the seizure to be valid in its entirety, and the seizure of documents that are personal or extraneous to the operation should not invalidate such seizure; that a DVD containing a copy of all the electronic documents, which were then seized and placed under seal, had immediately be given to the Applicant; and that the absence of any precise identification by the Applicant of a protected document, a mere reading of the names of the seized documents did not reveal that they obviously contained protected elements; that the Applicant had not indicated the number of protected documents, this time in hard copy, even though this could be constituted evidence of a failure by the authority both in the discharge of its duty of loyalty and in the alleged lack of proportion between means deployed and the necessary protection of fundamental rights; that, as such, it was for the Applicant and other interested persons to identify the documents that they considered to be protected by the secrecy of private correspondence or legal professional privilege, or to be outside the scope of the authorisation, and to request their return from the authority. The judge then confirmed to the authority his agreement to the return of those documents."

It would seem that the national judge in *Janssen* did what the ECtHR in *Vinci* considered should have been done by the national court in that case, as recorded earlier at para. 39. An appeal by Janssen to the Court of Cassation was rejected.

45. On the basis of the foregoing factual situation, the ECtHR considered the claim based on Article 8 of the Convention. As happened in *Vinci*, the Court considered that the inspections and seizures constituted an interference with the rights guaranteed by Article 8, but that such interference was "in accordance with law" and that it had a legitimate

purpose. The Court also recorded (at para. 19) that in *Vinci* it was highlighted that, where a judge hears allegations that precisely identify documents have been seized despite being unconnected to the investigation or covered by the confidentiality of lawyer and client relations, it is for the judge to determine what is to happen to such documents, following an effective review as to proportionality and, as the case may be, order their restitution. The ECtHR found that the French judge at first instance not only effectively examined Janssen's allegations, but also expressly pointed out the absence of any precise identification by Janssen of a protected document or even an indication as to the number of protected documents, even though this could have provided an indication of a failing on the part of the Competition Authority in discharging its duty of loyalty and in the alleged disproportion between the means implemented and the necessary protection of fundamental rights. The ECtHR went on to say (at para. 23):

> "The Court therefore notes that in this instance, unlike the case in *Vinci* . . ., the domestic judge, . . . having declared that the seizure of three files was invalid . . ., effectively undertook a review of proportionality as required by the provisions of Article 8 of the Convention, on the one hand, whereas the Applicant, on the other hand, had not referred to it the allegations that the documents which it had precisely identified were wrongly seized. The Court notes furthermore that it remained possible for the Applicant to identify the documents in dispute in order to then claim their restitution by the authority, and the judge even noted his approval in his order to this effect. In this regard, the Court points out that an application such as the one available under Article L. 450 - 4 . . . allows for restitution where appropriate of the relevant documents or the guarantee that they will be deleted in full in case of copies of computer files (*Vinci* . . . para. 78). It follows from these elements, that in this instance, the safeguards were practically and effectively applied, and were not just theoretical and illusory."

On the foregoing basis, the ECtHR considered that the application under Article 8 was unfounded and must be rejected.

46. Counsel for the Commission emphasise that in *Janssen* the applicant had not identified any protected documents which it contended had been wrongly seized, that is to say, any particular documents which interfered with private rights. It is suggested that the position is the same in this case in that the Respondents had not precisely identified the documents which they alleged were wrongly removed from the Respondents' premises at Platin. Counsel for the Respondents, on the other hand, in reliance on para. 23 of the judgment, point out that it had been found that Article 8 had been complied with. There had been a review by the French judge which was proportional. There was a return of documents. The procedure under the French Code provided for the return of unrelated documents. Counsel for the Respondents submit that the provisions of the French Code are the material point of difference between the *Janssen* case and this case. It is suggested that the process under French law at issue in *Janssen* guaranteed the conduct of a concrete review.

Judgments of the Court of Justice of the European Union

47. In the context of their submissions on the application of Article 8 of the Convention to this case, counsel for the Respondents refer to the practice of the EU Commission during "dawn raids" and the relevant judgments of the Court of Justice of the European Union ("CJEU"), stating that in the High Court they referred the Court to these matters, although they are not alluded to in the judgment of the High Court. The powers being exercised by the EU Commission considered in the authorities on which the Respondents rely are the powers conferred by Article 20 of Council Regulation (EC No. 1/2003) of 16 December, 2002 on the implementation of the rules on competition laid down in Articles

81 and 82 of the Treaty ("the 2003 Regulation"). The 2003 Regulation now regulates the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). The authorities on which the Respondents rely are:

> (a) the judgment of the CJEU in *Nexans SA v. Commission* (C - 37/13P) EU: C: 2014:2030; [2014] 5 C.M.L.R. 13 ("the *Nexans* case"), which was an appeal from the judgment of the General Court (T - 135/09, EU: T: 2012: 596), on which counsel for the Commission rely; and
>
> (b) the judgment of the CJEU in *Deutsche Bahn E.G. v. European Commission* Case C - 583/13, judgment 18th June, 2015; [2015] 5 C.M.L.R. 5 ("the *Deutsche Bahn* case").

As counsel for the Respondents place considerable reliance on those authorities, I consider that it is necessary to consider them in some depth.

48. Before so doing, it is appropriate to explain why those authorities are of relevance to the application of competition rules founded on statutory provisions of national law, for example, the provisions of the Act of 2002 and the Act of 2014 and to the particular context of the inspection by the Commission at ICL's premises at Platin, which the evidence establishes was for the purpose of obtaining information in relation to an investigation concerning alleged conduct or behaviour amounting to -

> (a) an abuse of a dominant position by ICL contrary to s. 5 of the Act of 2002 and/or Article 102 TFEU and/or;
>
> (b) anti-competitive agreements or concerted practices contrary to s. 4 of the Act of 2002 and/or Article 101 TFEU.

As noted in Andrews, Gorecki and McFadden on *Modern Irish Competition Law* (Dublin, 2015, Wolters Kluwer), at page 2, judgments of the CJEU and of the General Court of the European Union strongly influence interpretation of national rules on competition law. In delivering judgment in this Court in *Hemat v. Medical Council* [2010] 3 IR 615 ("the *Hemat* case"), an appeal on the application of competition rules, in explaining why he proposed to examine, in the first instance, the decisions of the European Court of Justice, Fennelly J. stated (at para. 41):

> "It is patent that the Oireachtas has used the language of Articles 81 and 82 TEC [now 101 and 102 TFEU] in ss 4 and 5 of the [Act of 2002]. Accordingly, the judgments of the Court of Justice must be taken as authoritative in the interpretation of notions such as 'undertaking' and 'association of undertakings', which are fundamental to the operation of both the Treaty articles and the [Act of 2002]."

As Fennelly J. observed earlier (at para. 27), having stated that the matter before the Court must be considered entirely within the ambit of national competition law, and having stated that the relevant provisions of the Act of 2002 are closely modelled on the corresponding articles of the Treaty, "the case law of the European Court of Justice provides important guidance".

Nexans

49. The judgment of the CJEU on the appeal from the General Court in the *Nexans* case is the appropriate starting point as it contains a useful summary of the background to, and the proceedings before, the General Court. By the decision in issue the EU Commission had ordered the applicant companies, which will be referred to as "Nexans", and all companies directly or indirectly controlled by them to submit to an inspection in

accordance with Article 20(4) of 2003 Regulation. By the application to the General Court Nexans sought the annulment of the decision at issue and of acts taken by the EU Commission during the inspection and also requested that the General Court order measures against the EU Commission in the event that the decision at issue and the acts taken by the EU Commission during the inspection concerned should be annulled. The basis on which Nexans supported their application in the General Court is recorded as follows in the judgment of the CJEU (at para. 6):

> "In support of their application, the appellants raised a single plea, alleging infringement of Article 20(4) of Regulation No 1/2003 and of fundamental rights, namely: the rights of the defence, the right to a fair trial, the privilege against self-incrimination, the presumption of innocence and the right to respect for privacy. By that plea, divided into two parts, the appellants criticised the [EU] Commission, first, for the overly broad and vague range of products covered by the decision at issue and, secondly, for the overly broad geographical scope of that decision."

Nexans were successful on the first part of their plea, namely, as to the product scope of the inspection, in that the General Court (at para. 91) found that the EU Commission had not demonstrated that it had reasonable grounds for ordering an inspection covering all electric cables and the material associated with those cables, as distinct from only high voltage underwater cables. The second part of the plea, that the decision of the EU Commission had an overly broad geographical scope, had been rejected by the General Court (at para. 100) and it was that decision which was under appeal to the CJEU. The judgment of the CJEU also recorded that the General Court dismissed as inadmissible the application for annulment of the acts taken by the EU Commission during the inspection.

50. The CJEU rejected the appeal by Nexans on the ground that geographical scope of the decision of the EU Commission was overly broad and vague. In considering that ground by reference to an argument by Nexans that there was infringement of the requirements to state reasons concerning the geographical scope of the decision, in the passages on which counsel for the Respondents rely, the CJEU outlined the rationale for the obligation imposed on the EU Commission under Article 20(4) of 2003 Regulation to state specific reasons as follows (at para. 34):

> "That obligation to state specific reasons constitutes, as the Court of Justice has made clear, a fundamental requirement not only to show that the intervention envisaged within the undertakings concerned was proportional, but also to put those undertakings in a position to understand the scope of their duty to co-operate, while at the same time preserving their rights of defence . . ."

By way of explanation of the outcome of that part of the appeal, the CJEU stated (at para. 36) that, although, admittedly, the EU Commission is obliged to indicate as precisely as possible the evidence sought and the matters to which the investigation must relate, it is not essential in a decision ordering an inspection to define precisely the relevant market, to set out the exact legal nature of the presumed infringements or to indicate the period during which those infringements were committed, provided that the inspection decision contains the essential elements. It rejected that part of the appeal, having stated that the General Court was able to conclude that the statement of reasons in the decision at issue concerning the geographical scope of the suspected infringement was sufficient.

51. Turning to the judgment of the General Court in the *Nexans* case, on which counsel for the Commission place much reliance, on the first ground on which Nexans were successful, namely, the contention that the product scope of the inspection decision was overly broad and vague, the General Court made some preliminary observations. These included the observations in para. 39, which are quoted in the judgment of Charleton J. (at para. 44), which are reflected in the statement in the judgment of the CJEU (at para.

34) quoted in the next preceding paragraph. The General Court went on to emphasise (at para. 40) that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities of any person, whether natural or legal, constitutes a general principle of EU law, as laid down in Article 7 of the Charter, under which "[e]veryone has the right to respect for his or her private and family life, home and communications". It was against the background of those observations that the General Court then went on to consider the argument advanced on behalf of Nexans that the high voltage underwater cables sector was the only sector in relation to which the EU Commission had reasonable grounds for suspecting an infringement of the competition rules on the part of Nexans, which resulted in the finding of the General Court (at para. 91) that the EU Commission had not demonstrated that it had reasonable grounds for ordering an inspection covering all electrical cables and materials associated with those cables. That finding was not appealed.

52. One of the claims advanced on behalf of Nexans before the General Court, apart from the claim that the inspection decision be annulled, which is the focus of the analysis by counsel for the Commission of the decision of the General Court, was for a declaration that the EU Commission's decision to remove copies of certain computer files and the hard drive of a computer of a Mr. C at Nexans premises for review at its offices in Brussels later was unlawful. Nexans also sought annulment of certain acts of the EU Commission in relation to Mr. C. and, specifically, sought an order that the EU Commission refrain from using, for the purposes of the proceedings in respect of an infringement of the competition rules, any documents or evidence which it might have obtained pursuant to the annulled decisions. The General Court (at para. 134) declared that the applications for annulment of those contested acts were inadmissible. There was no appeal to the CJEU against that declaration.

53. It was in the course of the General Court's analysis of Nexans arguments', as recorded at para. 118, that the contested acts had brought about a significant change in their legal position and had seriously and irreversibly affected their fundamental rights - their right to privacy and the rights of the defence - so as to render the contested acts challengeable measures, that the General Court made the observations at para. 130, which are quoted by Charleton J. in his judgment (at para. 46) and which I consider it unnecessary to reiterate. The General Court found that the contested acts could not be regarded as actionable measures and went on to state:

> "132. . . . The legality of those acts could only be examined - apart from in the context of an action for annulment of the decision imposing a penalty . . . - in the context of an action challenging the final decision adopted by the [EU] Commission under Article 81(1) EC. Review by the Courts of the way in which inspection was conducted falls within the scope of an action for the annulment of the final decision adopted by the [EU] Commission under that provision . . .
>
> 133. Moreover, if the applicants believe that the acts by which the [EU] Commission took a copy of several computer files and of the hard drive of Mr. C's computer in order to examine them later in its offices and requested from him explanations of documents found during the inspection are illegal and have caused them to suffer such as to cause the European Union to incur liability, they may bring an action against the [EU] Commission for non-contractual liability. A remedy of that kind is not part of the system for the review of the legality of acts of the European Union which have legal effects binding on, and capable of affecting the interests of, the applicant, but it is available where a party has suffered a harm on account of unlawful conduct on the part of an institution . . ."

54. It is worth recording that those observations in paras. 132 and 133 were preceded by a statement (at para. 129) that Nexans did not claim that the documents copied by the EU Commission were eligible, under EU law, for protection similar to that conferred on the confidentiality of communications between lawyers and their clients, so that the EU Commission, when it decided to copy those documents, did not adopt a decision withholding that protection from Nexans. Of course, in this case, the Respondents had, and still have, the protection of s. 33 of the Act of 2014.

55. There are aspects of the decision of the General Court in *Nexans* which counsel for the Commission suggest are relevant to the application of Article 8 to the Respondents' claim in this case. First, it is suggested that what the General Court stated at para. 130 (as quoted by Charleton J. in his judgment at para. 46) is particularly relevant, the issue being addressed being similar to the issue which arises here. Secondly, as regards the outcome of the claim before the General Court for the annulment of certain acts of the EU Commission in relation to Mr. C., it is emphasised that the General Court held that the legality of the measures implementing the inspection decision, for example, copying documents, cannot be examined except in the context of challenging the final decision adopted by the EU Commission, in relation to which, it is suggested, the General Court adopted an approach similar to the approach adopted in this jurisdiction in *Byrne v. Grey* [1988] I.R. 31, referred to by Charleton J. in his judgment (at para. 5). Thirdly, the General Court had regard to Article 7 of the Charter. Having regard to all of those factors, it is suggested by counsel for the Commission that the reliance by the Respondents on the decision of the ECtHR in *Vinci* as supporting their claim that the Commission is in contravention of Article 8 is misplaced. As will appear later, I do not consider that the reliance by the Respondents on the decision in the *Vinci* case is misplaced. It is necessary to comment, however, on the second factor. In the *Nexans* case the General Court (at paras. 115 to 134) was addressing the admissibility of the application for annulment of the contested acts and it was concerned with the enforcement of competition law under EU law in the context of Article 81 (EC), now Article 101 of TFEU, and of the 2003 Regulation and in the overall context of EU competition law, and, specifically, the application of Article 230 (EC), now Article 263 of TFEU, which was expressly addressed by the General Court (at paras. 115 and 136). In contrast, this Court is addressing the Respondents' claim in the context of the remedies available under Irish law and this judgment concerns only the remedies available to the Respondents for a contravention of Article 8 of the Convention under Irish law. Accordingly, that aspect of the decision of the General Court seems to me to be of no relevance whatsoever and the Commission's reliance on the judgment of the General Court turns out to be something of a "red herring".

Deutsche Bahn

56. The judgment of the CJEU in the *Deutsche Bahn* case relied on by the Respondents was on an appeal from the General Court by Deutsche Bahn and its subsidiaries seeking to set aside the judgment of the General Court dismissing an action by Deutsche Bahn for annulment of three decisions made by the EU Commission under Article 20(4) of the 2003 Regulation ordering Deutsche Bahn to submit to three separate inspections which took place in the presence of Deutsche Bahn's lawyers and in respect of which Deutsche Bahn had not raised objections or complaints about prior lack of judicial authorisation.

57. The first ground of appeal advanced on behalf of Deutsche Bahn was that there had been misinterpretation and misapplication by the General Court of the fundamental right to the inviolability of the home provided for in Article 7 of the Charter and Article 8 of the Convention. In setting out its findings on this ground, the CJEU stated (at para. 20) that, although it is apparent from the case law of the ECtHR that the protection provided for in Article 8 of the Convention may extend to certain commercial premises, the fact remains that that Court did hold that interference by a public authority could go further for professional or commercial premises or activities than other cases, citing, *inter alia*, the

Bernh Larsen case.

58. Following its analysis of the judgment of the General Court, the CJEU found that the General Court was correct in finding that the fundamental right to inviolability of private premises, as protected by Article 8 of the Convention, is not disregarded by there being no prior judicial authorisation and, accordingly, it concluded that no infringement of Article 7 of the Charter had been established. Of course, s. 37 of the Act of 2014 does provide for prior judicial authorisation in this jurisdiction. In its analysis, the CJEU made the following statement (at para. 31), which is relied on by counsel for the Respondents:

> ". . . it is settled case-law that the [EU] Commission's powers of investigation are strictly defined, encompassing *inter alia* the exclusion of non-business documents from the scope of the investigation, the right to legal assistance, the preservation of the confidentiality of correspondence between legal counsel and clients, the obligation to state reasons for the inspection decision and the option of bringing proceedings before the EU courts . . ."

59. The second ground of appeal advanced by Deutsche Bahn was that there had been misinterpretation and misapplication by the General Court of the right to effective judicial protection provided for in Article 47 of the Charter and Article 6(1) of the Convention. Article 6 of the Convention has not been invoked by the Respondents in this case. In any event, the CJEU held that the General Court was correct in holding that the right to effective judicial protection, as guaranteed by Article 6(1), is not disregarded by there being no prior judicial review and, noting that that fundamental right constitutes a general principle of EU law, as currently expressed in Article 47 of the Charter, it held that no infringement of Article 47 had been established.

60. The third ground of appeal advanced on behalf of Deutsche Bahn was that there had been an infringement of the rights of the defence due to irregularities vitiating the conduct of the first inspection. The CJEU found that that ground of appeal was admissible and went on to consider the merits. The finding on the merits was that the first inspection was vitiated by irregularity since the agents of the EU Commission, being previously in possession of information unrelated to the subject matter of that inspection, proceeded to seize documents falling outside the scope of the inspection as circumscribed by the first contested decision. It was also held that the second and third inspection decisions should be set aside on the grounds of infringement of the rights of the defence.

61. Having found that the third ground of appeal was admissible, in dealing with the merits, the CJEU, citing, *inter alia*, para. 34 from its judgment in the *Nexans* case quoted earlier, in a passage to which counsel for the Respondents point, stated (at para. 56):

> "As to the merits, it must be borne in mind that Article 20(4) of Regulation No 1/2003 requires the [EU] Commission to state reasons for the decision ordering an investigation by specifying its subject-matter and purpose. As the Court has held, this is a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence . . .."

62. Counsel for the Respondents also emphasise the succeeding paragraphs of that judgment (paras. 57 to 60) in which the CJEU, *inter alia*, itemised further constraints on the EU Commission, namely:

> (a) that information obtained during the investigations must not be used for purposes other than those indicated in the inspection warrant or decision;
>
> (b) that such a requirement is aimed at preserving, in addition to business

> secrecy, undertakings' rights of defence, which Article 20(4) is intended to safeguard, it being stated that those rights would be seriously endangered if the EU Commission were able to rely on evidence against undertakings which was obtained during the investigation but was not related to the subject matter or purpose thereof; and
>
> (c) that the EU Commission is required to state reasons for its decision ordering an inspection and, if the statement of reasons for that decision circumscribes the powers conferred on the EU Commission's agents, a search may be made only for those documents coming within the scope of the subject matter of the inspection.

63. While there is guidance for this Court in the judgment of the CJEU in the *Deutsche Bahn* case, it must be borne in mind that the function of this Court on this appeal is to apply national law, primarily the relevant provisions of the Act of 2002 and of the Act of 2014 and, in particular, the powers conferred on authorised officers under s. 37 of the Act of 2014. Further, the function of this Court is to apply national law in the context of the factual basis of the Respondents' claim and the dispute between the parties. Notwithstanding that, it is of assistance to consider the commentary by practitioners and academics in very recent articles on the recent authorities cited by the parties, which have been brought to the attention of the Court and which are material to understanding the relevance of the recent case law of the ECtHR and the CJEU to the function of this Court on the appeal.

Practitioner/academic commentary

64. An article by Goffinet & Bontinck entitled "*The 'Tangible' Examination of Inspections and Seizures: A Requirement After the ECtHR Vinci Judgment*?" (published in the Journal of European Competition Law and Practice 2016, Vol. 7, No. 4, pages 243 to 253), as the title indicates, contains an analysis of the decision of the ECtHR in *Vinci,* which was the first time the ECtHR ruled on a seizure which was carried out by investigators of a National Competition Authority. The authors describe the judgment in the *Vinci* case as having brought a new element to the protection under Article 8 of the Convention. The authors also consider the best practices of the EU Commission, referring to the revised version of the Explanatory Note considered by the ECtHR in the Vinci case, which was revised in September 2015, and also the ECN Recommendation adopted in December 2013. Their conclusion as to the consequences of the *Vinci* judgment (at p. 253) is as follows:

> "Although it does not directly impede the seizure of complete e-mail accounts, it can be argued that the *Vinci* judgment imposes indirectly an obligation on the European National Competition Authorities to be precise, circumscribed and proportionate in the volume and subject matter of their seizures. Indeed, the ECtHR requires that the reviewing judge must carry out a 'tangible' ([i.e.] concrete and factual) examination of the seizures to determine whether the documents fall outside the scope of the investigation or under [legal professional privilege]. In other words, if the seizures are not precise, circumscribed, and proportionate in their volume and subject matter, the reviewing judge will not be able to carry out a tangible examination of the seizures and there will be accordingly a violation of Article 8 of the [Convention]."

As regards the terminology in the second sentence in that passage, which is obviously intended to reflect what is stated in the judgment of the ECtHR at paras.75, 78 and 79, in particular, this is to say, the reference to a "tangible" (i.e. concrete and factual) examination", it appears to reflect some disparity between the translation before this Court and the authors' translation. In the interests of clarity it is to be noted that the

authors use similar terms in identifying the question posed by the ECtHR in para. 75 of the judgment, which is quoted earlier, stating (at p. 247) that the relevant question was to determine whether the "safeguards had been applied in a manner that was concrete and effective rather than theoretical and illusory". The authors go on to say that the best practices as developed by the EU Commission enable the competent judge to review tangibly the seizures of documents. They also state that the best practices developed in Belgium and the Netherlands also show that the idea is to obtain a final selection of documents (through key words and through an individual and manual review of the content of documents in the presence of the targeted company) with regard to which a judge can carry out tangible examination.

65. The commentary to which most significance is attached by counsel for the Respondents is the article by de Jong & Wesseling referred to earlier (at para. 31). In that article, the authors compare the EU Commission approach to digital investigations, which is referred to as the model of "on-site" selection, with the "off-site" selection model which is followed in the Netherlands by the National Competition Authority. In doing so, they point out that, in consequence of the fact that the ground of appeal relating to the legality of continued inspection-procedure was declared inadmissible by the General Court in the *Nexans* case, neither the CJEU nor the General Court has so far had the opportunity to rule on the legality of the approach where a copy of digital data is taken to the EU Commission's premises in a sealed envelope.

66. What is of particular relevance for present purposes is the authors' exposition of concerns with regard to the legality of the off-site selection procedure. They question (at para. 4.2) whether the off-site selection model sufficiently guarantees the rights of defence of the company that is subject to the investigation, these rights including the principle of proportionality and the company's right to privacy, but also the protection of legally privileged data. It is in the context of discussing the proportionality of the inspection and the company's right to privacy that (at para. 4.2.1) they make the observations about the *Bernh Larsen* case quoted earlier (at para. 31). They follow those observations by pointing out that in the *Vinci* case the ECtHR ruled that the French Competition Authority had violated the applicant companies' rights to privacy since it was not proportional, observing that it seized entire e-mail boxes of certain employees, and that the applicant companies were not able to prevent the collection of data that was out of scope or that was legally privileged. They then state:

> "According to the ECtHR this meant that the company should be able to have the seizure of the data effectively reviewed *ex post*. More particularly, a national court will need to actually review the specific documents of which it is claimed that they are out of scope or legally privileged. As the French court had not engaged in such an actual and effective review, the ECtHR concluded that the inspection was disproportional and a violation of art. 8 . . ."

Interestingly, the authors also refer to the judgment of the High Court in this case. They go on to say that, if an authority adopts the off-site selection model, concerns about compatibility with the principle of proportionality can be taken away if there are sufficient safeguards in place, suggesting that these could be provided by following a sealed envelope-procedure, by allowing the company's representatives to be present during the search of the copy data, and having an effective actual *ex post* right to appeal.

67. While I consider that the existence of s. 33 of the Act of 2014 renders it unnecessary to consider the authors' observations on legal professional privilege and the protection of attorney-client relationship, it is instructive to take account of what they have to say about the safeguards which should be in place to protect fundamental rights in the off-site selection of digital data, such safeguards being in place to cover both irrelevant material and legally privileged material. In this context, they state that, first, it is important to ensure that the authority will not review any data that is included in the secured (i.e. seized) dataset, but to which it is not entitled because it is irrelevant to the investigation.

They suggest that an efficient and effective way to ensure this is by putting a sealed envelope-procedure in place, as is done by the EU Commission, so that the digital dataset can only be taken out of the envelope in the presence of the company's representative, who should also have the right to be present during the whole selection procedure. It is suggested that when an authority adopts the off-site selection model it is important to put these two safeguards in place, so that the company can check which data is examined by the authority's officials and it is able to effectively exercise its right of defence. They state that, secondly, when the authority proceeds with the investigation by applying search terms to the dataset, it will need to ensure that it only selects data that is actually relevant to the investigation. They refer again to the statement by the trial judge in the High Court judgment in this case that there is no reason why an already existing "perfectly sensible and practically operable process", being a reference to s. 33 of the Act of 2014, could not be applied to exclude material that is out of the scope of the investigation. They make the point, thirdly, that it is essential that a company which is subject to an inspection has an effective right to appeal against any irregularities that have occurred during the inspection, emphasising that this means that the company must have a right to an actual and effective review of the legality of the seizure of the data and that it should be able to have illegally seized data returned or erased, citing the decision of the ECtHR in the *Vinci* case. Finally, they add that, also, in order to safeguard an effective right of *ex post* judicial review, it is important that the company is present during the securing, collection and selection of digital data by the authority. Starting with the sealed envelope procedure, none of those safeguards was in place to enable the Respondents to exercise their right of defence when the electronic data was removed by the Commission from Platin. Further, in the High Court and on this appeal, the Commission simply resisted the granting of any relief to the Respondents which would rectify those deficiencies and protect the Respondents' right to privacy.

Conclusions on the Article 8 issue

68. It is important to recall that the trial judge did not find that, in accordance with s. 3 of the Act of 2003, the Commission had acted in contravention of Article 8 of the Convention at the point in time when he made his decision. He merely found that there would be a contravention were the Commission to proceed, as he correctly considered it intended, to access, review and make use of the material seized by it and taken offsite. Accordingly, the core issue on the appeal on the application of Article 8 is whether, by taking those intended steps, which, in consequence of the injunction granted by the trial judge it is currently restrained from taking, the Commission would be acting in contravention of Article 8. For the purposes of this appeal, that issue must be determined having regard to the circumstances outlined earlier (in para. 26) and, in particular, to the acknowledgement by the appellant that, as a matter of high probability, not all of the electronic material it has seized and is now in its possession relates to an activity under investigation by it, so that it is not within the scope of the search warrant which it obtained under s. 37 of the Act of 2014.

69. It is also important to recall what was the kernel of the dispute between the parties which led to the proceedings in the High Court. As is clear from the affidavit evidence which was before the High Court, ICL, whose solicitors were present in the Platin premises during most of the period of the inspection which resulted in the search and seizure, co-operated with the Commission and it was with such co-operation that the Commission obtained the electronic data which it now holds. As regards privileged legal material which was included in the seized electronic data and which was protected by s. 33 of the Act of 2014, it was agreed between the parties that such material would be dealt with by subsequent correspondence between the parties. That occurred, in accordance with the provisions of s. 33, and no issue arises in these proceedings in relation to privileged legal material. The issues which arise relate to seized electronic data, some of which being in Mr. Lynch's e-mails, which the Respondents contend was outside the scope of the search warrant. As regards that out of scope data, from the outset, ICL's solicitors, Arthur Cox, sought to enter into an appropriate arrangement with

the Commission in relation to review of the electronic data seized by the Commission and removed from the premises at Platin and to deal appropriately with the electronic data which would be found to be outside the scope of the search warrant. In fact, the trigger for these proceedings was the response of the Commission to a process proposed by Arthur Cox in a letter dated 31st August, 2015 as to how such an arrangement might be achieved.

70. However, given the significance which counsel for the Commission attach to the decision of the ECtHR in *Janssen*, and, in particular, the suggestion that this case is analogous to the *Janssen* case in that, it is contended, the Respondents did not precisely identify any protected documents which had been seized, it is necessary to outline in detail the interaction between the Respondents and their solicitors, Arthur Cox, on the one hand, and the Commission, its officers and its legal adviser, on the other hand, during and after the inspection at the Platin premises until the initiation of these proceedings in the High Court.

71. The starting point is what is averred to in affidavits by Patrick O'Brien ("Mr. O'Brien"), a solicitor in Arthur Cox, in his affidavit sworn on 10th February, 2016 and by Mr. Ryan. Mr. O'Brien averred that, during the inspection he and Mr. Ryan informed Mr. William Fahy ("Mr. Fahy"), the authorised officer named in the search warrant, that Mr. Lynch was no longer employed by ICL but was employed by CRH and, as a result, his mailbox included documents that did not relate to ICL and that those documents were outside the scope of the search warrant. The purpose of the discussion was to put Mr. Fahy and the Commission on notice of the issue. It would have been impracticable to carry out a review of the data for the purposes of identifying the documentation concerned during the search. Given that it had been agreed that the issue of legal privilege would be raised in correspondence with the Commission and that it had been confirmed to Mr. Ryan that the Commission would not review any of the seized documentation pending resolution of the issue of legal privilege, Mr. O'Brien and Mr. Ryan decided to raise the issue in relation to Mr. Lynch's data in further detail in correspondence with the Commission rather than during the search. Mr. Ryan made similar averments in his affidavit sworn on 10th February, 2016.

72. The first letter from Arthur Cox to the Commission was dated 19th May, 2015. It dealt with legally privileged material and it also dealt with: "Data relating to Seamus Lynch". It was stated that, as noted to the authorised officers during the inspection, Mr. Lynch's position was "Managing Director Ireland and Spain for CRH Europe", and, as a result, his functions and activities extended to matters outside of and wholly separate and unrelated to ICL and that documents relating to the functions and activities of Mr. Lynch, which were separate and unrelated to ICL, were outside the scope of the warrant. It was stated that ICL was in the process of reviewing the copy of the seized electronic data for the purpose of identifying the documents relating to the functions and activities of Mr. Lynch which were separate and unrelated to ICL. In the interim, the Commission was requested to undertake not to review any data relating to Mr. Lynch until the position could be confirmed. Further, it was stated that there might be other documents that had been seized that were clearly outside the scope of the search warrant. Once ICL had completed a review of the seized documentation, it might revert in that regard.

73. The reply dated 21st May, 2015 to that letter was from the Commission's legal adviser. In relation to Mr. Lynch's data seized, the response was that the Commission case team identified Mr. Lynch as a person of interest given that he was the Managing Director of ICL until very recently and was still a director of ICL. It was stated that the electronic data relating to Mr. Lynch which was seized during the search was seized in accordance with the terms of the search warrant and in exercise of the Commission's powers under s. 37 of the Act of 2014. It was stated that, apart from documentation over which legal privilege would be successfully claimed, the Commission would review all the material

seized at our client's premises as part of its ongoing investigation.

74. Arthur Cox wrote again to the Commissioner's legal adviser by letter dated 26th May, 2015. It was reiterated that the data seized relating to Mr. Lynch included documentation in relation to the functions and activities of Mr. Lynch that were separate and unrelated to ICL and that such documentation clearly fell outside the scope of the warrant. It was stated that ICL was in the process of reviewing the copy of the seized electronic data for the purpose of identifying documents relating to functions and activities of Mr. Lynch which were separate and unrelated to ICL and that the rights of CRH to take whatever action might be necessary to protect the confidentiality of its electronic data were reserved. The request not to review any data relating to Mr. Lynch until the position was confirmed was repeated.

75. The response from the legal adviser of the Commission was dated 5th June, 2015. In relation to Mr. Lynch, the response stated that, notwithstanding the points raised in the letter of 26th May, 2015, the Commission maintained its view that the electronic data relating to Mr. Lynch which was seized during the search was seized in accordance with the terms of the search warrant and in exercise of the Commission's powers under s. 37. Once again it was stated that apart from documentation over which legal privilege was successfully claimed, the Commission would review all material seized at the premises as part of its ongoing investigation.

76. On 10th June, 2015 Arthur Cox wrote again to the Commission's legal adviser in relation to Mr. Lynch. It was stated that ICL's position remained as set out in the letters of 19th and 26th May, 2015 and that Arthur Cox would respond in further detail in respect of the matter under separate cover.

77. The next letter was the letter dated 31st August, 2015 from Arthur Cox. That letter focused primarily on Mr. Lynch's e-mails. It acknowledged that Mr. Lynch's e- mails contained data which was within the scope of the search warrant, but it also made the case, by reference to Mr. Lynch's roles as an employee of CRH and ICL, that there was material included which was clearly outside the scope of the search warrant. Having referred to the application of the Convention and the EU Charter to the inspection at the premises of ICL and to certain jurisprudence of the ECtHR, and to the fact that s. 37 of the Act of 2014 must be construed in accordance with the Convention, it was asserted that the Commission, by having unlawfully seized material outside the scope of the search warrant, had infringed the Convention. Further, having referred to Article 7 of the Charter, it was asserted that the taking of documents the property of companies other than ICL was not in accordance with law. Even though Mr. Lynch's position was addressed in the letter by reference to his business life, as distinct from his private life, nonetheless it is important to emphasise that it was the assertion that there was a breach of Mr. Lynch's right to privacy under the Convention which grounded the proposal which Arthur Cox went on to set out in the letter for resolving the issue to which it had referred, including identifying the electronic data held by the Commission, which was not within the scope of the search warrant. That proposal was complex.

78. In the light of the suggested similarity between this case and the *Janssen* case, it is necessary to record the steps, eight in all, which Arthur Cox proposed for the resolution of the issue. They were:

> (a) That ICL would undertake a review of Mr. Lynch's documents from 7th June, 2011, when he had ceased to be in full-time employment of ICL, to identify "non-ICL documents".
>
> (b) ICL would provide the Commission with a schedule setting out the

details of the ICL documents.

(c) Subject to the claims for legal professional privilege and the agreed process in relation to such claims, the Commission could then proceed to review Mr. Lynch's documents.

(d) Insofar as the Commission could not confirm that a document was a non-ICL document, there was provision for a "cursory look" procedure, to be carried out by the legal adviser or an experienced lawyer.

(e) If a dispute remained the document would be placed in an envelope and sealed in the presence of Mr. O'Brien and/or Mr. Ryan of Arthur Cox.

(f) The relevant documents would then be reviewed by an independent lawyer who would give an opinion as to whether the document was a non-ICL document.

(g) If the parties could still not reach an agreement as to whether a document was a non-ICL document, the document would be referred to the High Court for determination pursuant to an application by ICL/CRH.

(h) The Commission would undertake not to review any of the documents referred to in the schedule pending the resolution of the matter.

The critical point is that the proposal required an undertaking from the Commission not to review any of the documents identified by the Respondents as "Non-ICL" documents pending the resolution of the dispute between the parties, which, in accordance with the process suggested, which used s. 33 as a template, might be by agreement between the parties or, in the absence of agreement on any point, by the opinion of an independent lawyer, or ultimately by a determination of the High Court.

79. The Commission's legal adviser responded to that letter by a letter dated 10th September, 2015. Following an assertion that the Commission does not accept that the seizure of any data was beyond the scope of the Commission's powers, which, for the purposes of these proceedings, is no longer the position of the Commission, the essence of the response is encompassed in the following paragraph:

> "The [Commission] considers that the electronic data relating to Mr. Lynch which was seized during the search of your client's premises was seized in accordance with the terms of the search warrant and in the lawful exercise of the [Commission's] powers under s. 37 . . .. Apart from documentation over which legal privilege is successfully claimed by your client, the [Commission] will review all material seized at your client's premises as part of its ongoing investigation. The [Commission] does not agree to the proposed process set out on pages 5 and 6 of your letter of 31st August 2015."

It was also pointed out that the Commission, in the course of any search operation, is subject to the prohibition on unauthorised disclosure of confidential information contained in s. 25 of the Act of 2014.

80. In a further letter dated 25th September, 2015, Arthur Cox reiterated the proposal contained in the letter of 31st August, 2015, which was described, in my view, correctly, as a reasonable and workable procedure for resolution of the issue. It sought specific undertakings in writing. The undertakings were that the Commission would refrain from accessing, reviewing or making any use whatsoever of any of the electronic data relating

to Mr. Lynch which was seized pending resolution of the dispute as to whether the data falls outside the search warrant and that the Commission would agree to the dispute resolution procedure set out in the letter of 31st August, 2015. Legal proceedings were threatened if the undertakings sought were not forthcoming from the Commission. It was pointed out that the statement in relation to s. 25 of the Act of 2014 in the letter of 10th September, 2015 did not in any way assuage the Respondents' well-founded concerns that the Commission proposed to unlawfully review documents which fell outside the scope of the search warrant. The response of the Commission by letter dated 8th October, 2015 from its legal adviser was that it was not agreeable to providing the undertakings requested in the letter of 25th September, 2015. Apart from any documentation over which legal professional privilege was successfully claimed by the Respondents, it was made clear that the Commission intended to review all materials seized at Platin, including Mr. Lynch's mailbox, as part of its ongoing investigation.

81. Following that letter, the Respondents instituted the plenary proceedings in the High Court on 10th November, 2015. That, in my view, was the only practical and effective course open to the Respondents. It is patently obvious from the interaction which took place between the parties up to that point in time that, even if the Respondents had precisely identified the data in the possession of the Commission which they contended was unrelated to the investigation, such data would not have been protected from unlawful interference by the Commission. Moreover, the reality of the situation is that such protection could not have been assured without the intervention of the High Court.

82. Fundamental to the dispute between the parties from the outset was whether the seizure of all of the material then in its possession by the Commission had been lawful and in accordance with the search warrant, as the Commission contended at the time, or, alternatively, whether some of the material in the possession of the Commission was outside the scope of the search warrant, as the Respondents contended. Further, notwithstanding that, subsequently, for the purposes of these proceedings, it was sensibly acknowledged by the Commission that, as a matter of high probability, some of the e-mails in its possession did not relate to the activity under investigation, which I understand to be an acknowledgement that such material was outside the scope of the search warrant, the Commission was not prepared to agree to a process through which the material which was outside the scope of the search warrant, and, accordingly, should not have been seized, could be identified. Implicit in the Commission's approach was that it was going to retain all of the material seized, other than legally privileged material, and to access it and deal with it in whatever way it thought fit. There was nothing in the Commission's approach to suggest that it intended doing anything other than retaining all of the material, not returning any of it to either CRH or Mr. Lynch, as the case may be, or, in the case of digital material, erasing it.

83. As the correspondence between the parties clearly illustrates, what the Respondents were trying to achieve in their proposal was to prevent the Commission accessing, reviewing and using such of the material in its possession as was outside the scope of the search warrant and to prevent a threatened infringement by the Commission of Mr. Lynch's right to privacy under Article 8. The only obvious route by which that objective could be achieved was the route which the Respondents adopted, namely, issuing plenary proceedings claiming the declaratory and injunctive relief which is being addressed in this judgment. In particular, s. 37 of the Act of 2014 does not address the circumstance in which the Commission seizes material in purported reliance on a search warrant issued pursuant to s. 37(3) but the material or some of the material seized is outside the scope of the search warrant. There is no provision in s. 37 and, indeed, there is no statutory provision in existence which provides for a mechanism by which a person the subject of a search and seizure under s. 37, using the terminology in the *Vinci* case (at para. 78), can have the lawfulness of the seizure actually and effectively reviewed by a court after it has taken place. In particular, no statutory provision exists which would enable an issue in relation to the seizure of documents that are unrelated to the investigation to be

addressed, for example, in the manner in which seizure of privileged legal material is addressed in accordance with s. 33. In short there is no statutory provision to which a person in the position of the Respondents could have resorted.

84. Digressing slightly, in this case, the Respondents were able to resort to judicial remedies available to the High Court in plenary proceedings to redress the alleged breach of Article 8 of the Convention. However, in the proceedings and on the appeal, the Commission has consistently and vigorously opposed the Respondents' entitlement to the declaratory or injunctive relief sought by them. If the Commission was successful in opposing the granting of such relief, it is difficult to see how it could stand over its assertion that the law does not lack sufficient safeguards to defend the Respondents' rights under Article 8.

85. Returning to the statutory powers conferred on the Commission, which was established by the Act of 2014, under s. 37, those powers are expressly conferred for "the purpose of obtaining any information which may be required in relation to a matter under investigation under the [Act of 2002]". Notwithstanding that this appeal is concerned with the application of national law, as explained by Fennelly J. in the passages from his judgment in the *Hemat* case quoted earlier (at para. 48), the judgments of the CJEU in the *Nexans* case and in the *Deutsche Bahn* case are instructive as to the proper application of the law in this case. Moreover, in addressing the Article 8 issue, the observations of the ECtHR in relation to the *Prysmian* case in the *Vinci* case are instructive. This case proceeded in the High Court on the basis that, as a result of the search and seizure at the Platin premises, at least some material the property of CRH or Mr. Lynch, which the Commission was not entitled to seize under the search warrant granted under s. 37(3), was removed, albeit with the co-operation of ICL, and retained by the Commission. The appeal in this Court has proceeded in a similar vein. On the basis of that premise, on the authority of the decision of the ECtHR in the *Vinci* case, CRH or Mr. Lynch or both, must be in a position "to be able to ensure that the lawfulness of the seizures could be actually and effectively reviewed after they took place", unless they "were able to prevent the seizure of documents that were unrelated to the investigation" (para. 78). What happened in this case is that, although the Respondents did not seek to prevent seizure of the documents in question when it took place, in the plenary proceedings they did seek to prevent, to use the terminology used in the ECN Recommendation, the continued inspection post-seizure, which is unregulated and which they contend would, in relation to the out of scope data, be unlawful and in breach of Article 8.

86. The outcome of the hearing in the High Court was that the intended continued inspection by the Commission of the material which had been seized was prevented by the terms of the injunctive relief granted. One gets an interesting perspective on that outcome if one considers what the position would have been if a permanent injunction in the terms granted by the trial judge had not been granted in the High Court. The Commission would have continued in possession of, and no doubt would have retained, all of the material it had seized, including the material which, admittedly, was unrelated to the investigation. It would be free, without having to refer to its owner, to access, review and use the unrelated material, although it was not being retained lawfully and it was being retained in breach of the owner's rights under Article 8. Further, the Commission could not be compelled to return the unrelated material to its owner, be it Mr. Lynch or CRH, nor could it be compelled to erase or render invisible the unrelated electronic data in its possession. In short, Mr. Lynch and CRH would have been utterly devoid of any remedy to effectively enforce their rights under Article 8 of the Convention.

87. For that reason, I am satisfied that, in addressing the claim of the Respondents that there had been a breach of Article 8 of the Convention, the trial judge was correct in law in granting the declaratory relief and the permanent injunction in terms which prevents

the Commission breaching the right to privacy of Mr. Lynch or CRH, or both, under Article 8 of the Convention through its continued inspection, if not restrained, of all the electronic data seized, having regard to the factual basis that, as a matter of high probability, some of the material seized was outside the scope of the search warrant. On the basis of the jurisprudence of the ECtHR on Article 8 and, in particular, the decision in the *Vinci* case, the orders made by the trial judge were the appropriate orders to ensure that safeguards are in place which effectively protect the rights of CRH and Mr. Lynch under Article 8. Unfortunately, those reliefs do not provide a resolution to the underlying dispute between the parties, which prompted the view the trial judge expressed (at para. 50) that the outcome does not appear to be "a fully effective remedy". However, it is the Commission, which is the party at fault, which is at a loss by not being in a position to access, review or use the data within the scope of the search warrant, which the Respondents acknowledge it is entitled to seize.

88. The inclusion of s. 33 of the Act of 2014 to expressly save legally privileged material from inspection highlights the lacuna in the legislation arising from the absence of a mechanism which could be utilised to identify and separate digital material unrelated to the investigation being conducted under the Act of 2002, which may be mixed with digital material which the Commission is entitled to seize under the powers conferred on it by s. 37. It is for the Oireachtas to fill that lacuna. However, there is no reason why, in a particular case, an undertaking or an individual whose digital material has been seized and is to be searched could not reach an agreement with the Commission on an appropriate mechanism to resolve the difficulty, which might include a key word search process and a rendering of out of scope material invisible or, alternatively, which might follow the template contained in s. 33 of the Act of 2014. It is for the Commission, not the Court, to take the steps necessary to resolve its difficulty on the facts of this case.

Proposed order
89. For the foregoing reasons I would affirm those portions of the order of the High Court relating to the Article 8 issue and outlined earlier in para. 16, I would dismiss the appeal insofar as it relates to those parts of the order.

Judgment of Mr Justice Peter Charleton, delivered on Monday, May 29th 2017

1. A search into breaches of competition law occurred on 14th May 2015. At issue on this appeal are the statutory powers specific to the defendant appellant, the Competition and Consumer Protection Commission, to search business premises under warrant and what may be taken, copied, retained and later analysed. It is asserted by the plaintiffs/respondents, the parties searched, CRH, Irish Cement Limited and Séamus Lynch, that the Commission has no power to take or copy material and later scrutinise it. The extent to which a corporation or an individual may assert rights which endure notwithstanding a valid taking or copying of material is at issue in arguments made on behalf of the plaintiffs. They assert that scrutiny by the Commission of taken or copied material from a search must be on notice to them, must happen while they are present, must be subject to judicial determination if argued to be outside the scope of relevance to the investigation and, finally, must be returned or destroyed where not directly relevant. Correspondence between the parties raised unresolved issues and led to a plenary summons dated 10th November 2015. The matter was heard speedily by the High Court, which found in favour of the plaintiffs, injuncting any scrutiny of materials copied in the search. By leave, this appeal was then taken directly from the decision of Barrett J of 5th April 2016 under Article 34.5.4º of the Constitution; [2016] IESCDET 86.

Background
2. In May 2014, the Competition Authority, which is now the Commission, commenced an investigation into price-fixing of bagged cement. While this was expressed to relate to activities within the jurisdiction, the scope of the sales by Irish Cement Limited (ICL) may

be wider. In her affidavit in these proceedings, Haiyan Wang of the Commission states that the investigation is concerned with suspected breaches of sections 4 and 5 of the Competition Act 2002 and of Articles 101 and 102 of the Treaty on the Functioning of the European Union. Under s. 4(1) of the 2002 Act "all agreements between" firms and individuals and all "concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void". Examples given within the sub section include actions which:

> (a) directly or indirectly fix purchase or selling prices or any other trading conditions,
>
> (b) limit or control production, markets, technical development or investment,
>
> (c) share markets or sources of supply,
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

3. In addition, it is alleged that ICL and, it is to be inferred, associated companies are in a dominant position in the market for bagged cement which they are abusing. Examples of such illegal action given in s. 5(2) of the 2002 Act embrace:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
>
> (b) limiting production, markets or technical development to the prejudice of consumers,
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
>
> (d) making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

4. Breaches of sections 4 and 5 are serious criminal offences carrying, under s. 8, fines of up to 10% of turnover for a firm and up to 10 years imprisonment for an individual. According to Ms Wang, the Commission received a complaint in May 2014 that ICL had "entered into exclusive purchasing arrangements" with distributors of bagged cement. This had the result of "potentially foreclosing, or otherwise having an exclusionary effect on, other competing producers of bagged cement." On investigation it appeared that evidence in relation to the commission of such alleged offences might date back to January 2011. The methodology is alleged to have involved exclusive rebate arrangements; target rebate arrangements; and practices such as the offering of inducements by way of credit notes or free stock in order to prevent or deter the stocking of competitive products.

5. The search warrant issued by Judge William Hamill on 12th May 2015 authorised William Fahy of the Commission to enter the premises of "Irish Cement Ltd", and to "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." This was supported by an appropriate information on oath; but the point of that is neither here nor there since it is not possible to bring judicial review proceedings for the purpose of condemning searches prior to a criminal trial; *Byrne v Grey* [1988] IR 31, *Berkeley v Edwards* [1988] IR 217. The criminal trial must retain its unitary character. The methodology of the search was to target a number of individuals in a number of locations at the same time. One particular individual, Séamus Lynch, the plaintiff respondent, was of interest in relation to emails exchanged by him from the date of search back to when the suspected arrangements are said to have been initiated. In consequence, on that day, the database of his emails was restored from a server in another location, downloaded to a particular computer and was then copied in its entirety by officers of the Commission. All of these emails were received on a server @crh.com. At para. 1 of the defence to these proceedings, the Commission accepts "that as a matter of high probability, not all of the emails … will relate to the activity" under investigation. This sensible concession should be read together with an equally reasonable statement on affidavit by Richard Ryan, solicitor for the plaintiffs ICL, regarding the possibility of remaining on the site and sifting through the data, perhaps over weeks. He says that it "would have been impractical to carry out a review of the data for the purpose of identifying the documentation concerned during the search". Some documents from the company's lawyers may have been taken in the trawl. Since solicitors were present on behalf of CRH and others during the search, it was confirmed that the Commission would not "review any of the seized documentation pending resolution of the issue of legal privilege" and that therefore any issue in relation to the data of Séamus Lynch would be raised "in further detail in correspondence with the [Commission] rather than during the search."

6. The focus on this appeal has been on the email account of Séamus Lynch. More than 100,000 individual email communications were taken. In his affidavit in these proceedings, he raises the distinction between the un-relatedness of the business activities of ICL and CRH. He avers that the Commission has seized documents "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 [ICL]" and therefore fall outside the scope of the search warrant. He claims that there is "a serious issue to be tried that the taking of documents the property of other companies and unrelated to the business activity of ICL is not in accordance with law." He avers that the trawling through such emails is outside the scope of the search warrant and outside the scope of the 2014 Act, and that in consequence he had "no option but to make this application due to the blanket and unreasoned refusal by the [Commission] to agree to a workable process… whereby non-ICL related documents could be a identified and excluded from review by agreement between the parties." His affidavit goes into considerable detail as to his roles and this is, indeed, the focus of the vast majority of the affidavit. This claim of the unrelatedness of ICL and CRH looms large in the judgment in the High Court. Mr Lynch also claims that the taking of the documents "is an interference with the private life, correspondence and/or home of the company (sic) and insofar as documents of other companies are seized, and my personal emails or emails unrelated to business activity of ICL, my private life as well as the private life, correspondence and/or home of those CRH companies (sic) is unlawfully interfered with". This is argued to be a breach of Article 8 of the European Convention on Human Rights, Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and Article 40.3 of the Constitution.

7. In the affidavit of James Plunkett, a technology manager with the Commission, he states that the copying of the emails and taking them off site is justified. He says that hidden text would need to be examined, relating to when emails were sent, deleted text would need to be retrieved and that a considerable amount of time and resources are required to conduct a proper forensic examination within a non-Internet-linked digital laboratory. This is what he describes as "best practice". As the investigation develops, a "proportionate approach to digital forensic [investigation]" is applied. This involves the

targeting of "persons of interest who the case team deem relevant to the investigation." This will involve the extraction of "very specific electronic data relating to a person of interest". James Plunkett says that "the most proportionate approach is used where practicable", but that in some instances this cannot be applied "due to technical reasons, such as in cases where the Commission wishes to seize backup tapes, where hard drives have failed or where encrypted files may exist and need to be decrypted." This is a job for laboratory applications.

8. Detective Sergeant Joseph McLoughlin is an experienced policeman who was trained in the Garda Bureau of Fraud Investigation and in general detective work but secunded to the Commission. He points out that the duty of investigating authorities is to "search out and retain all relevant evidence whether it supports guilt or innocence"; citing *Braddish v DPP* [2001] 3 IR 127. He asserts this is "particularly relevant in the context of white collar and regulatory investigations where there is every possibility that enforcement proceedings, be they criminal or civil, may well issue against individuals and corporate persons who may, at trial, have competing and adverse interests." He avers that "the initial assessment as to relevance that is made on-site" is done with a view to giving further consideration of the material off-site. The analogy he draws is that if an officer "were to come across a lever arch folder containing documents or records that appeared to be of relevance to the investigation" he or she "would seize the folder rather than attempting to separate out those documents which were of strict relevance and likely to feature as exhibits in any subsequent proceedings." Detective Sergeant McLoughlin states that "the context and sequence of the records may be significant" and that the "relevance of a particular record may only emerge or crystallise later by reference to consideration of other records and documents". He says that in this regard, digital searches and seizures or copying is similar to ordinary criminal investigations, for instance in relation to fraud or sexual violence. The kind of search necessary here he claims "could potentially take months depending on the amount of documentation" and that there is a serious risk of digital alteration were such a search to be conducted on site. Therefore he favours that material be "copied with a view to being scrutinised off-site later on." Any such analysis would be conducted "in a controlled fashion in which the relevant steps are documented in accordance with best practice."

9. Harry O'Rahilly, a case officer with the Commission, avers that "only documents falling within" selected search terms will be reviewed of those copied. He says that this means that such documents that are "responsive to a particular keyword search are made visible to the authorised officers."

Unrelatedness

10. It is clear that the focus of any complaint by the solicitors on behalf of ICL, CRH and Séamus Lynch prior to this appeal was on the issue of the unrelatedness of the roles of the individual whose email account was copied in respect of the period relevant to the investigation. In this regard, it should be emphasised that legal personnel take instructions, firstly, and make representations or allege facts, secondly, that potentially arise on that fact base. The letter of 31st August 2015 alleges that there was a breach of the Act and makes specific reference to four periods when it is said that Séamus Lynch had roles outside of ICL. These are divided into four distinct tranches. A proposal is made that ICL would consider the documents and set out a schedule of what "it considers to be Non-ICL Documents", allowing the Commission to review "documents relating to Mr Lynch's ICL roles." It is then proposed that the solicitor for ICL, CRH and Séamus Lynch and a solicitor for the Commission would meet and take a "cursory look" at disputed documentation, including documentation which contains "commercially sensitive information". Where a dispute might emerge on these specific issues, and these are the only ones mentioned and that nothing to do with the privacy rights of Séamus Lynch is advocated, a sealed envelope would contain any disputed documents to be reviewed by "the 'Independent Lawyer' (sic)" within seven days. In the event that both parties "still cannot reach agreement on whether one or more of the documents is a Non-ICL

Document, the document(s) would be referred to the High Court for determination pursuant to an application by ICL/CRH", while the Commission "would undertake not to review any of the documents referred to in the Schedule pending resolution of this matter (and subject to claims of legal privilege applying to any of these documents)."

11. In the reply of 10th September 2015, the Commission identify Séamus Lynch as "a person of interest given that he was Managing Director of ICL at times material to the … investigation and has been a director of ICL from 2001 to date." The Commission assert that the seizure of the material was lawful. Correctly, it is said that the Commission is subject to a duty of confidentiality under s. 25 of the 2014 Act and an assurance is given that "[c]ommercially sensitive information is routinely taken up in the course of such searches", but that it will be subject "to the same considerations in terms of its commercial sensitivity and confidentiality." The Commission do not intend to depart from their existing practices, the letter asserts. In a comment on s. 25, Barrett J worried that what might be involved in the sharing of information by the Commission was "a leaky sieve". It is not to be doubted, however, that the commission takes its duties of confidentiality seriously.

12. It should be recalled here that it is presumed that any party who is the subject of an investigation is presumed innocent at all times until there is sufficient proof, within the context of a trial in due course of law in accordance with Article 38.1 of the Constitution. In effect, the proposition put forward by the solicitors on behalf of ICL and CRH and Séamus Lynch is that a person who moves from a role in a company under investigation to a related company within the group, and moves from having a responsibility in relation to Ireland to having a different geographical remit in terms of business could not commit a crime on behalf of the company under investigation. That proposition is utterly untenable. The essence of a competition offence is that a person organises a scheme whereby the market is unlawfully distorted. In the case of an individual, the fixing of prices or the preferment of unequal terms to equivalent transactions, for example, is done with a view to ensuring that other individuals or firms which are capable of competitively offering goods and services are deprived of the natural effect of the marketplace to move towards economy and efficiency. It is the same in the case of an undertaking, or a firm. In order to promote the interests of a firm, individuals may act unlawfully by unfairly retaining business or may draw business to that firm by, for instance, predatory pricing which may result in profit loss over a short period of time with a view to removing a competitor and enforcing a strong, dominant, or even monopoly position over the longer term. This can be done through meetings, through correspondence, through emails or by designating other individuals to make appropriate arrangements by word-of-mouth. Whether any of this happened or not, or whether there was any abuse of a dominant position by ICL, if it occurred, and it is unproven as of this moment, it was done by human interaction which is possibly evidenced in diary entries, in correspondence, in emails and may be recovered from such or may be the subject of further investigation with a view to obtaining the evidence of alleged accomplices.

13. None of that is dependent on where an individual works at any particular time, who that individual works for, the nature of the geographic responsibility devolved and that person's role in the workplace. A contract killer, to take an unrelated but pertinent example, who murders someone in a large food company may have no connection to the business of that firm but may be paid through an individual account or a corporate or corporate subsidiary account. Once the suspicion may reasonably be held, the investigation may proceed down such lines, subject to appropriate legal authorisation where searches or arrests are to be made. His motivation may be money but motivation to commit a crime may exist either within or without a precise corporate structure or designation of responsibilities.

14. Further, even on the set of affairs as set out in the correspondence advanced by the

solicitors on behalf of ICL, CRH and Séamus Lynch, nothing establishes any distance from the matter under investigation which would render the email traffic entirely irrelevant and the context within which it occurred, such as dates, servers used, those addressed or copied, unimportant. Barrett J, in the course of his judgment in the High Court at para. 27, dealt appropriately with this argument:

> 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 needs 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.

15. As to the precise structure of the companies as between ICL and CRH, no specific information has been forthcoming beyond the fact that these are related companies and are not denied to operate in some way within a group. The precise circumstances under which assets may be transferred from one company to another within a series of companies and the particular relationships which might justify what is in effect the diminution of one company's assets in favour of another company remains to be decided. It may be that the ordinary rule established by the maxim that "there are to be no cakes and ale save for the benefit of the company" applies to each company as an entity, isolated as each company is and regulated in that regard by law, or it may be that the transfer of assets is lawful. A reliable text, Pennington's Company Law, (7th edition, London, 1995) at page 993 cites *Charterbridge Corporation Ltd v Lloyd's Bank Ltd* [1970] Ch 62 in support of the following assertion:

> [I]f a subsidiary company enters into a transaction, not for its own objects, but in order to assist its parent or holding company or a fellow subsidiary...the transaction may be a misuse of the power of its directors....This is not so, however, if the directors of the subsidiary act to promote or safeguard the common interests of the subsidiary and its holding company....

16. It is unnecessary now to decide that specific issue; it may be subject to argument on the traditional adage sometimes expressed as "there may be no cakes or ale from company funds, save for the good of the company." The statement of the general principle underlines, however, the ordinary good sense of the proposition that a person working for company A within the Y group may do something to benefit company B within that same group. Whether that activity is criminal, or otherwise, does not matter for these purposes. The fact that the individual does not work for a company, or works for an unrelated company, does not stop that person acting on behalf of, or for the advantage of, another individual or another firm. In that regard, the finding of the High Court accords with a proper legal analysis and should be upheld on this appeal. The issue of powers under the search warrant and the proper approach to the later examination of the copied emails should now be considered.

Balance

17. What is empowered by a search warrant is a matter of the proper construction of the legislation. At issue on any challenge is what the legislation permits in terms of an intrusion into the privacy of an individual or of a firm. In this particular situation, competition law searches, as mandated by Articles 101 and 102 of the Treaty on the Functioning of the European Union, require a balance to be struck between the nature of the private interests involved and the requirement for searches to be thorough so as to fulfil "the principle of sincere cooperation" required in "carrying out tasks which flow from the Treaties"; Article 4(3) of the Treaty of the European Union. This is a context apart from the general criminal law and of the various powers therein mandated. It calls into

the question the nature of the privacy rights properly to be considered and the scope of searches lawfully enabled by legislation. The balance to be established in this particular competition law context can include the scope of an examination away from the scene of a search in order to determine irrelevant material and the disposal of what is unnecessary for the legitimate aim of pursuing administrative measures for breach of competition law or a criminal prosecution.

Search warrant powers

18. There is no general power for investigating authorities to enter and search business premises, much less the dwelling of a citizen which, under Article 40.5 of the Constitution, is "inviolable and shall not be forcibly entered save in accordance with law." Since the decision in *Entick v Carrington* (1765) 19 State Tr 1001, an entry onto private property must be justified either at common law or be within the specific terms of the statute authorising the intrusion. Since entry must be justified "upon some rule of positive law", actions such as sorting through documents or emails, copying material or taking it away for analysis, which involve what is ordinarily a trespass to property or a breach of copyright, also require statutory or common law authority. Here, that is said by the defendant Commission to be founded on s. 37 of the Competition and Consumer Protection Act 2014. Such seizure and copying as occurred was outside the scope of that statutory permission, claim the plaintiffs as the parties searched, and furthermore the execution of the process of search, seizure, copying and analysis must be conducted so as to protect them from any breach of privacy and enable their full participation so as to uphold their constitutional rights and Convention rights guaranteed by the European Convention on Human Rights under the European Convention on Human Rights Act 2003, s. 3.

19. The extent of the powers available on a warrant is a matter of construction of the statute under the authority of which it is issued. Such legislative authority is to be construed from the plain words enacted, read in the light of any other relevant provision, within the statutory context as a whole. When addressing the conferring of powers of search or arrest, it is desirable that "broad, plain, intelligible principles" should be stated. Those tasked with the temporary deprivation of liberty that arrest involves or the intrusion into home or business which a warrant authorises, as well as those who are the subject of same, need plain guidance and clear boundaries; see the remarks of Best J in *R v Weir* (1823) 107 ER 108 at 117. This principle is echoed in the judgment of the Court of Justice of the European Union in Case C-37/13P in *Nexans SA v Commission* [2014] 5CMLR 13 which refers at para 34 to the need for specific reasons on search application to show proportionality and to "put the undertakings" concerned "in a position to understand the scope of their duty to co-operate".

20. Here, the statutory authority is a unique one apart from general criminal law. Section 37 of the Competition and Consumer Protection Act 2014 mandates a search in particular terms and, hence, the relevant portions of that section should be quoted:

> (1) For the purpose of obtaining any information which may be required in relation to a matter under investigation under the Act of 2002 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.
>
> (2) The powers mentioned in subsection (1) are the following:
>
> (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;

(b) to enter, if necessary by reasonable force, and search any place occupied by a director, manager or any member of staff of an undertaking that carries on an activity or of an association of undertakings that carry on activities, being, in either case, a place in respect of which there are reasonable grounds to believe books, documents or records relating to the carrying on of that activity or those activities are being kept in it;

(c) to seize and retain any books, documents or records relating to an activity found at any place referred to in paragraph (a) or (b) 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 of or extracts from any such books, documents or records, including in the case of information in a non-legible form, copies of or extracts from such information in a permanent legible form;

(f) to require a person mentioned in paragraph (d) to give to the authorised officer any information he or she may require in regard to the persons carrying on the activity referred to in paragraph (a) (including in particular, in the case of an unincorporated body of persons, information in regard to the membership thereof and its committee of management or other controlling authority) or employed in connection therewith;

(g) to require a person mentioned in paragraph (d) to give to the authorised officer any other information which the officer may reasonably require in regard to the activity referred to in paragraph (a).

(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 authorising an authorised officer (accompanied by such other authorised officers or members of An Garda Síochána or both as provided for in subsection (5) of section 35) at any time or times within one month from the date of 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.

(4) The reference in subsection (3) to an offence under the Act of 2002

> shall, for the purposes of this section, be deemed to include a reference to the taking by the Commission of proceedings (whether civil or criminal), and the taking of proceedings by the Director of Public Prosecutions, in relation to any contravention of an enactment repealed by section 48 of the Act of 2002 that the Commission suspects has occurred.

21. Subsections (5) to (14) deal with the questioning and recording of interviews by members of An Garda Síochána accompanied, as may happen, by officers of the Commission. On this appeal, the emphasis was not on the lawfulness of the search, indeed that was conceded, but rather on: taking away material by copying; the later analysis of same; and the need for disposal of unrelated material caught in the search net.

22. In terms of the ordinary construction of the powers of search, a warrant is issuable by the District Court on reasonable suspicion that "evidence of, or relating to" an offence under the 2002 Act "is to be found in any place"; thereafter the officers of the Commission have a month to "enter and search the place" and to "exercise all or any of the powers conferred on an authorised officer under this section." A reasonable suspicion is one founded on some ground which, if subsequently challenged, will show that the person arresting, issuing the warrant or extending the detention of the accused acted reasonably; see Glanville Williams, "Arrest for Felony at Common Law" [1954] Crim LR 408. A reasonable suspicion can be based on hearsay evidence or the discovery of a false alibi; *Hussein v Chong Fook Kam* [1970] AC 942: or on information offered by an informer who is adjudged reliable; *Lister v Perryman* [1870] LR 4 HL 521, *Isaacs v Brand* (1817) 2 Stark 167, *The People (DPP) v Reddan* [1995] 3 IR 560. A suspicion communicated to a garda by a superior can be sufficient to constitute a reasonable suspicion, as may a suspicion communicated from one official to another, which is enough to leave that other individual in a state of reasonably suspecting; *The People (DPP) v McCaffrey* [1986] ILRM 687. The fact that a suspect is later acquitted does not mean that there was not a reasonable suspicion to ground either an arrest or a search. It is accepted by the European Court of Human Rights that "the existence of a reasonable suspicion is to be assessed at the time of issuing the search warrant"; *Robathin v Austria* [2012] ECHR 30457/06 at para. 46. Having information before a judge of the District Court whereby he or she may reasonably suspect the potential presence of information on a premises founds the warrant. The standard being applied here is such as might be familiar from civil or criminal practice. But issuing a search warrant is not to be confounded with any analogy with the criminal trial process. That is not the task. Facts are not being found: facts are being gathered. It necessarily follows that what is involved is an exercise in the pursuit of what is potential, essentially an exercise which may yield no information or limited information. It is of the nature of a criminal enquiry that a warrant may authorise an intrusion into someone's privacy to little or no effect. This is of the nature of what is required in the course of information gathering and a negative result does not upset the validity of what was done if, after the event, information that may serve towards displacing the presumption of innocence happens not to have been gleaned. The power to issue the search warrant, therefore, does not in this instance inform the nature of the powers that may be exercised pursuant to it.

23. Potentiality carries through into the exercise of powers under the warrant. All of the powers of entry, search, copying, questioning and gathering of material in s. 37 are premised on this being for "the purpose of obtaining any information". That is not cast in terms of certainty, necessity, probability or even of reasonable suspicion, since all that is required for the exercise of s. 37 powers is targeted at that "which may be required in relation to a matter under investigation under the Act of 2002". Whereas, in argument on this appeal, there was a canvassing of other powers of search, these, while of interest, do not inform the construction of this section. Instead, other statutory models equip those authorised to search with definite powers based upon the possibility that something will be found that could turn out to be of assistance to an investigation. The wording is the

touchstone. It may be possible following the scrutiny of an object, for example an axe as a potential murder weapon, that it is not the cause of the wounds on a victim's body, yet a statutory model cast in terms of what may be required for an investigation excludes relevance as the criterion where the power of gathering material is concerned with what may be relevant, not just to the marks on the body of the deceased, but instead to the wider investigation into the crime. This may include motive or absence of motive, the personality of any potential suspect in relation to their capability to commit the offence and the object as a potential lead to where other weapons were obtained. This is the kind of thing that police work involves. It is through gathering potential leads and clues, the following of lines of consequent enquiry and the elimination of avenues for the resolution of what may be merely suspected, that a case is built. Barrett J, in his judgment in the High Court, rightly refers to what may be known or potentially known. It has also always been the position at common law, and this was not challenged on this appeal, that a valid search in respect of one crime which uncovers evidence relating to another crime remains valid and that such material may be seized and later analysed. An example is where a mobile telephone seized validly in relation to a particular murder investigation yields evidence on analysis of a different homicide or thereby child pornography is uncovered.

24. This statutory model is argued by the plaintiffs to be unfit and unsound for the gathering of anything other than what is directly relevant to price-fixing of bagged cement or the abuse of a dominant position in the market. In that regard, however, the wording gives the widest possible ambit for enquiry to the Commission. It is also to be noted that nowhere in the affidavits, or in the argument before the High Court, was it ever alleged by the plaintiffs that the officers of the Commission went about their task other than in good faith and in pursuit of the purposes of their enquiry. Nor, on the state of the evidence, could that be alleged. If a test of relevance were to be imposed on the Commission, which is not the statutory test set out in this specific legislation, even then that test would surely not differ from the test for civil discovery of documents which requires the disclosure and potential copying of documents, including computer files, diaries, text records and emails set out in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55 at 63. There the solemn duty, pursuant to court order and subject to the penalty of criminal contempt, is to reveal material which may advance your case or damages your opponent's or "may … either directly or indirectly enable the party requiring [discovery] either to advance his own case or to damage the case of his adversary." That is not, however, the test. The test to be applied is the one set out in the 2014 Act. It may also be remarked that Article 20 of Regulation No 1/2003, which provides for the powers of inspection of the European Commission as to breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union, while enabling searches not mandated by judicial authority, also enables entry, examination, copying and seeking explanations. It is within the terms of such authorisation that examination take place away from the searched premises; see Case C-583/13 P *Deutsche Bahn AG v Commission*, judgment of 18 June 2015 and see the separate judgment of Laffoy J on this, with which this judgment concurs.

25. Central to the argument of the plaintiffs was that everything that was required to be done in terms of scrutiny of materials under this legislative model had to be done on the premises of the plaintiff ICL and completed there; in other words, that only material shown to be directly relevant to the matter under investigation could be removed from the premises or copied. In the first instance, such an interpretation would be contrary to the express wording of the statutory power. Secondly, in terms of the ordinary investigative process that is conducted every day in dozens of searches in criminal cases, items of potential interest are commonly seized in the course of searches so that later examination can focus in on whatever direct or potential assistance such items may be, in terms of the prospect of direct proof or of initiating a line of enquiry of a possibly promising avenue. On cursory examination, a notebook may contain only three or four pages which jump out as relevant. The context, however, is important, as it is with diary entries, only some of which may ostensibly relate to the commission of a crime, but

where context is of vital importance. Where was a person on a particular day? Who was he with? Who are his associates? What is the ordinary pattern of behaviour demonstrated or suggested by the context? These types of questions are part and parcel of mobile phone analysis as to the time, the place where a mast transmitted a call, the length of the call, the person or persons contacted and the people with whom a suspect associates by habitually ringing or texting them. Again, a concrete example helps to focus the mind. If a woman alleges that she was the victim of sexual violence, the perpetrator may often be someone with whom she has had some contact. His clothing may only be identified in relation to the day the alleged offence was committed, by giving a general description such as jeans and a T-shirt. All such clothing may lead to a discovery, as may underwear or, as those experienced in the area will be all too familiar, the contents of a washing machine. If the perpetrator is unknown, then any item that may yield hair samples consistent with the alleged victim, supposing her hair was dyed and thus allowing a match to be made, or fibres from a jumper she was wearing need necessarily be searched for. Investigators know what they are doing because that is what they are trained to do. Later, under microscopic examination, the clothing may reveal signs of distress, potentially relevant to consent, in the first instance, or of the transfer or fibres or DNA in the second instance as to prior contact. No one will actually know, or even be able to shrewdly predict, possible relevance, until the item is taken away and scrutinised under controlled circumstances. Sometimes a cold case review will yield the very evidence that even dry-cleaning has not removed, hidden within the inner seam of a garment or on a button thread; see for instance the facts of *Nash v DPP* [2015] IESC 32 at paras. 6-11. This was an instance of where evidence in relation to a murder in 1997 was discovered 12 years later upon the development of more sophisticated DNA techniques.

26. Under s. 37 of the 2014 Act, powers of copying and later examination are provided for. It is usually a past activity that is under investigation by the Commission. That activity may well be a continuing conspiracy or may be one that has ceased on fulfilment or failure of its object. Activity is defined in s. 34 as including "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". Since what was copied here was part of an email account, the definition of a record under the same section is relevant. This is defined as including "discs, tapes, sound-tracks or other devices in which information, sounds or signals are embodied" and significantly qualifies that by stating that such records embodies same "so as to be capable (with or without the aid of some other instrument) of being reproduced in legible or audible form". The capacity to conduct an in-depth analysis of records may not emerge at the time of search, but information as to deletion, times of sending and receipt of an email, who is copied to the email under cc or bcc (which is not revealed on the face of an email on receipt), are clearly contemplated by the statutory scheme as facts which may emerge in the course of a forensic or laboratory analysis. This, again, accords with the ordinary approach to search and analysis in criminal law. This unique competition law context does not differ in respect of the powers conferred by the legislation.

27. Section 37(2)(c) empowers authorised officers "to seize and retain any book, documents or records relating to an activity" found at the place of the search. Of itself, this substantial power to take and keep material encompasses the ability to later scrutinise the material; that is what retention means. But, officers are also mandated to "take any other steps which appear to the officer to be necessary for preserving, or preventing interference with" that material. If material is copied from a hard drive onto disc, this ensures its original nature for the purpose of examination and trial. What is necessary for a proper scrutiny is empowered by the section. In addition, s. 37(2)(e) empowers such officials of the Commission to "inspect and take copies of or extracts from any such books, documents or records". In terms of the plain use of language, copying can only mean that it is done within the sense of the subsection which contemplates that later scrutiny be brought to bear on the material. Material in non-legible form may be extracted into "a permanent legible form" and this, again, can only be for the purpose of

later scrutiny. The statutory wording does not disenable scrutiny of the material, but it does reasonably inform and limit it. Nothing in the exercise of the powers under s. 37 has in any way disenabled search and scrutiny off the premises. The argument that this material could not be taken off site must therefore be rejected.

The commonplace nature of this process

28. While the *Byrne* and *Berkeley* cases, cited above, emphasise the unitary nature of the criminal trial, there have been court applications over decades in relation to the seizure of property during searches. These applications have been necessarily rare since other powers of search and seizure tend also to be ample in the authority which they give to gardaí or other authorised personnel. Central to the commencement of such an application is the writing of a letter setting out in detail the nature of the property, the retention of which is claimed to no longer be of any potential assistance to an investigation. Experience shows that such a letter would set out, for instance, that gardaí had taken some item of personal sensitivity during the course of a search, for instance a photograph album of no potential relevance to the investigation, or that an item needed for work, such as a car, should be returned following inspection and testing. That was not done in this case.

29. This is not a case where the subject of the search, effectively the plaintiff Séamus Lynch, was in any way potentially disadvantaged. The entire email file was within his control. It had been copied by the Commission. It was noticeable how, with the dismissal of the argument by Barrett J in the High Court that a formal position in a particular company outruled criminal activity in the context of ICL, the attention on this appeal has shifted to privacy rights. Counsel for the plaintiffs correctly did not specify any particular concerns; these had not been articulated at all in correspondence and only mentioned in the briefest possible way on affidavit - effectively through quoting Article 8 of the European Convention on Human Rights without adding any meaningful detail as to why it might apply. No case has been made through the sworn assertion of fact that the subject of the search is concerned with any particular aspect of his non-business activities. While medical records, the infirmity of elderly relatives and family photographs were mentioned in argument, this was entirely by way of giving examples which counsel were careful to state were not based on sworn evidence or even on instructions.

30. While this was a business email address, not a private or family email address, the separate judgment of MacMenamin J rightly emphasises the extraordinary scope of what was seized. It was every single email from a particular person. That may be justified within the general context of criminal searches under warrant, depending on the suspicion validly held; as with the necessity to research the activities of someone suspected of terrorist activity or of organised crime or money laundering. The problem which emerges is due to the scope of the seizure which the Commission decided to effect and the absence of justification. This may be a part of the uneasy intersection of the investigation of traditional crimes, such as drug dealing or murder, with crimes which of their nature tend to be evidenced not by physical items but by electronic communications. A police officer entering a home occupied by a suspected drug dealer will immediately see what is relevant; the scales, the powder, the paraphernalia of dealing, the wads of cash. The intrusion involved in walking into a home is justified. The breach of privacy in seizing a mobile phone is necessitated by the search. Possibly, as well, it may be necessary to copy a computer hard drive. A police officer investigating terrorism may need to scope the seizure of electronic communications widely because a pattern needs to be established. In those cases, there will be a reason for the search and its ambit and there will be judicial oversight in the issuance of the relevant warrant. Hence, such actions may be amply justified. Here, the problem is in the seizure of an entire email account of many

thousands of communications without justification for such an ample and undifferentiated seizure. Nor does the context necessarily, as in the examples just given, provide that justification. This search was done without any relevant dates as target and without the consideration of using target search terms or some other means of limiting the material proportionately to what needed to be taken. That may be justified where the police or investigating authority needs to search out accomplices or co-conspirators to prevent or investigate an atrocity or where the identification or an organised crime or terrorist ring requires a complete analysis of all information available as to their communications. Such a necessity, however, has not been identified here by the Commission.

The nature of privacy

31. Mc Mahon and Binchy in their Law of Torts (4th edition, Dublin, 2013) comment at para. 37.100 on the "ongoing uncertainty as to the source, extent and character of a generic right to privacy in Irish law". This, the authors state, is in part due to the "fact-specific" nature of the case examples which render "generalisations both difficult and dangerous." Such a right has been recognised as an unenumerated right within the Constitution in *Kennedy v Ireland* [1987] IR 587 by Hamilton P and subsequently approved. That was a case of deliberate, conscious and unjustifiable telephone eavesdropping by agents of the State. The authors give an illuminating narrative of how the private space may become public through movement from that zone into more open spheres at paras. 37.06-37.07.

32. Various jurisdictions have struggled with an appropriate definition of a tort of privacy, in particular in setting out the circumstances in which privacy is to be protected and in delineating such boundaries against the competing entitlement of media enquiry, or even entertainment, within the public space; see for instance *Campbell v MGN Ltd* [2004] 2 AC 457. The reasonable expectation of privacy test has been used as a working model in other jurisdictions and perhaps displays the necessary flexibility whereby the legitimate resort away from the public space may be considered within an appropriate context. As Fleming comments in Law of Torts (10th edition by Sappideen and Vines, New South Wales, 2011) at para. 26.10, no "simple answer can be given to the question of how contemporary law affords protection for what is compendiously called the "right of privacy"." Resort to a private space, it must also be recognised, may be for illegal and even criminal purposes. There are some spaces into which the law has no entitlement to intrude, even though it may disapprove of actions which in themselves are an aspect of human expression; see the dissenting judgment of Henchy J in *Norris v Ireland* [1984] IR 36 at 71-72. Circumstances may dictate where a right to privacy may be asserted, as where a couple converse in their own bedroom, and where the assertion of such a right is not to be met with favour, as where people meet in a public forum, and this is recorded as a fact, or engage with newspapers or television or the Internet as to their life or opinions in such a way as to make themselves an aspect of wide interest. The nature of the conduct may also have a bearing on whether any right to be left alone is engaged. Criminal conduct is not planned publicly and nor do conspirators generally give advance notice of their actions. Hence, to organise a crime, resort is had to what may be otherwise described as the private space. The Constitution, in contemplating the attainment of "true social order", as recognised in the Preamble, could hardly extend to the planning of crime the protection of a specific right that is recognised because of the legitimacy of people being enabled to retreat from public notice. That there may be legal rights attached to communications through telecommunications is undoubted, legislation provides for this, and their general application is necessitated by the need to protect the public. But, there is no constitutional right of privacy that inures to the organisation of a crime.

33. This is not an action for breach of privacy. It is an attempt to stop the examination of material that has been copied in consequence of statutory authority. It is inevitable that in granting a warrant, intrusions into the private space occur. It is certain that matters outside those of even potential relevance to a criminal or regulatory investigation will

come to the attention of those authorised to search. Even entering an office, there may be family mementos or other personal items, while a legally-mandated entry into a dwelling is far wider than the access normally granted to any visitor and is revelatory of life choices. Visitors are generally confined to one room, a kitchen or a living room, while those who search must necessarily look at bedrooms and inside cupboards or under floorboards. Hence, the importance of the interposition of judicial scrutiny to authorise such intrusions. That judicial authorisation is only given where the statutory parameters are fulfilled to satisfy with the necessity for the search; most usually that of reasonable suspicion about a crime that has been perpetrated or is in planning. Mirroring the nature of entry into the private space which a judicially authorised search engages, the taking or copying of records, of data or email necessarily moves into the private space. But, it may be necessary and that depends on the nature of what suspicion is held and the nature of the crime. It may be proportionate because of the nature of investigations, conducted as they are for the benefit of society for the detection of crime, with a view to gathering both what will assist a prosecution and what may offer a defence to an accused. An investigation, for example, into child pornography offences will almost invariably require the seizing of a suspect's computer. That is necessary. As in all criminal investigations, other rights are engaged, most obviously that of the protection of the life and bodily and mental integrity of victims. In addition, there is the duty of all democratic states to have a functioning criminal justice system, founded on reason and on clear rules to which the victims of crime can have recourse. Embedded in that computer will perhaps be material outside the scope of constitutionally mandated privacy, the images that constitute the nature of the charge; that is what the investigators are seeking to establish. Also included will be legitimate and private communications with friends, photographs of social occasions and perhaps documents or literary efforts of the suspects. In due course, only what is relevant and what has the ability to provide assistance to the prosecution or the defence will be focused on, the remaining material will be winnowed out as unimportant. That why the computer was seized in the first place. Its seizure was proportionate and the necessity to examine what is on it is justified by the nature of the investigation. Similarly, with the investigation of a terrorist offence, the nature of what has been done, or what needs to be uncovered where a planned outrage is suspected, may similarly justify such complete scrutiny as requires the copying of an email account or the downloading of the hard drives of multiple computers.

The non-equivalence of legal professional privilege

34. In correspondence, and on this appeal, it has been contended on behalf of the plaintiffs that any material that may eventually be found to not be directly relevant to the investigation should be treated as if it were a legally professionally privileged communication. That contention led to the letter, quoted above, calling for the intervention of some legally qualified person as a decision-maker, prior to resort to litigation should both parties not agree. That is provided for in the 2014 Act as a protection that is available here where legal advice material has been seized. While the absence of an equivalent provision in respect of out of scope material is not present in the Act, as Laffoy J comments, this would have been a useful addition to a legislative scheme which may involve the wide seizure of lawful material. Certainly, it would have required submissions in real terms as to what private material had been intruded upon.

35. Legal professional privilege protects from any disclosure advice given by a lawyer to a client. Legal advice is opposed to legal assistance, such as the drafting of contracts or other documents designed to have legal effect. A client, in order to get advice, may have to make a definite indication of what he or she has done. The advice as to liability or as to a potential defence, which can only be on the basis of facts as revealed by a client, may then follow. Thus a document giving legal advice may contain or reference a complete confession to murder, to rape or to the abuse of a dominant position in the marketplace. A note might be drawn up pursuant to the right of a prisoner to receive legal advice while in custody and prior to questioning by gardaí. This may later be contained on a computer or on a computer server. Nothing could be more relevant to an investigation, or more

definitive, yet nothing could be more untouchable. This is not the place to consider the possible obligation of a lawyer that might arise for limited disclosure if the innocence at stake exception of another person were to arise. A legally professionally privileged document may not be waived by the lawyer; the privilege is that of the client alone.

36. Legal professional privilege is an exception at common law to the disclosure of documents in civil and, where it arises, in criminal cases. It is one of the exceptions which is absolute, or almost so, as with the extraordinary instance of innocence of another perhaps enabling limited disclosure. Within its terms it is not subject to interference. That privilege is of immense benefit to society in enabling those accused to have professional assistance under questioning and to assert their right to liberty and to have recourse to the rule of law. It enables non-production of relevant documents. Hence, it is not trammelled or curtailed. Privacy is. Thus it is not surprising that s. 33 of the 2014 Act deals with instances in which the documents found provide legal advice:

> (1) Subject to subsection (2), nothing in this Act, the Act of 2002 or the Act of 2007 shall compel the disclosure by any person of privileged legal material or authorise the taking of privileged legal material.
>
> (2) The disclosure of information may be compelled, or possession of it taken, pursuant to this Act, notwithstanding that it is apprehended that the information is privileged legal material provided that the compelling of its disclosure or the taking of its possession is done by means whereby the confidentiality of the information can be maintained (as against the person compelling such disclosure or taking such possession) pending the determination by the High Court of the issue as to whether the information is privileged legal material.
>
> (3) Without prejudice to subsection (4), where, in the circumstances referred to in subsection (2), information has been disclosed or taken possession of pursuant to this Act, the person—
>
> (a) to whom such information has been so disclosed, or
>
> (b) who has taken possession of it,
>
> shall (unless the person has, within the period subsequently mentioned in this subsection, been served with notice of an application under subsection (4) in relation to the matter concerned) apply to the High Court for a determination as to whether the information is privileged legal material and an application under this section shall be made within 30 days after the disclosure or the taking of possession.
>
> (4) A person who, in the circumstances referred to in subsection (2), is compelled to disclose information, or from whose possession information is taken, pursuant to this Act, may apply to the High Court for a determination as to whether the information is privileged legal material.
>
> (5) Pending the making of a final determination of an application under subsection (3) or (4), the High Court may give such interim or interlocutory directions as the court considers appropriate including, without prejudice to the generality of the foregoing, directions as to—
>
> (a) the preservation of the information, in whole or in part, in a safe and

> secure place in any manner specified by the court,
>
> (b) 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.
>
> (6) An application under subsection (3), (4) or (5) shall be by motion and may, if the High Court directs, be heard otherwise than in public.
>
> (7) In this section—
>
> "computer" includes a personal organiser or any other electronic means of information storage or retrieval;
>
> "information" means information contained in a book, document or record, a computer or otherwise;
>
> "privileged legal material" means information which, in the opinion of the court, a person is entitled to refuse to produce on the grounds of legal professional privilege.

37. This section declares protection in a different context. Nonetheless, on the basis of the analysis of Laffoy J, a situation of the seizure of out of scope material has occurred and what needs to happen now to advance matters is to find a mechanism for the lawful examination of the material while enabling representations as to the nature of what is private to be taken into consideration.

Data protection

38. The argument of the plaintiffs concerning data protection was maintained on this appeal. It is submitted that s. 8 of the Data Protection Act 1988, as amended by the Data Protection (Amendment) Act 2003, does not authorise a search. In particular, it is argued that ICL and CRH had no authority from Séamus Lynch to pass data to him. This argument is equivalent to a person claiming on a search for child pornography that the computer on which such downloads were suspected to be held was in fact the property of another and that that individual had personal data on same. Laffoy J correctly dismisses this contention.

39. Section 8 of the 1988 Act, as amended, bypasses the restrictions under the legislation on the processing of personal data by clearly stating that such restrictions "do not apply" if the processing is, under subsection (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

40. The plaintiffs also argue that since s. 37 of the 2014 Act does not apply, there can be no retention or processing of data off-site. When legislative provisions are clear, which

they are in this instance, such an argument cannot stand. This is an explicit, and not an accidental, alteration of the law. That law is to be construed within the legislative context and also in light of where the legislative scheme fits into the legal order; *Bederev v Ireland & Others* [2016] IESC 34 at para. 23. The intention in this case was to ensure that arguments concerning data protection did not impede the steps necessary by way of search, seizure and copying required in order to detect serious criminal offences.

Safeguards

41. The plaintiffs argue that in addition to the rights which arise by virtue of the Constitution protecting their asserted corporate, and in the case of Séamus Lynch personal, privacy, the approach of the Commission has infringed its obligation under s. 3(1) of the European Convention on Human Rights Act 2003. That section provides:

> Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

42. The rights asserted are those provided for under Article 8, which states that "[e]veryone has the right to respect for his private and family life, his home and his correspondence." Privacy is both a limited and a qualified right, the exercise of which may be subject to legislative interference for legitimate reason or, from the sensible wording of Article 8, to "interference by a public authority … in accordance with the law" and where same is "necessary in a democratic society" where the interests engaged are "national security, public safety or the economic well-being of the country" or if an intrusion occurs "for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." The first part of the test therefore requires that there is a legal basis for the interference with the right to privacy. In this case, s. 37 of the 2014 Act allows such interference. The second requirement is that any interference with the right to privacy must be "necessary in the democratic society", meaning that any interference must be proportionate to the legitimate aim pursued, which are specifically listed in Article 8(2). Interference with the right to privacy by public authorities is allowed "for the prevention of … crime", which is directly applicable to this case. Clearly, the detection of crime prevents crime. Crime also interferes with the rights of victims, and while uncompetitive cement pricing may have no immediately obvious victim, it causes disorder within the general economy to the detriment of consumers and undertakings which might otherwise have a competitive edge. Thus, crime interferes "with the rights and freedoms of others." The scope of what is seized in criminal investigations is, in the first instance, justified by a warrant issued by judicial authority and is, secondly, scoped by the nature of what material the investigators need to examine. Here, the problem is in justifying the examination of many thousands of emails which are accepted by the Commission to be outside the scope of anything that could be said to be relevant. A solution must be found to enable the proportionate scrutiny of that material. Laffoy J rightly suggests that the parties correspond as to this issue. Some suggestions as to the scope of a proper compromise are also within the competence of a court.

43. The plaintiffs assert multiple arguments. Firstly, the right not to be searched is claimed; but since this is authorised by law, the search has taken place in line with the requirement that any interference with the right to privacy under Article 8 is to occur "in accordance with law". Secondly, they argue that the taking or copying of documents outside what is expressly relevant to a contemplated charge is unlawful; but again this is authorised by law. They claim, thirdly, the entitlement that the scrutiny of the material should now be proportionate to the purpose pursued: that the investigation into the alleged crime should continue but that they should have an input into the exclusion from detailed examination of private family communications. In the extraordinary circumstances of this statutory model, which differs from the powers generally available for searches in criminal law, and in the absence of justification by the Commission for the examination of private communications, a proportionate response, the plaintiffs urge, includes an entitlement to be present when all files are scanned through the use of key search terms, an entitlement to influence the choice of such terms, and an entitlement to

be present while any email targeted by the Commission is perused or further examined as to metadata. Any dispute that arises, and in this regard a dispute would easily arise if the proposals of the plaintiffs were to be adopted, is to be treated in an equivalent way to the assertion of legal professional privilege, the absolute right of a client provided for under s. 33 of the 2014 Act. That, in turn, is said to be subject to judicial scrutiny. Finally, it is argued by the plaintiffs that any data found not to be relevant is to be destroyed. What is crucial to this analysis is the obligations arising under European law within this particular context, and in particular as analysed by Laffoy J, and the complete absence of justification for such a wide seizure of hundreds of thousands of emails. Despite not justifying the seizure of an entire email account over several years of an individual, the Commission have not proposed, in the first instance, what is to happen to obviously irrelevant material, in the second instance, how proposed search terms could not have been used on site when the search was conducted, in the third instance, why it was necessary for the plaintiff's legal representatives to protest before any search terms were even proposed and, finally, that legal representatives having been allowed to attend during the search, why these may not assist in at least attempting to settle the basis for the analysis.

44. Central to the protections afforded to an undertaking or individual searched pursuant to warrant is that there should be judicial authorisation for such an intrusion and that the information grounding the search be sufficiently precise as to the target of the enquiry; Case T-135/09 *Nexans France SAS v Commission*, judgment of 14 November 2012. As the General Court observed at para. 39:

> The obligation of the Commission to specify the subject-matter and purpose of the inspection is a fundamental requirement in order both to show that the investigation to be carried out at the premises of the undertakings concerned is justified, enabling those undertakings to assess the scope of their duty to cooperate, and to safeguard the rights of the defence.

45. This protection was present in this case, as it is in all criminal law searches in this jurisdiction. As in the *Nexans* case, the defendant Commission specified the subject matter and purpose of the investigation through the setting out of "essential information" and by stating "the essential characteristics of the suspected infringement, indicating inter alia the market thought to be affected"; see paras. 42 and 44. It has not been demonstrated that what occurred in this case was a hovering up of documents with no regard to a specified subject matter, nor has there been any apparent violation of the entitlement to confidentiality as to legal advice; see *Niemitz v Germany* (1993) 16 EHRR 97. That issue is, in any event, specifically covered by s. 33 of the 2014 Act. This was not a legal office and in consequence the specific sensibility attaching to professional communications with a lawyer does not arise; *Robathin v Austria* [2012] ECHR 30457/06.

46. The copying of emails has taken place on a commercial email server run and paid for by one of the plaintiff companies. Where there has been a mixing of materials both relevant and irrelevant to the investigation, due to multiple uses of the server, this may not the fault of the party searching; see *Bernh Larsen Holding AS v Norway* [2013] ECHR 24117/08, para. 173. Codes of practice, including those employed by An Garda Síochána, may specify that where a computer hard drive is downloaded, three copies on digital devices must be kept; one for the party searched, one kept untouched as a control and one for forensic scrutiny. This, however, is a practice and not a legal requirement. Having protocols, however, makes clear to everyone what should happen. Such may, operate as a guide to circumstances as extreme as in this case where a vast capture of irrelevant material has occurred. The plaintiffs, fortunately, know what has been copied because they have the original material. The individual suspected of complicity in breaches of competition law, who has an entitlement to be presumed innocent, has been specifically targeted. This is not, therefore, a case where material has been taken and where the

context enables a court to find that the searched individual or undertaking has no precise knowledge of what has been taken in the search. In such circumstances, the rights of defence may be compromised as it will then be probable that legitimate representations as to what was directly or potentially relevant to the investigation could not precisely be made. Here, such precise representations can be made. The significance of this is made clear by the General Court in *Nexans* at para. 130:

> As regards the documents copied during the inspection, it must be pointed out that the applicants kept the originals, in either paper or electronic form, and are able to ascertain the nature and the content of those documents. Notwithstanding that fact, the applicants did not identify specific documents or parts of documents which are protected under EU law. The applicants merely maintain that the Commission did not have the right to copy those documents in order to examine them later in its offices. According to the applicants, the documents ought to have been examined at the premises of Nexans France, and the Commission was entitled to take a copy only of those documents relevant for the purposes of the investigation. It must therefore be held that the applicants are not taking issue with the Commission for having consulted or copied certain specific protected documents, but for having examined them in its own offices in Brussels rather that at the premises of Nexans France and for having kept them up until the time of the examination.

47. Consequently, the plaintiffs are not at a disadvantage in seeking to assert that certain documents within the email account of Séamus Lynch relate to genuinely private engagements or concerns. They have the ability to assert that certain precisely defined and described emails bear no relationship to the nature of the investigation, which is amply described in the warrant and in the sworn statement which accompanied it. It is thus incumbent on the plaintiffs to assert the proportionality of the coming scrutiny by making a detailed submission as to what communications on this business email server have been entirely for private or family purposes.

48. In reality, the plaintiffs have, on the facts as laid before the trial judge in the High Court, made an entirely separate and incorrect case as to the incompatibility of executive duties within the cement industry with the pursuit of breaches of competition law. Any taking of or copying of email material in the course of a valid search will capture ordinary day-to-day stuff like conversations about hurling matches or clothes or recipes for Irish stew. It would have assisted the process for genuinely private and sensitive material to be precisely specified by the plaintiffs in their legal submissions to this Court. This has not been done, certainly that is not the fault of counsel, and it should have been done by them in order to assist in this process. It is clearly important to the outcome of a case that such specification be done; that a party the subject of a search and seizure should simply state that particular items of genuinely private concern and of no relevance to the case under investigation have been taken and state clearly what these are. To fail to do that is to undermine any such later case that might be made; *Janssen Cilag SAS v. France* Application No. 33931/12, European Court of Human Rights. But, of course, the searching authority may display an unwillingness to consider any such submission, as is pointed out in the judgment of Laffoy J.

49. The entitlements contended for by the plaintiff relating to attendance at any examination of documents, exist in some jurisdictions pursuant to protocols where a vast seizure of electronic material has been made and where that input may assist in identifying a proportionate examination of material that is accepted to contain out of scope material. It is to be noted that in some codes of practice concerning the copying of digital material, it is thought that it may be desirable that a representative from the party searched be present for the examination of the documents. The jurisprudence on Article 8 shows that the European Court of Human Rights has not found that there is any general right for the party searched to be present for the opening or scrutiny of copied digital

material. The circumstances in which this occurs must be fact-specific. For instance, in a terrorist investigation, it is surely proportionate to conduct an immediate scrutiny in order to head off an impending atrocity or prevent yet another gross breach of human rights which public bombings or assaults with vehicles, or other weapons, represents. A suspect may have fled; or may be required to be kept from material where the legitimate purpose of preventing dissemination as to methods occurs. Any such cases will, in any event, have their own statutory matrix and it is not proposed that any change in the methodology of examination is necessary. Any one believing that more material has been seized than necessary, may of course make a representation as to precisely what that is and the investigating authorities may consider their methodology in the light of it. In competition cases, specific to this legislation, as opposed to any other kind of case, it may be appropriate in order to ensure that out of scope material is excluded that representations are considered from the party searched, as to what is specifically private and as to what search terms may hit on what is sensitive private material, and that a representative should be enabled to attend some part of the necessary initial scrutiny. In the *Bernh Larsen* case, at para. 61, the Court refers to the fact that the taxation authorities notified the companies suspected of taxation irregularities of "the dates, time and place of the review, its object, certain preparatory processing not involving searching or opening of documents, and the identity of the companies concerned" and invited them "to appoint a common representative" to attend. As Barrett J did not make a specific suggestion as to a way forward, in the context of this case, it is within the scope of this Court's function on appeal to consider a way forward.

50. There may be some instances where, following precise representations from the party searched, that a response of having a legal or other representative in competition cases present for an initial scoping exercise may meet with good practice. However, there is nothing to establish it as a legal right in itself. Certainly, it is not an entitlement which obtains in criminal cases in general. The foundation for any such presence should be the assertion of particular areas of sensitivity with regard to privacy and these must be specified in a helpful way by letter by the plaintiffs to the Commission. A mischievous assertion may result in some competition cases but that is not necessarily to be expected here. The necessary specification of irrelevant and private material by the plaintiff should be simple in the light of the precise specification of the nature of the investigation by the defendant Commission in this case. De Jong and Wesseling in "EU competition authorities' powers to gather and inspect digital evidence - striking a new balance" (2016) 37(8) ECLR 325 consider two diverging approaches to investigations of competition law infringements by public authorities, referring to the EU Commission practice which is known as the 'on-site' selection model as it "primarily selects the digital evidence to be included in its file during the inspections at the premises of the subject of the investigation", while the off-site model includes that employed by the Dutch Competition Authority. At page 326, the authors refer to the importance of finding "a balance between ensuring that competition authorities' powers to investigate business records and books remains effective in a digital era, and safeguarding at the same time the companies' fundamental rights during these investigations." This analysis is specific to competition law.

51. The plaintiffs also contend that there is an absence of judicial review of the process. Such a process is specifically provided for in s. 33 of the 2014 Act in relation to claims that particular documents constitute professional advice on legal issues. It has been commonplace in this jurisdiction that those searched may wish to make a precise representation as to property taken in the course of an investigation and seek its return. The possibility of judicial involvement has never been ruled out from this process, nor has the taking of an action for damages should a civil trespass occur through an exercise of bad faith by authorised parties under a search warrant, or through actions outside the scope of legitimacy conferred by a warrant. No judge would validly entertain such a case had not representations of a sensible and precise kind first been made in such a detailed way as to enable the party holding the material after the search to respond. In this case,

that has not occurred. Instead, a vague and entirely erroneous case was essayed. Thus it has been necessary to hold that the search was within the scope of the legislation, as was taking material off-site, and that corporate structure is in no way an answer to legitimate suspicions.

52. Finally, in relation to the destruction of copied material, there is no reason for the Commission to hold on to irrelevant material. The Commission, which has been injuncted from its lawful function to date, should first of all be enabled to open and search the material in the precise and targeted way it has indicated. Since potential relevance is the test, and since the context will help to define the nature of any case to be made, once that material has been subject to scrutiny, arrangements can be made by the Commission to destroy material irrelevant to the investigation.

Result

53. In consequence, the order of the High Court was correct in the context in which the case was presented. It should be upheld. As Laffoy J suggests in her judgment, the forward movement of the investigation can easily be effected through the agreement of the parties. To some extent, positions have become entrenched. Thus, a suggestion as to what might now be addressed may be helpful to the concerns expressed and which are ruled on in this judgment and in the separate judgment of Laffoy J, with which this concurs. The Commission is entitled lawfully to proceed with its investigation. In assisting the process, and within the specific context of this legislation, the following might be offered as a suggestion:

> (a) the plaintiffs are entitled to, and might usefully, write a letter to the Commission setting out what private material has been copied in the email server of Séamus Lynch and why there is an especial sensitivity that attaches to it which requires the protection of his privacy rights under Article 8 of the Convention, specifying either dates or the subject matter requiring protection;
>
> (b) the Commission, in the context of this litigation, has suggested particular forms of electronic search of the material and it may there for assist for the Commission to invite submissions as to word searches and the appropriate analysis to bring to light relevant material and the plaintiffs are entitled to respond to that, bearing in mind that the statutory responsibility for the final decision is that of the Commission;
>
> (c) for the initial search of the voluminous material here with a view to scoping what is relevant by word-specific search, it may be appropriate in the light of the lack of justification put forward by the Commission, and because of that, that a representative of the plaintiff Séamus Lynch should be enabled to attend at that initial analysis;
>
> (d) the Commission should endeavour to protect the privacy of the plaintiff Séamus Lynch but may proceed to investigate crime in a proportionate way, and this the steps suggested ought to fulfill;
>
> (e) context in relation to emails may be important and so the meta data for any relevant material uncovered in the search may be of importance in placing communications in their proper context;
>
> (f) what is private and not relevant to the breach of competition investigation should be destroyed at the end of the process of identifying what is relevant and the representatives of the plaintiff might usefully assist

in consideration of an appropriate methodology;

(g) it would not be incorrect for the Commission to consider a code of practice, perhaps involving individual protocols, for future cases under this legislative code.

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