APPROVED JUDGMENT

NO REDACTION NEEDED

THE COURT OF APPEAL

Court of Appeal Record No: 2024/67

No 2022/261JR

Neutral Citation Number [2024] IECA 191

Edwards J.

Kennedy J.

Burns J.

JAMES FLYNN AND J.T. FLYNN & CO, SOLICITORS

Applicants/Appellants

V

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

Respondents

THE LAW SOCIETY OF IRELAND, THE CENTRAL BANK OF IRELAND, THE EUROPEAN CENTRAL BANK AND THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Notice Parties

JUDGMENT of the Court delivered by Mr. Justice Edwards on the 4th of June 2024.

Introduction

1. On Friday, the 31st of May 2024, this Court heard an appeal by the applicants/appellants (i.e., "the appellants") against the judgment of Barr J. delivered on the 2nd of February 2024 in High Court judicial review proceedings in this matter (bearing record no 2022/261JR) and his subsequent Order perfected on the 11th of March 2024, refusing the appellants' claims for certain interim and/or interlocutory injunctive relief.

2. The substantive proceedings herein are framed as a claim for various reliefs by way of judicial review, including (but not confined to) a declaration that s. 10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by s. 6(1)(a) of the Criminal Justice Act 2006 (i.e., "s. 10(1) of the Act of 1997, as substituted") is incompatible with *Bunreacht na hÉireann* for failure to incorporate procedural or prescriptive measures to protect privacy rights guaranteed by Article 40.3.2° of *Bunreacht na hÉireann*; and a declaration, under s. 5 of the European Convention on Human Rights Act 2003, that s. 10(1) of the Act of 1997, as substituted, is incompatible with the State's obligations under the European Convention on Human Rights (i.e., "ECHR") for failure to incorporate procedural or prescriptive measures to protect privacy rights guaranteed by Article 8 ECHR.

3. The basis for these claims centres principally upon certain statements of Hogan J., and Collins J., made *obiter dicta* in their respective concurring judgments in the Supreme Court case of *Corcoran v. Commissioner of An Garda Síochána* [2023] IESC 15 suggesting shortcomings and deficiencies within s. 10 of the Act of 1997, as substituted, which were beyond the capacity of the courts to cure, and which could only be addressed by the Oireachtas. In particular, concern was expressed about a lack of safeguards in the section to protect privileged or protected material from inappropriate disclosure (in that case the material at issue was said to attract journalistic privilege, but it is not disputed that the criticisms made would apply equally to material attracting legal professional privilege).

4. In circumstances where events had moved on somewhat since the hearing in the High Court, the appeal was confined to a claim for an interim / interlocutory injunction restraining An Garda Síochána from examining any of the data downloaded from the first-named applicant's mobile phone pursuant to a warrant granted by the District Court pursuant to s. 10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by s. 6(1)(a) of the Criminal Justice Act 2006.

5. The warrant in question, which was dated 29th of March 2024, authorised Detective Sergeant John Cahill of the Garda National Economic Crime Bureau, a member of An Garda Síochána, accompanied by such other members of An Garda Síochána or persons or both as the said member thought necessary, to enter, at any time or times within one week of the date of issue of that warrant, on production if so requested of that warrant, and if necessary by the use of reasonable force, the following place, namely the Garda National Economic Crime Bureau, Locker Number 3, Room 54, 2nd floor, Clyde House, IDA Business and Technology Park, Blanchardstown, Dublin 15 in the Dublin Metropolitan District Court Area, and to search that place, the mobile telephone of solicitor James T Flynn, and any persons found at that place, and to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that the said member reasonably believed to be evidence of, or relating to, the commission of an arrestable offence.

6. The warrant was issued by a District Court Judge on the basis of an information on oath and in writing of the aforementioned Detective Sergeant John Cahill dated the 29th of March 2024. The said information contained a commitment that the investigation team would only seek to examine the data on the mobile phone at issue in accordance with a protocol proposed to the solicitors for the appellants by the Chief State Solicitor, which protocol was intended to ensure respect for the personal private life of the first-named appellant and to alleviate concerns regarding legal professional privilege, and which proposed a mechanism

for the safe navigation of these issues whilst allowing An Garda Síochána to investigate a suspected serious offence.

7. The said warrant was executed on the 2nd of April 2024 within the currency of the warrant and the mobile phone in question was seized. Counsel has informed us that while data from the phone has been downloaded, it has not been examined to date.

8. Having heard detailed submissions by relevant parties this Court has reserved judgment on the application for interlocutory injunctive relief pending the outcome of the substantive action. The appellants have nonetheless pressed for interim injunctive relief to apply during the period while the Court's judgment is reserved, contending that unless such relief is granted the appellants, and particularly the first-named appellant, may suffer irremediable harm and damage. In those circumstances this Court indicated that it would further reserve a decision over the bank holiday weekend on whether or not to grant the interim relief being sought, and that it would give judgment on that issue at 3.00 PM today, i.e., Tuesday, the 4th of June 2024. In circumstances where it was intimated to us by counsel for the respondents that the respondents were not in a position to offer any undertaking with respect to maintenance of the status quo over the bank holiday weekend, the Court further indicated that it was disposed to grant interim injunctive relief restraining the respondents from examining the mobile phone data at issue until the sitting of the Court at 3.00 PM on today's date. We stated that we would give judgment at 3.00 PM today on whether or not to continue the said injunction during the further reservation of the Court's decision on whether or not to grant interlocutory injunctive relief pending the outcome of the substantive action.

Outline of the Background to the Matter

9. The general background to this matter is set out in the judgment of the High Court judge in these proceedings, bearing neutral citation [2024] IEHC 51, to which the reader is referred. In brief outline, on the 4th of March 2022 gardaí from Garda National Economic

Crime Bureau (i.e., "GNECB"), who were in possession of a search warrant, dated the 3rd of March 2022, from the District Court issued pursuant to s. 10(1) of the Act of 1997, as substituted, conducted a search of the offices of the second-named appellant. This was in the context of an investigation into suspected money laundering offences. The first-named appellant who is a solicitor and partner in the said firm was present at the time. He was arrested on that occasion pursuant to s. 6 of the Criminal Law Act 1997, and his mobile phone was seized by gardaí in exercise of their powers under s. 7(1) of the Criminal Justice Act 2006.

10. The said mobile phone was not immediately interrogated for its data (perhaps due to the initiation by the appellants of this litigation by way of an *ex parte* application for leave to apply for judicial review on the 28th of March 2022). It was submitted by the GNECB to the Garda National Cyber Crime Bureau (i.e., "GNCCB") to be forensically downloaded, and this was done on the 31st of March 2022, and two copies of the data were created. One copy was furnished to the first-named appellant with an invitation to him to specify areas of the data over which he wished to claim legal professional privilege (i.e., "LPP"). The other was furnished, in password encrypted format, to the GNECB (with the password being withheld by Detective Sergeant Michael Ryan of the GNCCB, pending the ascertainment of the extent to which LPP was being claimed). The phone itself was returned to GNECB and placed in a secure storage locker at GNECB headquarters. The appellants subsequently refused to co-operate with the investigation team in regard to identifying data which is potentially the subject of LPP, or to acquiesce in an examination of the data according to a protocol proposed by the Chief State Solicitor aimed at protecting the first-named appellant's privacy rights and respecting LPP.

11. Then in light of subsequent Supreme Court jurisprudence concerning police searches of "*the digital space*", particularly the decision in *People (DPP) v. Quirke (No. 1)* [2023] 1

I.L.R.M. 225, it was considered by the respondents that in order to lawfully interrogate the data on the first named appellant's mobile phone they would require another search warrant pursuant to s. 10(1) of the Act of 1997, as substituted, specifically authorising such interrogation. It was in that context that the warrant of the 29th of March 2024 was applied for and obtained. The sworn information grounding that warrant, which has been exhibited before us, is extremely detailed (running to 16 pages in length). It sets out the background to the matter, discloses that the first-named appellant is a solicitor and that the second-named appellant is a solicitors firm, and acknowledges an appreciation that potentially some of the data on the mobile phone could attract LPP. As stated already, the information outlines the proposed protocol containing safeguards prepared by the Chief State Solicitor, and it contains an express commitment that the investigation team would use the protocol in question in any interrogation of the data on the mobile phone.

Should Interim Relief Be Granted?

12. It was conceded by counsel for the respondents that there is a fair issue to be tried on the basis of the appellants' proceedings. As counsel for the respondents put it, it was accepted that the appellants have an arguable case on constitutionality grounds, albeit that the respondents believed it to be a weak one. In asserting this, counsel for the respondents relied strongly upon the fact that s. 10(1) of the Act of 1997, as substituted, enjoys a presumption of constitutionality. Insofar as the claim is based on the ECHR, the point was made by the respondents that the most the appellants can hope to achieve is a declaration of incompatibility of the statutory provision at issue with the Convention. Again, the respondent's contention in regard to that is that the appellant's claim in that regard, while arguable, is a weak one.

13. For their part, the appellants did not accept that their claim is a weak one. Be that as it may, in circumstances where the respondents accepted that there is a fair issue to be tried,

they said that the battle ground insofar as the granting of interim relief is concerned must therefore be with respect to the balance of convenience. They said that for any solicitor, it would be inimical to the maintenance of solicitor/client confidence that LPP should be breached, or the solicitor's right to privacy overridden, save in the most limited and strongly justified circumstances. Counsel for the appellants referred to the "*chilling*" effect that the failure to grant interim relief in the present case would have. It was said that no monetary damages could compensate for that and no undertaking as to damages could ever be adequate. In counsel for the appellants' submission, if the Court were to permit LPP to be breached, or the first-named appellant's right to privacy overridden, in the interim period while the Court's judgment is reserved, the damage would be irremediable. The Court was strongly pressed therefore to maintain the status quo pending the delivery of its judgment on the appellants' application for interlocutory injunctive relief until the outcome of the substantive proceedings.

14. The point was further made that there is no ostensible urgency about the interrogation of the data on the phone, as the GNECB did not move for many months to attempt to do so.

15. Responding to his opponent's submissions, counsel for the respondents pointed to the protocol proposed by the Chief State Solicitor, and to the commitment volunteered on oath to the District Court judge in the sworn information of Detective Sergeant John Cahill dated the 29th of March 2024 that the investigation team would operate the protocol in question in any interrogation of the data on the mobile phone. Counsel submitted that the proposed protocol contains extensive safeguards sufficient to address any concerns which the appellants might have concerning inappropriate breaches of the appellants' (and particularly the first-named appellant's) right to privacy, and of LPP.

16. In terms of the status quo, the point was again made by counsel for the respondents that the status quo is that the impugned statutory provision is presumed to be constitutional.

The respondents said that it would be wrong to attach too much weight to the asserted impact on the appellants' individual or business rights as that would fail to recognise that enforcement of the law is itself an important factor and that disapplication of the law, even on a temporary basis, would itself give rise to a damage that could not be remedied in the event that the claim in the substantive proceedings does not succeed. Reliance was placed on *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2020] IESC 42 and on *Okunade v. Minister for Justice & Ors* [2012] 3 I.R. 152 in support of this contention.

17. It was accepted by the appellants that the statutory provision at issue must be constitutionally operated, and in that regard they said that operating it in accordance with the proposed protocol would ensure its constitutional operation. The point was made that privacy rights are not absolute, and that they can, in certain circumstances, be overridden in the public interest, such as where proportionate measures are taken in pursuance of the legitimate public interest of investigating serious crime. It was submitted that while LPP is to all intents and purposes an absolute privilege, once it is safeguarded appropriately (which the commitment to operating the protocol facilitates) the right to privacy can nonetheless be overridden to allow the investigation of serious crime in the public interest.

Discussion and Decision

18. While it is not in dispute that the appellants have an arguable case to make in their substantive proceedings that the impugned statutory provision is repugnant to the Constitution, and that issue is not before us today, we accept the contention of the respondents that it is of importance and of great significance that the provision at issue enjoys a presumption of constitutionality.

19. In the course of legal argument we were referred, *inter alia*, to the concurring judgment of O'Donnell J. (as he then was) in *Krikke v. Barranafaddock Sustainability*

Electricity Ltd. [2020] IESC 42 (the principal judgment being that of O'Malley J., with whom O'Donnell J expressed agreement), at para. 9 *et seq.*, He stated:

> "***9.*** […] *An overly rigid application of the Campus Oil criteria can lead to an applicant with a flimsy case nevertheless obtaining an interlocutory injunction, which in many cases determines the practical outcome of the dispute. It has come to be recognised that the approach is subject to a number of exceptions. Where, for example, the underlying assumption that there will be a full trial of the issues is not necessarily correct, as it is not in many cases, then the approach can lead to injustice and it is now recognised that, in such circumstances, the court must consider the merits of the case in greater depth. Moreover, as has been pointed out, those exceptions are to be found in many of the areas where interlocutory injunctions are often sought.*
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> ***10.*** *A related problem arises in the field of public law where application of a Campus Oil type of approach can tend to give too much weight to the asserted impact on an individual or business unless it is recognised that the enforcement of the law is itself an important factor and that even temporary disapplication of the law gives rise to a damage that cannot be remedied in the event that the claim does not succeed. The real insight of Okunade v. Minister for Justice [2012] IESC 49, [2012] 3 I.R. 152, was to require that weight be given to this factor in any application for an interlocutory injunction. C.C. showed that this factor was also to be taken into account in any application for a stay pending appeal.*
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> ***11.*** *It is worth, however, pausing to consider why this is factor is important and should be addressed in any application for an injunction or a stay which would have the effect of disapplying a measure which is prima facie valid. It*

arises – perhaps most clearly – in the case of a challenge to the constitutional validity of legislation. Such legislation is enacted by the Oireachtas pursuant to its constitutional obligation. It is of general application. An individual ought not be permitted to obtain from a court an order disapplying the law, either individually or generally, merely by asserting a stateable, though perhaps weak, case and a fear of substantial damage. If an injunction is granted and the claim nevertheless fails, there is no easy way of repairing the damage to the rule of law caused by the fact that the law has been (wrongly) suspended. That is why a court must take that factor into account on any application for an interlocutory injunction and consider whether a speedy trial is possible, the strength of the case, and the reality of irreparable harm.

12. *The starting point is, however, the application of a law validly enacted by the body entrusted with that task by the Constitution. Even where the challenged measure is made pursuant to statutory power and is of more limited application, the temporary disapplication of a measure which is ostensibly valid is a serious matter, and the fact that there is no remedy should it transpire that the challenge was not justified is a matter that must be weighed in the balance on any application for an interlocutory injunction or stay pending trial, and perhaps even more so where a stay is sought pending appeal*".

20. This is not an application for an interim injunction in the usual sense of an application being made *ex parte* and with just one side to the litigation being heard. Rather the present application for interim relief was made on notice to and in the presence of the respondents. What is sought is "*interim*" relief solely in the sense that while the appellants are primarily seeking to preserve what they regard as the status quo until the outcome of the substantive

proceedings, they apprehend that if the respondents act to interrogate the data on the first-named appellant's mobile phone during the period of reservation of this Court's judgment(s) it could render nugatory the granting of any further injunctive relief, were this Court minded to grant it, as they believe that irremediable damage would have already been caused.

21. In considering this application, we are entitled to form an impression of the strength of the appellants' substantive case on the basis of the pleadings and to have regard to that impression. In doing so, it is important to emphasise that we are not deciding any of the issues in the case. They have not been comprehensively argued before us. That having been said, our impression based upon the pleadings aligns with what has been submitted to us by the respondents, namely that while the case is a stateable one, it would not appear to be a particularly strong one. The provision which it is sought to impugn is presumed constitutional and will only be found to be unconstitutional if there are no circumstances in which it can be operated constitutionally.

22. Second, we have considered the reality of the claim that irreparable harm would be caused to the appellants if the Court were not to grant injunctive relief during the period of reservation of its judgment. The concerns that have been articulated relate to the possible breaching of LPP and of the privacy rights of the appellants (particularly the first-named appellant). We accept that safeguards are required to protect LPP and that no interrogation of the data on the first-named appellant's mobile phone can be allowed to take place which breaches LPP. However, the protocol which has been proposed by the Chief State Solicitor contains safeguards which appear to us to be sufficient to address any concerns that the appellants might have in that regard. There is an express commitment, given on oath to the District Judge who issued the search warrant on foot of which the respondents seek to rely, that they will not interrogate the data otherwise than in accordance with the proposed protocol. Therefore, if the respondents are genuinely concerned to protect LPP they have the

means of doing so. In those circumstances we do not attach reality to the contention that irreparable harm must necessarily follow if the respondents follow through on their evinced intention of interrogating the data on the phone in the manner in which they have committed to doing so.

23. Third, while the members of this Court are entitled to take an appropriate time to deliberate upon and issue a judgment with respect to the principal claim for interlocutory relief, namely that such relief should be granted and extend until the conclusion of the substantive proceedings, it is appreciated that there is a degree of urgency in this matter and every effort will be made to issue our judgment(s) before the end of the present term. It is not therefore expected that the period of reservation of judgment will exceed eight weeks.

24. Fourth, what the appellants are seeking in the present application, and also in their main application for interlocutory relief, is in effect the disapplication of a current law which is presumed constitutional. In considering the merits of the present application we recognise that the enforcement of existing law is an important factor. The provision at issue must of course be operated constitutionally. Our starting point is that there is a valid search warrant in place which authorises the interrogation of the data in question. Adherence to the proposed protocol has not been made a pre-condition to the execution of that search warrant. As has been pointed out by Hogan and Collins J.J. in the *Corcoran* case to which reference was made earlier, there would not appear to be any power to attach such a condition to a s. 10 warrant. However, in this instance the State respondents voluntarily, and in advance of the issuance of any warrant, offered a commitment on oath that they would operate the proposed protocol in the event of the warrant being granted. While they could not have been required to give such a commitment, they have volunteered to do so, and in such circumstances can be held to it. Having given such a solemn commitment on oath it would be a matter of the utmost seriousness if there was a breach of faith in that regard. We therefore see no reason on

the evidence before us why, contingent on operation of the protocol pursuant to the commitment given, the s. 10 warrant cannot be acted upon constitutionally and relevant data interrogated. We do not think that the appellants have put forward circumstances sufficient at this stage to justify the non-enforcement of an instrument validly issued under and in accordance with existing law.

25. In conclusion, and for all the reasons stated above, we are not disposed to continue the injunction granted last Friday on an interim basis pending the delivery by this Court in due course of its judgment on the appellants' main application for interlocutory injunctive relief pending the outcome of the substantive proceedings herein.

Kennedy J.

I agree.

Burns J.

I also agree.