



THE COURT OF APPEAL

CIVIL

RECORD NO: 2022 No. 237

Edwards J.

Neutral Citation Number [2024] IECA 86

McCarthy J.

Burns J.

Between/

THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL

Respondent

and

ENOCH BURKE

Appellant

And/

**IN THE MATTER OF AN APPLICATION POST JUDGMENT PURSUANT TO
ORDER 123, RULE 9 OF THE RULES OF THE SUPERIOR COURTS**

Between/

THE GARDA SÍOCHÁNA OMBUDSMAN COMMISSION

Applicant

and

THE BOARD OF MANAGEMENT OF WILSON'S HOSPITAL SCHOOL

First Named Notice Party

and

ENOCH BURKE

Second Named Notice Party

and

THE COURTS SERVICE

Third Named Notice Party

JUDGMENT of Mr. Justice John Edwards delivered on the 12th of April 2024

Introduction

1. The roll out, a little more than a decade ago, of Digital Audio Recording (i.e., “DAR”) in the Irish courts represented an important innovation that has proven to be both valuable and of significant assistance and utility to the judiciary and other court users. The system creates a digital audio record in real time of the proceedings in any court room equipped for DAR, which record can be replayed in whole or in part during the same proceedings, or in any other proceedings, or by any authorised person who has a legitimate need to access it and who is equipped with the necessary computer hardware and software, e.g., a judge in chambers engaged in judgment writing. Further, a transcript can be generated utilising this audio record obviating any need to have a shorthand notetaker or stenographer present in court. Experience to date has shown that the system works well and is, generally speaking, highly reliable.

2. Of course, any such system, having as it does electronic, mechanical and computerised components, and requiring some level of human command inputting (albeit minimal), e.g., switching it on and off, may in theory fail to record due to technical or human factors. Given the envisaged, and as it has transpired actual, high level of dependency on the DAR system in our courts, provision was sensibly made for a back-up system in certain court rooms to which recourse can be had in the event of a failure of the primary system to record. The back-up system, otherwise known as the ambient DAR system (i.e., “ambient DAR”) (to distinguish it from the primary DAR system (i.e., “primary DAR”)) is always on during court business hours, i.e., it is switched on in the early morning and switched off in the evening, in the courtrooms equipped for ambient DAR. Courtroom No. 1, Court of Appeal Building, The Four Courts is one such courtroom. The back-up recording that the back-up system provides, being an ambient recording, and not one in which speakers’ speech will necessarily have been recorded by microphones directly in front of them, may as a consequence be inferior in quality to a recording

by primary DAR but will nevertheless in most cases be of sufficient quality to be usable in the event that it is required to have recourse to it.

3. The applicant in this matter is the Garda Síochána Ombudsman Commission (i.e., “the applicant” or “GSOC”) and it is engaged in an investigation arising from complaints made by members of the Burke family (although it has received no such complaint specifically from the appellant / second named notice party (i.e., “the appellant” or “Mr. Enoch Burke” or “Mr. Burke”)) against members of An Garda Síochána arising out of their alleged conduct during and following incidents which occurred in Courtroom No. 1, Court of Appeal Building, The Four Courts, and in the precincts and environs thereof, on the 7th of March 2023 on which date this Court sat to give judgment in the substantive appeal (Court of Appeal Record No. 237 of 2022) between the appellant and the respondent / first named notice party (i.e., “the respondent” or “the Board of Management of Wilson’s Hospital School”). The applicant has applied to the Court of Appeal for access to both the primary DAR and the ambient DAR covering Courtroom No. 1, Court of Appeal Building, The Four Courts on that date, as it believes that these records may contain evidence relevant to its investigations. The request for access to the primary DAR is uncontroversial, and it has been granted on a consent basis. However, the request for access to the ambient DAR, the requested timeline for which is bracketed as “*commencing from the conclusion of [the primary DAR recording], and concluding when that courtroom had been cleared*” has proven highly controversial and the application has been hotly contested by Mr. Burke before this Court.

4. Amongst the issues which this judgment must address is (i) whether the Court of Appeal enjoys a jurisdiction in principle to grant a person or body, such as the applicant, access to the ambient DAR for criminal investigation purposes; and (ii) if the Court does have such jurisdiction in principle, whether it is appropriate and proportionate in the circumstances of this case to grant such access to the applicant.

The Applicant’s Motion

5. The applicant's Notice of Motion dated the 11th of July 2023, and returnable in the first instance for the 21st of July 2023, claimed the controversial relief (as item no. 2 in the list of reliefs being sought) on the following basis:

“2. *An Order pursuant to Order 123, Rule 9 of the Rules of the Superior Courts, or in the alternative, to the Court's inherent jurisdiction allowing the applicant herein access to the digital audio recording of Court 1, Court of Appeal building, Four Courts, on 7 March 2023, commencing from the conclusion of the recording referred to above, and concluding when that courtroom had been cleared*”.

6. The motion was grounded upon an affidavit of a Mr. David Power solemnly affirmed on the 11th of July 2023 and the documents therein exhibited.

7. The motion was on notice to the Board of Management of Wilson's Hospital School and to Mr. Enoch Burke. These parties were put on notice in circumstances where on the 7th of March 2023 the Court of Appeal had been engaged in judgment delivery in Courtroom No. 1, Court of Appeal Building, The Four Courts in proceedings entitled The Court of Appeal (Civil), Record No 2022/237, between the Board of Management of Wilson's Hospital School, Respondent and Enoch Burke, Appellant, when the incidents referred to in para. 3 above are said to have occurred; and because sub-rule 1 of Order 123, Rule 9 of the Rules of the Superior Courts provides:

*“Any party or person who seeks access to any part of a record of proceedings (in this rule referred to as the “relevant record”) which is held by or for the Supreme Court, the Court of Appeal or the Court, as the case may be (in this rule referred to as the “relevant court”) may apply to the relevant court by motion in the proceedings concerned **on notice to the other party or the parties to those proceedings**, grounded upon an affidavit”.*

[Emphasis by this Court]

8. The respondent has opted not to engage with the motion, as is its entitlement. The appellant, however, strongly opposed the granting of item no. 2 in the list of reliefs being sought.

In so doing, he solemnly affirmed a replying affidavit dated the 20th of July 2023 and relies on it and the documents therein exhibited.

9. In circumstances where the ambient DAR system is owned and operated by The Courts Service; where the physical equipment associated with the ambient DAR system is situated in premises forming part of the Courts Service's estate; and where, in respect of the data recorded on that system on the date in question and which is the subject matter of this application, it was not immediately clear to the Court, pending further argument, as to who might be the sole controller, or (if more than one) the joint controllers, of such data (or such part of it as was recorded after the Court of Appeal had risen) and who might potentially be a processor (or processors) of that data, an invitation was extended to the Courts Service to participate as a notice party at the hearing of application and to be heard in respect of it. That invitation was accepted, and the Courts Service was joined as a third named notice party (i.e., "the third notice party" or "the Courts Service").

10. Written submissions were in the due course received on behalf of the applicant and from the appellant. The motion was ultimately heard on the 15th of January 2024, when the Court received oral submissions on behalf of both of those parties in amplification of the previously mentioned written submissions, as well as oral submissions on behalf of the third notice party. Following that hearing the Court reserved its judgment.

The Affidavits

The Affidavit of Mr. David Power

11. Mr. Power is a designated officer of GSOC. He has deposed to the fact that complaints were received by GSOC on the 27th of March 2023, and that arising from these complaints the applicant commenced a criminal investigation into the conduct of members of An Garda Síochána arising from the manner in which Courtroom No. 1, Court of Appeal Building, Four Courts was cleared on the 7th of March 2023. Mr. Power said that he was directed, pursuant to s. 92I of the Garda Síochána Act 2005, to conduct this investigation pursuant to s. 98 of that Act.

12. At para. 4 of his affidavit Mr. Power stated:

“As matters stand, I am informed and believe that the following matters, relevant to my investigation, may have occurred on 7 March 2023:

- (a) Mr Enoch Burke, Mr Simeon Burke, Ms Ammi Burke and other members of the Burke family, attended at Court 1 of the Court of Appeal Building, Four Courts, and were present when the Court sat to give judgment in the appeal entitled The Board of Wilson’s Hospital School v. Enoch Burke (Appeal No. 237 of 2022). So too, a number of Gardaí were present in the courtroom;*
- (b) The President of This Honourable Court proceeded to give judgment until he was disrupted from doing so by Ms Ammi Burke who vocally raised objections to the President’s findings. The Court rose to allow the courtroom to return to an orderly state;*
- (c) The court set again, at which time, President Birmingham noted that there had been a number of interruptions to the proceedings and that the judgment would be given electronically if these interruptions continued;*
- (d) Following further, repeated interruptions by members of the Burke family, the President stated that the Court would deliver its judgments electronically. The Court or a Judge thereof may have ordered that the Burke family be removed from the courtroom;*
- (e) The Court rose, and the Judges left the courtroom;*
- (f) It appears that after the Court rose additional Gardaí may have entered the courtroom. The Burke family may have been asked or ordered to leave the Court by Gardaí. If so asked or ordered, it appears that members of the Burke family may have refused to comply with any such directions, claiming they had a right to remain in the courtroom;*
- (g) It appears that Gardaí used physical force to eject some members of the Burke family from the courtroom; forcibly removing Ms Ammi Burke and Mr Simeon Burke from the Four Courts; and arresting Mr Simeon Burke on suspicion of committing an offence contrary to section 6 of the Criminal Justice (Public Order) Act, 1994;*

(b) In ejecting the Burkes, it is unclear whether those Gardaí present acted at the direction of the Court to clear the courtroom, as expressed by a Judge or by the Registrar of the Court, or whether they acted on their own initiative; and

(i) It appears that Mr Simeon Burke, Mr Enoch Burke, and Ms Ammi Burke, may have suffered some injuries due to the force used by Gardaí?.

13. Mr. Power further averred to the fact that the applicant's investigation encompassed *inter alia* whether gardaí used force to eject members of the Burke family, and whether any such force that may have been used was lawful in the circumstances. He then went on to say that it was incumbent on him to seek out evidence that may be relevant to the guilt or innocence of those who are the subject of the investigation. He deposed that he considered it a necessary part of this investigation to seek evidence that may authoritatively establish:

“(a) whether a Judge of this Honourable Court, or the Court's Registrar, gave any instructions to Gardaí present in the courtroom during the sitting of the Court or when the Gardaí ejected the Burkes;

(b) what, if anything was said by the persons who were present in the courtroom after the Court rose; and(c) whether any other sounds recorded in that courtroom may prove or disprove any of the allegations that are the subject of this investigation?.

14. Mr. Power said and believed that the interests of justice require that he apply for access to the recordings the subject of the motion. He stated that he believed that these recordings are likely to provide objective and reliable evidence of certain aspects of what is alleged to have occurred, and to materially assist in the investigation of the conduct alleged.

15. He concluded by praying for the reliefs set out in the applicant's Notice of Motion.

The affidavit of Mr. Enoch Burke

16. At para. 3 of his affidavit Mr. Burke asserted, in an unqualified statement, that he is a teacher of German and of History at Wilson's Hospital School, Co Meath.

17. He went on to aver that he did not object to the relief being sought by the applicant insofar as it related to such relief as is sought in para. 1 of the applicant's Notice of Motion (i.e., GSOC's request for the primary DAR record, not the ambient DAR record) provided that the access granted would be restricted to each of the two periods when the Court was sitting on the afternoon in question. As previously indicated, that relief was therefore granted on a consent basis.

18. However, at para. 5 of his affidavit Mr. Burke raised a preliminary objection with respect to the relief being sought at para. 2 of the Notice of Motion, i.e., the request for the ambient DAR record. He pointed out that Order 123 of the Rules of the Superior Courts relates specifically to access to the recording of proceedings (the actual wording of the statutory instrument refers to "*access to any part of a record of proceedings (in this rule referred to as the "**relevant record**")*"), which would cover not just any audio recording but also any transcript record), and he asserted that the relief being sought by the applicant at para. 2 aforesaid is not access to a recording of proceedings. He averred that, as such, that part of the applicant's application is not and cannot be an application pursuant to Order 123 as claimed. He further averred that Order 123 is irrelevant and provides no support for the application.

19. At para. 6 of his affidavit Mr Burke denied that the Court has inherent jurisdiction as asserted by the applicant to grant it access to "*any recording of Court 1, Court of Appeal Building, Four Courts, on 7 March 2023, commencing from the conclusion of the digital audio recording (DAR) of the proceedings on that afternoon and concluding when that courtroom had been cleared*".

20. He pointed out that in separate proceedings, what he claims was "*an identical application*" made by the Commissioner of An Garda Síochána to a judge of this Court (Edwards J.), sitting alone for case management purposes on the 9th of June 2023, was refused.

21. I would digress momentarily to observe that while this is true, the information provided in Mr. Burke's affidavit is far from comprehensive. The application to which he alluded, was made by the Commissioner in the context of an ongoing Garda investigation into a public order

offence which Mr. Enoch Burke's brother, Mr. Simeon Burke, was suspected of having committed at the Court of Appeal Building on the 7th of March 2023. Mr. Simeon Burke was ultimately charged with and tried before the District Court with a public order offence and he was convicted, which conviction, this Court understands, is the subject of a pending appeal to the Circuit Court. Mr. Enoch Burke is correct that the Garda Commissioner's application to this Court for the DAR record of what had occurred in Courtroom No. 1, Court of Appeal Building, Four Courts on the 7th of March 2023 was indeed refused insofar as it extended to the ambient DAR. However, it was granted insofar as it related to the primary DAR. The reason it was refused in relation to the ambient DAR was that the application had been framed on the basis that access to the DAR was required to resolve a dispute between the State's representatives and Mr. Simeon Burke concerning whether, on the occasion in question, a request was made by the Court of Appeal to members of An Garda Síochána to remove members of the Burke family from the Court following their repeated disruptions. The grounding affidavit on behalf of the applicant in that matter did not mention anything else. I took the view that this dispute was something that could be resolved by the primary DAR, and that it was not necessary in those circumstances for the Court to consider granting access to the ambient DAR (assuming, but without considering or deciding the issue as it was unnecessary to do so in the circumstances, that there was jurisdiction in principle to do so). I stated to counsel for the applicant in that matter that while I was only prepared to grant access to the primary DAR record at that point, I would grant his client liberty to renew his application for the ambient DAR if, once he had reviewed the primary DAR record, it transpired that that record was in some respect insufficient and did not meet the purposes for which it was being sought, such that a case could be made for more extensive disclosure of the DAR record, i.e., that the ambient record should also be provided. Accordingly, a renewed application might have been made if the primary DAR was found, upon review, to have been corrupted, or if it was indistinct, or if the record was partial

only, or if it was in some other technical respect insufficient. I am not aware that any renewed application was ever made.

22. Returning to the replying affidavit of Mr. Burke in respect of GSOC's application, he asserted at para. 9 that, under the Data Protection Acts 1988-2018, data is not processed fairly unless the data subject is made aware of the processing and the purpose of the processing at or before the data is obtained. At para. 10 he complained that there is no indication whatsoever to individuals in the courtroom regarding the existence of an ambient recording system, its purpose, or when it is in operation. He asserted that there is no general awareness of the system amongst court users, and that there is no appropriate signage exhibited in the locus of the recording such as to give rise to an awareness amongst court users that the ambient DAR is in operation. He said that this is in contrast to what he characterises as "*the official DAR system*", by which I assume he means the primary DAR system, of which court users are generally aware. He correctly pointed out that when the latter is operational this is made evident by a red digital counter on the registrar's desk.

23. At para. 12 of his affidavit Mr. Burke asserted that the Court is not entitled to engage in the surveillance of individuals of which they are unaware. He said that audio obtained without those present being informed amounts to unlawful covert surveillance without knowledge. He further claimed that it is also not a recording of proceedings, and he asserted that the ambient recording system in use by the Court is in breach of both Irish and European law in relation to privacy and data protection.

24. At paras. 13 to 15, inclusive, he contended that the Data Protection Acts 1988-2018 further provide that data shall not be further processed in a manner incompatible with the specified purpose for which the data was obtained; and that, as the sole purpose of the ambient recording system is to provide a backup if the official (i.e., the primary) DAR system fails, the purpose for which the applicant seeks access to the ambient recording is therefore entirely

incompatible with the specified purpose. The Court was asked to refuse the application for access to the ambient recording on that ground alone.

25. At para. 16 of his affidavit Mr Burke said that if this Court were to grant the applicant access to the ambient DAR, it would be an impermissible violation of the constitutional rights of individuals recorded on the ambient recording system, and that it would be in breach of the General Data Protection Regulation (“GDPR”) (i.e., Regulation (EU) 2016/679 of the European Parliament and of the Council of the 27th of April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC). He further asserted (at para. 17) that the State has no right to the use of this recording.

26. Mr. Burke asserted his belief at para. 18 that whether the Court, or any of the judges thereof, ordered that the courtroom should be cleared before An Garda Síochána forcibly ejected members of the Burke family from the courtroom, can be addressed without any need for a recording of what happened after the judges had risen and the Court was no longer in session. That said, he contended at para. 19 of his affidavit that the Court did not make a direction to clear the courtroom on the 7th of March 2023 and that therefore An Garda Síochána had no right whatsoever to clear the courtroom on that afternoon.

Order 123, Rule 9 of the Rules of the Superior Courts

27. Before reviewing the submissions of the parties, particularly with respect to the issue of jurisdiction, it is appropriate to set out in full the terms of Order 123, Rule 9. It provides:

*“(1) Any party or person who seeks access to any part of a record of proceedings (in this rule referred to as the “**relevant record**”) which is held by or for the Supreme Court, the Court of Appeal or the Court, as the case may be (in this rule referred to as the “**relevant court**”) may apply to the relevant court by motion in the proceedings concerned on notice to the other party or the parties to those proceedings, grounded upon an affidavit.*

(2) On the date first fixed for the hearing of the motion, the relevant court may:

(a) direct that copies of the notice of motion and affidavit be served on any other person who the relevant court considers has a sufficient interest in or may be affected by the application;

(b) fix time limits for the delivery of any replying affidavit.

(3) The relevant court may, for the purposes of considering any such application, review privately the contents of the relevant record.

(4) Subject to sub-rule (5), the relevant court may, where it considers it necessary in the interests of justice so to do, permit the applicant to have such access to all or such part of the relevant record concerned as is specified in the order made on the application, by such means and at such time or times as may be specified in that order and on such terms and under such conditions (including terms restraining the publication, dissemination or further disclosure of all or any part of the relevant record by the applicant, and the giving of an undertaking to such effect) as the relevant court may direct.

(5) Unless the relevant court otherwise directs, access to the relevant record concerned shall, where permitted under sub-rule (4), be afforded solely by the provision to the applicant of a transcript of all or any part of that record, on payment by the applicant to the transcript writer of the transcript writer's fee for producing the transcript^l.

Submissions Received by the Court

28. Submissions in writing were received both from the applicant and Mr. Burke. Oral submissions were also received from both of those parties in elaboration upon and supplementation of their written submissions, as well as from the third notice party at the hearing of this matter on the 15th of January 2024. I will briefly summarise each party's respective submissions.

Submissions on behalf of the applicant

29. The applicant initially filed what are described as “*outline submissions*” in writing on the 5th of December 2023, and later also furnished what are described as “*supplementary outline submissions*”, again in writing, on the 1st of January 2024.

30. In submissions dated the 5th of December 2023 counsel for the applicant pointed to what he described as “*common ground*” with the appellant, namely:

- (i) That both of those parties submitted that the Court is the data controller of the data contained in the ambient DAR, albeit that the applicant submitted that in that respect the Court may be a joint controller of the data with the Courts Service, whereas the appellant submitted that the Court is the sole such controller, and;
- (ii) that there exists an ambient recording facility servicing the courtroom at issue.

31. Counsel for the applicant maintained that although the Court may be *functus officio* with respect to the appeal in the above-entitled proceedings, same does not mean that the Court does not have jurisdiction to hear and consider the present motion. It was argued that while it is clear from Order 123, Rule 9(1) that such an application is to be brought by motion within the relevant proceedings, the Rule does not preclude the motion being brought after the proceedings have otherwise concluded, or where the Court is for the purposes of the substantive proceedings *functus officio*. It was submitted that to interpret the Rule more narrowly would oust the jurisdiction of this Court by implication, and this would do a mischief to the clear legislative intention that parties to an action (and any other interested parties) may take up a record of proceedings where the interests of justice necessitate their doing so.

32. The applicant’s submissions went on to consider the scope of Order 123, Rule 9, and it was noted that the term “*record of proceedings*” is not defined. While it was accepted on behalf of the applicant that only rarely will this cause difficulty, it may do so when the issue of when proceedings conclude is of significance. Such an issue requires to be considered in the present case because the turning on or off of the primary DAR system, and what it therefore captures, does not of itself determine the beginning or conclusion of proceedings before the Court. Moreover, there requires to be clarity as to what comes within the terms of the phrase “*record of proceedings*” for the purposes of Order 123 Rule 9, in a situation where the primary DAR has been

turned off, or is not operating after the judges have risen, but sound in the courtroom continues to be captured on the ambient DAR system. It was submitted that in such a situation, in order to determine when the proceedings concluded, it is necessary for this Court to consider if that was when the judge(s) stood, when they departed from the courtroom in which they were sitting, or when the courtroom had been cleared.

33. Counsel for the applicant submitted that the determination of this question is relevant to this case, and to any case where disorder breaks out in court, and where the judge(s) are compelled to leave the courtroom. It was suggested on behalf of the applicant that it does not require any great imagination to consider a hypothetical scenario where, following the imposition of a sentence in a criminal case, disorder breaks out, the judge is compelled to leave the courtroom and, while leaving, is the subject of criminal threats or an assault. It was submitted that, if an investigating agency applied under Order 123 RSC (in the case of the Central Criminal Court) or Order 67A CCR (in the case of the Circuit Court), for the objective audio evidence of what occurred, and were refused on the basis that the provision of such a recording was outside the scope of those provisions, this would stymie the investigation of crimes against the administration of justice, and would thereby undermine the authority of the courts.

34. Counsel for the applicant suggested that a purposive interpretation of Order 123 would allow for the granting of access to the ambient recording of the courtroom until the courtroom had been cleared of persons. It was further submitted that this would allow the Court to ensure that the interests of justice are best served by the provisions of Order 123.

35. The applicant's submissions of the 5th of December 2023 went on to consider the position of the Court of Appeal as a data controller. We were referred to Article 4 (7) of the GDPR which provides that:

“For the purposes of this Regulation:

[...]

(7) ‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law”

36. It was submitted that the Court is therefore the data controller of the recording both by the primary DAR and by the ambient DAR. It was said that further support for this contention was to be found in S.I. No. 659 of 2018 - Data Protection Act 2018 (Section 159(1)) Rules, 2018 (i.e., “S.I. No. 659/2018”) in which it is recognised that the Court may be a controller in respect of the processing of personal data contained in a “*court record*” (a term that is clearly broader than “*record of proceedings*”). These Rules (being processing rules, within the meaning of section 159(9) of the Data Protection Act 2018) apply to the processing of personal data (a) of which a superior court of record, when acting in a judicial capacity, is a controller, and (b) which are personal data contained in a record of that court, where such personal data are processed on behalf of such controller by any processor, including any other processor engaged by a processor for carrying out specific processing activities on behalf of the controller.

37. The data to which those Rules apply is set out in Rule 4(2) of S.I. No. 659/2018, which provides that:

“The subject matter of processing to which these Rules apply consists of personal data included, by or on behalf of a party to proceedings before a court, or any other person, in and, subject to any order of the court concerned, retained in, a court record, in accordance with the provisions of statute, the Rules of the Superior Courts, any applicable practice direction of the court concerned and any order of that court, for the purposes of the conduct of those proceedings”.

38. Counsel for the applicant submitted that within those Rules a “*processor*” means a processor of personal data of which a superior court of record is the controller and includes without limitation, any court officer, any member of the staff of the Courts Service for the time being employed in a court office and any contractor of the Courts Service (including any

employee or person working under the direction of such contractor) who is processing personal data of which a superior court of record is the controller, thereby implying that the Courts Service is not a data controller for the purposes of such records, and that its role is more limited and subordinate to the direction of the Superior Courts.

39. It was further submitted that in the context of these proceedings, Rule 5(c) of S.I. No. 659/2018 is also significant, in circumstances where it provides that:

“(5) A Processor may, subject to the provisions of statute, the Rules of the Superior Courts, any applicable practice direction of the court concerned and any order of that court, disclose by transmission, dissemination or otherwise, personal data contained in a court record:

[...]

(c) by direction of the court concerned to a member of An Garda Síochána or a prosecuting authority, for the purposes of—

(i) the investigation of, or

(ii) use as evidence in the prosecution

of an offence alleged”.

40. It was submitted that this Rule clearly envisages that this Court has the jurisdiction to direct the Courts Service to provide a court record to GSOC, as is sought in this case.

41. The applicant’s submissions of the 5th of December 2023 then addressed the alternative contention being made that, quite aside from any statutorily granted jurisdiction, this Court has inherent jurisdiction to grant the applicant access to the relevant ambient DAR record in the circumstances of this case.

42. It was submitted that the appellate jurisdiction of the Court of Appeal is provided for in Article 34.1.1^o of the Constitution, and that by virtue of s. 7A of the Court of Appeal Act 2014, read in conjunction with Article 34.1.1^o, it enjoys an appellate jurisdiction which was, immediately before the Court of Appeal’s establishment day, vested in or capable of being exercised by the Supreme Court. It was contended that the existence of such jurisdiction cloaks

the Court with inherent power to regulate the exercise of that jurisdiction, including with respect to control of, and the granting of access to, any record created in the context of the exercise by the court of its said appellate jurisdiction. The applicant has referred us to cases such as *People (DPP) v. Stephen Geraghty* [2014] IECA 2, *Hughes v. O'Rourke & Others* [1986] I.L.R.M. 538, *Opinion of Panel to advise the Chief Justice on the power to remove a Commissioner for Oaths* [2020] 11 J.I.C. 2706, and *Riordan v. Ireland (No. 4)* [2001] 3 I.R. 365 as offering support for this argument.

43. Counsel for the applicant said that on the authorities, where a properly brought motion, entitled in the name of appellate proceedings, is brought even after those proceedings have reached finality, the Court is not precluded from hearing that motion, and is certainly not precluded from considering the extent of its inherent jurisdiction, insofar as that may be relied upon as a basis for a relief sought the proceedings. It was submitted that the taking by the Court of such position does not undermine the value that has been judicially placed on finality in proceedings. In the applicant's submission, the Court of Appeal has an inherent jurisdiction to consider the present motion, and this jurisdiction has not been set at naught by virtue of it being *functus officio* at this stage in respect of the substantive matter that had been before it; and where it is accepted, that it would not be proper to reopen that litigation.

44. It was submitted that where, as here, the motion seeking access to the digital audio recordings, both primary and ambient, is linked to disorder that occurred before the Court, causing the Court to rise, the inherent jurisdiction of the Court must allow for it to safeguard the administration of justice and the dignity of the Court. It was submitted that in such circumstances, an investigation into what occurred as a consequence of that disorder, the steps taken by members of An Garda Síochána to remove people from the courtroom, and what instructions or directions they may have received from the Court, serves the interests of the administration of justice. It was submitted that the making of an order that the ambient DAR be disclosed to the applicant is in the interests of justice in this instance and within the jurisdiction of this Honourable Court.

45. The supplementary outline submissions filed on behalf of the applicant on the 1st of January 2024 addressed data protection concerns that the appellant, had flagged at earlier case management hearings, and in the written submissions filed by him in response to the applicant's outline written submissions dated the 5th of December 2023, that he would be relying upon.

46. It was accepted on behalf of the applicant that the possibility that the ambient DAR might include the personal data of a person or people who were present during the incidents that are the subject of GSOC's investigation cannot be discounted. However, the applicant said that, even if personal data is contained within the ambient DAR, s. 41 of the Data Protection Act 2018 (i.e., "the Act of 2018") applies to the processing of any such data.

47. Counsel for the applicant contended that its obligation to seek the ambient DAR arises from the very real prospect that it could provide objective and reliable evidence of what occurred during a disturbance that caused the Court to rise, and in which members of An Garda Síochána used force to eject people from the courtroom. The applicant relied upon the well-known quotation from the judgment of Hardiman J. in *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127, wherein the late learned Supreme Court judge stated (at p. 133 of the Report):

"It is the duty of the gardaí, arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. This is so whether the prosecution proposes to rely on the evidence or not, and regardless of whether it assists the case the prosecution is advancing or not".

48. It was submitted on behalf of the applicant that the above duty applies equally to GSOC as a body empowered to conduct criminal investigations. Consistent with this duty, the objectives of the applicant, as set out in s. 67(1) of the Garda Síochána Act, 2005, as amended, include:

"(a) to ensure that its functions are performed in an efficient and effective manner and with full fairness to all persons involved in complaints and investigations under Part 4 concerning the conduct of members of the Garda Síochána.

[...]

(c) *to promote public confidence in the process for resolving complaints referred to in paragraph (a)*”.

49. Section 41 of the Act of 2018 provides:

“Without prejudice to the processing of personal data for a purpose other than the purpose for which the data has been collected which is lawful under the Data Protection Regulation, the processing of personal data and special categories of personal data for a purpose other than the purpose for which the data has been collected shall be lawful to the extent that such processing is necessary and proportionate for the purposes—

(a) of preventing a threat to national security, defence or public security,

(b) of preventing, detecting, investigating or prosecuting criminal offences, or

(c) set out in paragraph (a) or (b) of section 47”.

50. Counsel for the applicant contended that this section clearly makes lawful the necessary and proportionate processing of data for the purposes of investigating criminal offences, whether or not that data has been lawfully processed before it was sought, taken up, or processed by the applicant. The point was further made that where the applicant is under a duty to take up evidence that may point to the innocence or guilt of those being investigated, and where that evidence may contain limited personal data (e.g. the voices of those in the courtroom who spoke during the limited time between the judges rising and the expulsion of members of the Burke family from the courtroom by members of An Garda Síochána), the taking up of that data by the applicant is both proportionate and necessary to the criminal investigation being conducted. Accordingly, counsel for the applicant said, it is lawful for that evidence to be taken up by the applicant pursuant to s. 41 of the Act of 2018.

51. It was further submitted on behalf of the applicant that the interests of justice favour the provision of the ambient DAR recording to the applicant and that, pursuant to s. 41 of the Act of 2018, it will be lawful for this Honourable Court to order this provision to the applicant if the Court considers that this provision is necessary and proportionate having regard to the investigation being conducted.

52. While counsel for the applicant did not accept that it must demonstrate that any personal data that may be contained on the ambient DAR was lawfully processed in its initial capture and storage, the applicant's position was that even if the operation of the ambient DAR was in some way unlawful, as contended by the appellant, the use of an ambient DAR system as a backup for the primary DAR system is clearly a lawful purpose for the processing of the data concerned. It was submitted that the courts and/or the Courts Service are and were, at all material times, lawfully entitled to operate a scheme whereby a backup recording is made in certain courtrooms to ensure that the record of proceedings is not lost due to user or machine error.

53. In respect of the latter, counsel for the applicant drew support from s. 6(1) of the Courts Service Act 1998 (i.e., "the Act of 1998") read in conjunction with the functions of the Courts Service, as set out in s. 5 of the same Act.

54. Section 6 (1) of the Act of 1998 provides that:

"Subject to this Act but notwithstanding any other enactment, the Service may do anything necessary or expedient for enabling it to perform its functions".

55. Section 5 of the Act of 1998 (as amended by s. 17 of the Civil Law (Miscellaneous Provisions) Act 2008) provides that:

"The functions of the Service shall be to—

(a) manage the courts,

(b) provide support services for the judges,

(c) provide information on the courts system to the public,

(d) provide, manage and maintain court buildings,

(e) provide facilities for users of the courts, and

(f) perform such other functions as are conferred on it by any other enactment".

56. Counsel for the applicant said that the creation of the scheme involving both primary DAR and ambient DAR, to ensure that court records are reliably and consistently kept, is a

proportionate and necessary performance of the functions of the courts and of the Courts Service.

57. Noting the contention of Mr. Burke, that the implementation of the DAR backup scheme was conducted unlawfully with respect to Article 5 GDPR, counsel for the applicant maintained that he was not in a position to comment on whether it might or might not have been unlawful as claimed, but contended that even if it had been operated unlawfully, it did not equate to a breach of the appellant's constitutional rights, and, in particular, any of his privacy rights, as alleged or at all.

58. Counsel for the applicant contended that, as recognised by the appellant, the administration of justice must, in general, be conducted in public. Accordingly, courtrooms are public *fora*, in which the public business of the courts and those who are before the courts is conducted. Counsel for the applicant said that as the courtrooms are such public places, no reasonable expectation of privacy arises in those courtrooms such as to give rise to a stateable claim to a privacy right, in respect of which the ambient DAR could have interfered.

59. The point was made on behalf of the applicant that no evidence had been adduced by the appellant to establish that his personal data is contained on the ambient DAR recording that is being sought. Moreover, no clarity had been provided in respect of with what exactly, over which the appellant may claim a right of privacy arises, could there have been an unlawful interference. Counsel for the applicant said that the appellant had failed to address these issues clearly in his affidavit and/or in his submissions.

60. Counsel for the applicant further said that even if a privacy right was to be established in respect of the data sought, such a right would not apply so as to prevent an investigative agency from lawfully taking up the data concerned for the purposes of a criminal investigation. The case of *DPP v. Harty* [2016] IECA 142 was referenced as offering support for that submission.

61. In conclusion, counsel for the applicant submitted that even if the operation of the ambient DAR amounted to the unlawful processing of the personal data of those present, the

applicant is still lawfully entitled to process that data, as is the Court, insofar as the Court may grant the order sought. If a person whose data is caught on the recording concerned wishes to have their rights vindicated, there are specific mechanisms in place to allow them to seek that vindication, e.g. by making a complaint to the assigned judge pursuant to s. 157 of the Act of 2018; alternatively, in the context of a criminal prosecution in which the person concerned is a defendant, by contending before the court of trial that the evidence ought not to be admitted on the grounds of being obtained unlawfully and/or in breach of constitutional and/or other rights of the defendant. Counsel for the applicant maintained that the appellant's objection to this application is misconceived as, even if the data concerned were unlawfully processed to-date, the processing the applicant seeks to engage in would be lawful and would not operate to the detriment of the appellant or his interests.

Submissions on behalf of the appellant

62. The Court is in receipt of three sets of submissions filed by the appellant. The first were filed in advance of the case management hearing of this motion on the 10th of November 2023, a second set were filed in advance of a similar case management hearing on 8th of December 2023, and a third set entitled “*Supplementary Submissions of the Second Named Respondent*” were filed in advance of the substantive hearing of the motion on the 15th of January 2024. (It should be observed that for the minimisation of confusion we have opted in the title to this judgment to formally designate Mr. Burke as “the appellant” insofar as the main proceedings are concerned, and as “the second named notice party”, rather than “second named respondent” (although he might have been called either, hence Mr. Burke’s understandable self-reference to “*second named respondent*”) insofar as the present motion is concerned. However, it matters not by what title he is referred to, there is no dispute but that these were also Mr. Burke’s submissions). It is proposed to review all of them in turn.

63. In his first set of submissions Mr. Burke commented on an observation made by me at a mention hearing on the 6th of October 2023 to the effect that the Court of Appeal was *functus*

officio insofar as the substantive appeal (i.e., Appeal No. 237 of 2022) was concerned, and that there was no longer any pending appeal with which the Court was concerned. He contended that this cannot be a valid justification for this Court to refuse to deal with the present application. It was suggested that the Court did not hesitate to exercise jurisdiction in what he contended was “*an identical application*” on the 9th of June 2023, a matter on which I have already commented, and have offered context in respect of, at para. 21 above. Mr. Burke contended that the Court undoubtedly has jurisdiction to make an order in this matter, and that the appropriate order to be made is one refusing the application. He said that the ambient DAR is unquestionably unlawful and unconstitutional.

64. The appellant made a further point in his first set of submissions that at the hearing of a previous application, similar to the present one, on the 21st of July 2023, I had refused GSOC’s application and had directed that if GSOC wished to renew the application, it “*must first provide evidence that the ambient system was actually recording*” at the relevant time. It was suggested by the appellant that this had not been done, and that no evidence to that effect had been produced by GSOC. While Mr. Burke is correct in the essentials of what he has said, it should be stated that matters have moved on since the 21st of July 2023, and that the substantive issues arising on this motion have been litigated before this Court on the premise that all parties accept that there was an ambient DAR recording, which was likely operating at the material time. The issues in controversy concerned whether this Court has jurisdiction to make the order which the applicant is seeking, and if it does have such jurisdiction whether it would be lawful and proportionate for the Court to make the order sought in the circumstances of this case.

65. The appellant also engaged in his first set of submissions with a further observation I had made in the course of an engagement with counsel for the applicant on the 6th of October 2023 to the effect that the ambient DAR from a time when the Court is not sitting is “*the same as CCTV in a shop premises*”. The appellant is correct in suggesting that I had challenged his opponent with that proposition. I did so in the context of making clear to him that I had grave

reservations at that point, and without having heard the matter fully argued, as to the appropriateness of his application in the circumstances of the case, and I was concerned that the application might be misconceived. On that occasion, counsel for the applicant was seeking an adjournment of the motion for four weeks in circumstances where his solicitors were awaiting a response to a letter that they had written to the Courts Service (which had not at that point been joined as a notice party), and where it was understood that the Courts Service, in turn, were awaiting counsel's opinion. Having outlined the nature of my reservations, I stated that I was disposed to grant the adjournment, and that I would welcome further submissions from the parties when they had had a chance to consider the concerns that I had raised. The appellant in his first set of written submissions contended that the comparison made on the 6th of October 2023 between an ambient DAR recording and a CCTV camera recording in a shop was invalid, in that CCTV does not generally record audio. More fundamentally, he submitted, *“the courtrooms of the land, the temples of justice, should not be equated with shop premises”*.

66. The appellant went on to contend that the ambient DAR amounted to the creation of a covert court recording, and that to release it to another arm of the State, such as GSOC, would be so unlawful and unconstitutional, and would set such a dangerous precedent, that it should not be permitted. He pointed to the fact that the Bar Council is said to have expressed concern about the then proposed DAR system prior to its introduction, on the basis of a concern that it would record *“confidential exchanges other than legal submissions and arguments read into the public record”*.

67. The appellant submitted that the Court was the data controller of the ambient DAR, and that this had, in effect, been acknowledged in remarks made by me on the 9th of June 2023. In addition, the appellant submitted that were the Court to grant the application sought by GSOC, the implications for the administration of justice would be grave. It was submitted that it is the happenstance of observation by members of the public that is the font of what makes open courts a critically important facet of a functioning democracy. Further, he submitted that if the creation and release to third parties of covert court recordings from times when the Court is not

sitting is permitted to take place, this would deter members of the public from observing court proceedings, and it would thereby greatly compromise the openness of our judicial system. The appellant contended this would be an outright attack on Article 34.1 of the Constitution which provides *inter alia* that “*justice shall be administered in public*”.

68. In yet further written submissions filed by the appellant in advance of the case management hearing on the 8th of December 2023, it was accepted by him that there was undoubtedly a *prima facie* case to put before a panel of three judges regarding the issue of jurisdiction. His position was that because the Court is, in his belief, the data controller for the ambient DAR, it is the only body that has jurisdiction to deal with the present application.

69. The appellant reiterated and re-emphasised his contention that attention must be given to the intended purpose for the ambient DAR. He submitted that it had no other use beyond providing a backup in the event that the primary DAR system failed, and that this fact alone demonstrates that the Court is the relevant data controller.

70. It was submitted that were the Court to refuse the present application outright, on the ground that it is not the data controller, an immediate consequence of that decision would be that the Courts Service is the data controller. He said that the implications of this must be considered. He highlighted as a potential implication that the Courts Service would act independently of the Court in relation to access to ambient digital audio recordings made when the Court is not sitting. This would, he said, amount to the relinquishment by the Court of control over the system to the Courts Service, an unprecedented step in his contention. In effect, he maintained, the judiciary would cede control to the executive.

71. Further, he suggested, to relinquish control in that way would be to drive between the primary DAR and the ambient DAR a wedge which was not intended when the courts recording system was established in 2008. It would also be to implicitly assert that some other purpose could exist for the ambient DAR other than as a backup for the primary DAR. At paras. 9, 10 and 11 of these submissions, he reiterated the points that he had made earlier with regard to the

observation of court proceedings by members of the public and the constitutional requirement that justice shall be administered in public. Further, he submitted that were the Courts Service to become the data controller for the ambient DAR, access requests would be handled privately, as opposed to the current position where all DAR requests are heard in open court. This, he said, would be a retrograde step.

72. In a section of his submissions entitled “*Illegality of the Ambient DAR*”, the appellant contended that the ambient DAR is illegal as representing “*an excessive intrusion on liberty, inimical to the interests of justice and contrary to the common good*”.

73. He contended that, under the Data Protection Acts 1988 - 2018, data is not processed fairly unless the data subject is made aware of the processing and the purpose of the processing at or before the time when the data is obtained. He complained that there is no indication whatsoever to individuals present in a courtroom regarding the existence of an ambient recording system, its purpose, or when it is in operation. He said that there is no general awareness of the system amongst court users, and that there is no appropriate signage, for example, exhibited in the locus of the recording. He said that the State is not entitled to engage in the surveillance of individuals of which they are unaware. Audio obtained without those present being informed amounts to covert surveillance without knowledge, in his submission. He contended that the ambient DAR violates the constitutional right to privacy of the individuals recorded, and that it is also in breach of European law in relation to privacy and data protection and, in particular, it is in breach of the GDPR.

74. He submitted that the general view of court users is that the court recording is only on when the large red digital display lights up and displays the time. He suggested that given what is now known, however, about the ambient DAR system recording continuously, “*the large red digital display could legitimately be viewed as an act of deception perpetrated on the public*”.

75. He submitted that the Court should not shy away or evade from dealing with these very serious issues by shunning responsibility for the ambient DAR. He added that there is a moral and legal onus on the Court to take responsibility in this matter.

76. In his final set of written submissions filed just before the hearing on the 15th of January 2024 the appellant addressed the issue of separation of powers. He emphasised that the context in which the applicant is seeking the ambient DAR is that it is currently conducting a criminal investigation. He suggested that the applicant has invited the Court to involve itself in that investigation, and that this is a breach of the separation of powers. He referenced passages from the judgments in *O'Flynn v. District Justice Clifford* [1988] I.R. 740 and in *Cosgrave v. DPP & Anor* [2012] IESC 24, respectively, as providing support for his argument.

77. He posited that the constitutionally enshrined doctrine of the separation of powers suggests that, at the very least, extremely compelling reasons would be required to justify departure from it, particularly in a motion such as this one. He submitted that such reasons are patently absent in the present case.

78. The appellant said that it is noteworthy that the applicant appeared to portray this Court as an aggrieved party in the criminal investigation and had invited the Court to make a ruling that would protect the Court's dignity and the Court's interests. He submitted that this cannot be appropriate. He further said that the applicant went so far as to suggest that the Court should view the disclosure of the ambient DAR to GSOC as a substitute for the Court's exercise of its contempt jurisdiction. He submitted that this is to fly in the face of the separation of powers and the Court's duty to remain impartial and independent.

79. In the next section of this set of written submissions the appellant addressed the applicant's argument that it is unnecessary for the Court to consider the legality of the ambient DAR before granting access to it. He submitted that this proposition flies in the face of the fundamental principles of data protection.

80. Elaborating on this, he contended that as a general principle, when a data controller is requested to share data, it is of paramount importance that the said data controller, in deciding whether or not to accede to the said request, considers whether or not the said data has been lawfully obtained in the first place. This, he maintained, is because the further transmission of data which has been originally unlawfully obtained exacerbates the data breach which has already taken place. In support of this contention, he referenced a guidance document published by the Data Protection Commissioner, entitled “*Guidance for Individuals who Accidentally Receive Personal data*” (August 2020 ver.).

81. He said that there are several ways in which the ambient DAR breaches law and/or the Constitution, and he proceeded to reiterate points that he had made in his earlier submissions concerning what he characterised as “*the covert and untransparent nature of the ambient DAR*”, while also pointing to Article 5(1)(a) of the GDPR, which provides that:

“1. *Personal data shall be:*
 (a) *processed lawfully, fairly and in a transparent manner in relation to the data subject*”.

[Emphasis added by the appellant]

82. The appellant further submitted that the ambient DAR is illegal having regard to its excessive and indiscriminate nature, which is disproportionate to its intended purpose. In support of this argument he cited Article 5(1)(c) of the GDPR, which provides that:

“1. *personal data shall be:*
 [...]
 (c) *adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed* (*‘data minimisation’*)”.

[Emphasis added by the appellant]

83. He submitted that while the applicant has argued that the system is justified on the basis that the court must “*ensure that the record of proceedings was not lost due to user or machine error*”, the

ambient DAR goes far beyond this. He submitted that there are numerous other ways of maintaining a backup system which would not trench on the Constitution and the laws as the ambient DAR does, and he suggested various possibilities or alternatives in that regard such as a manual checklist, a warning system if no recording is detected, dual recording devices both activated at the same source by the court registrar, or a backup recording channel activated by sound recognition.

84. The appellant also argued that the ambient DAR system violates the constitutional right to privacy. He pointed to the fact that at all times, even during recesses and adjournments, and before and after court proceedings, recordings are being made continuously of all sounds in the courtroom. This necessarily includes, he said, private consultations and confidential exchanges other than legal submissions, arguments and statements read into the public record. He contended that this is a wholly excessive intrusion on liberty and that these communications are protected by the constitutional right to privacy.

85. The appellant disputed the applicant's contention that no reasonable expectation of privacy arises in courtrooms such as to give rise to a stateable claim to a privacy right. In support of this contention, he cited the judgment of MacMenamin J. in *Idah v. Director of Public Prosecutions* [2014] IECCA 3 wherein the former Court of Criminal Appeal adopted, with approval, the approach of the Law Reform Commission regarding the application of a reasonable expectation of privacy doctrine. He said that the reasonable expectation of privacy, and the right of privacy which flows from it, do not cease when one is in a public place. Privacy is a personal right and one that follows the personal space of the person. Further, words spoken privately are confidentially protected, and it is not necessary that they be spoken in a private place. What counts most, he submitted, is whether a "*a reasonable expectation*" of privacy exists given all the circumstances of the case.

86. The appellant made clear that it is his position that he has a right to privacy in respect of his private communications and confidential exchanges in the courtroom when the Court is not in session.

87. The appellant also contended that the ambient recording system violates the constitutional protection for legal professional privilege. He submitted that many of the communications in a courtroom when the Court is not in session would be legally privileged.

88. The appellant again, reiterating the point made in his earlier submissions, contended that the ambient DAR actively compromises the constitutional principle of open justice enshrined in Article 34.1 of the Constitution.

89. We were referred to *Kane v. Governor of Mountjoy Prison* [1988] I.R. 757, specifically p. 769 of the Report where Finlay C.J. observed (with respect to surveillance of a “general type”):

“Such surveillance is capable of gravely affecting the peace of mind and public reputation of any individual and the courts could not, in my view, accept any general application of such a procedure by the police, but should require where it is put into operation and challenged, a specific adequate justification for it”.

90. The appellant also submitted that the ambient DAR is not authorised by law. He said there is an absence of any statutory power which provides for its operation, and that it does not fall under the scope of Order 123 of the Rules of the Superior Courts which deals only with recording of proceedings.

91. In the next section of these written submissions, the appellant addressed the applicant’s reliance on s. 41 of the Data Protection Act 2018. He said that he does not accept the assertion by the applicant that s. 41 makes lawful the necessary and proportionate processing of data for the purposes of investigating criminal offences whether or not that data had been lawfully processed before being sought, taken up, or processed by the applicant.

92. The appellant said that s. 41 clearly relates to data held by a data controller, which has been collected lawfully and for a lawful purpose, and subsequently been made the subject of a law enforcement request to be used for a specified law enforcement purpose. He said that it does

not provide authority for the proposition that data that has been collected and/or processed unlawfully at source may legitimately be the subject of a law enforcement request under data protection legislation.

93. The subsidiary point was made that, in any event, s. 41 of the Act of 2018 does not by itself impose a mandatory obligation on the recipient of such a request to disclose the data requested. The appellant submitted that s. 41 is permissive and not prescriptive. Accordingly, he said that the recipient of a request should still consider the principles in Article 5 of the GDPR and the applicable legal basis for processing under Article 6 of the GDPR. He submitted that when a data controller receives a law enforcement request that falls under s. 41 of the Act of 2018, it must comply with the GDPR in its handling of that request.

94. Elaborating on that, the appellant said that the recipient of the request (in this case, the Court) must be satisfied that disclosure of the data is necessary and proportionate for the specified law enforcement purpose, based on the information provided in the request by the law enforcement body. In this regard, the recipient must consider if the disclosure would align with the reasonable expectations of data subjects, whether the data that is requested seems excessive or disproportionate, and whether the data that is requested seems objectively necessary for the requesting party's stated purpose(s). He submitted that the applicant's request for disclosure of the ambient DAR fails completely to meet the required standard under the headings of necessity and proportionality.

95. Dealing first with necessity, the appellant submitted that a bare claim of necessity is insufficient, and he contended that the applicant has failed to demonstrate necessity in the present case. He said that the matters put forward at paras. 4(a) to 4(i), and at para. 6, of Mr. Power's affidavit can be more than adequately addressed by taking witness statements, and by consulting the primary DAR, CCTV, photographic evidence, and/or medical and other records available. In the appellant's contention, the applicant has not demonstrated by way of affidavit or submissions any irremediable lacuna in the evidence already gathered or proposed to be gathered

by the applicant which would render the disclosure of the ambient DAR necessary. Further, the appellant submitted that the matters at paras. 6(b) and 6(c) of Mr. Power's affidavit are intolerably vague and do not remotely approach the standard of necessity. He said that these such matters would appear to be more akin to "*a fishing expedition*", which is not permissible in this sort of application. Issue was also taken with Mr. Power's contention in para. 7 of his affidavit that the DAR (both primary and ambient) is likely to provide objective and reliable evidence of "*certain aspects*" of what is alleged to have occurred. He complained that Mr. Power does not delineate precisely what those "*certain aspects*" are, nor does he explain why the ambient DAR, as opposed to the primary DAR, is essential to the investigation, or why the more traditional types of evidence are insufficient in the circumstances.

96. With respect to the issue of proportionality, the appellant contended that any granting of access to the applicant of the ambient DAR would be a wholly disproportionate step. The appellant disputed that the *Harty* case, relied upon by the applicant, is in any respects apposite, and he further contended that the *Harty* case is distinguishable in any event in that it concerned a person suspected of having committed serious crimes. It was submitted that there are no comparable circumstances in this case which does not involve serious crime.

97. The appellant concluded by referencing the dissenting judgment of Hardiman J. in *Director of Public Prosecutions v. J.C.* [2017] 1 I.R. 417, wherein the late learned Supreme Court judge considered the issue as to whether the constitutional protection of the privacy of telephone calls recorded in the workplace is enjoyed by members of the gardaí. Hardiman J. stated, at para. 171 of his judgment:

"A garda is entitled to the same rights in this regard as any other citizen. Neither a garda nor anyone else can have this right breached by the State and the result of the breach proved in evidence against her in a serious criminal case. If it were otherwise, the Constitution could be breached with impunity, the rights it assures not vindicated, and there would be no disincentive to a public authority or an individual public official simply ignoring the law and even defying the Constitution. The breach would actually be rewarded

when its fruit or result is admitted as evidence on the side of those committing the breach of the Constitution. This is to set the Constitution itself at nought. It is to infringe the Constitution a second time”.

98. The appellant rejected the suggestion that his opposition to the application is in any way misconceived, and he urged this Court to respect and vindicate his data protection and privacy rights. The Court was further requested to refuse to grant the relief sought by the applicant.

Submissions on behalf of the third named notice party

99. Counsel for the third notice party addressed the Court at the oral hearing on the following points.

100. She contended, firstly, that it was not necessary for the Court to decide the legal question of controllership in relation to the data. In counsel’s submission, the only substantive question that the Court needed to address was whether it should, either pursuant to Order 123, Rule 9 of the Rules of the Superior Courts, or alternatively pursuant to its inherent jurisdiction, release the recording at issue to the applicant. Insofar as jurisdiction was concerned, counsel for the third notice party’s submission was that in the circumstances of this case the Court has the necessary jurisdiction, both under Order 123, Rule 9, and on the basis of inherent jurisdiction. For the Court to so conclude, as she commended we should, would involve consideration of whether the ambient recording, in the context of this application, falls within the definition of a “*record of proceedings*”, and whether the interpretation and arguments advanced on behalf of GSOC were correct. Counsel stated that the third notice party was supportive of the applicant’s analysis on the jurisdiction of the Court to release the ambient DAR in this case.

101. Counsel for the third notice party sought to emphasise that controllership does not equate to the ownership of data, and that it is not determinative of the question of whether or not it may be appropriate to release it. A controller is a natural or legal person who determines the purposes or means of data processing. Determining controllership usually requires a complex fact- and law-based analysis. It is a functional concept used to assign responsibilities. Moreover,

she submitted, a party's legal status *qua* the issue of controllership can change for micro acts of processing within a chain of processing activities which comprise one global activity. So, she submitted, it is quite a complex task to determine controllership and processorship.

102. An additional complication highlighted by counsel for the third notice party was the need to consider whether what is sometimes called "*the Law Enforcement Directive*" (i.e., Directive (EU) 2016/680 of the European Parliament and of the Council of the 27th of April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA) has any role, and we were asked to note that there are separate sets of definitions for controller and processor depending on which regime applies, i.e., the Law Enforcement Directive or the GDPR. While they are broadly similar definitions, it was stressed that they are not identical.

103. In counsel for the third notice party's submission, an analysis of controllership is not required for the purposes of this application. It was said that the Court does not need to, and should not, seek to determine the status of the parties. Indeed, it does not have the necessary factual material, i.e., evidence, to enable it to do so. Rather, it was submitted that the Court's focus should centre on whether it is in the interests of justice to release the record of proceedings.

104. Counsel for the third notice party further submitted that characterising what had occurred in the courtroom before and immediately after the Court had risen as representing one "*continuum*" was apposite, and that in considering whether the ambient DAR recording was "*a record of proceedings*" it was appropriate to view it as being the recording of such a continuum.

105. Counsel sought to draw our attention to s. 159(1) of the Act of 2018 which provides:

"The Superior Courts Rules Committee may make processing rules in respect of personal data that are contained in a record of a superior court of record".

106. Such rules have been made and promulgated as S.I. No. 659/2018, referenced earlier at para. 36 of this judgment. We were referred with specificity to the interpretation provisions in Rule 3 thereof, and also to Rule 4(5)(c) in the section of the rules concerning the subject matter of processing previously alluded to by counsel for GSOC. Counsel for the third notice party submitted that these rules clearly envisage a system of court records being handed over or disseminated to certain parties on request pursuant to directions of the Court.

107. Counsel for the third notice party further submitted that insofar as the appellant may have complaints concerning the processing of data gathered by means of the ambient DAR system, the present application is not the appropriate vehicle or means to have such complaints adjudicated upon. She referred to s. 157 of the Act of 2018 and to the assignment by the Chief Justice, in accordance with that section, of a specific judge to supervise the data processing operations of the courts when acting in their judicial capacity. In circumstances where the appellant, Mr. Burke, has not raised his complaints with the assigned judge, counsel for the third notice party suggested that so much of his objections to the present application as relate to data processing to-date, amounting, in his contention, to data breaches, are misconceived. In counsel for the third notice party's submission, this Court does not have jurisdiction in the context of the present application to determine if there has been a data breach or breaches in the operation of the ambient DAR on the 7th of March 2023. Further, insofar as the appellant apprehends that further data breaches may occur in the event of this Court acceding to GSOC's application, that again is a matter to be raised with the assigned judge who has the power to investigate such complaints.

Some Applicable Rules and Legislative Provisions

108. Although they may already have been referenced, and quoted in part, in the foregoing summaries of the parties' respective submissions, I think it is important for the purposes of this judgment, and that it may be helpful for the reader, if I set out *in extenso* the relevant provisions

of the Rules of the Superior Courts; of the Data Protection Act 2018 (Section 159(1)) Rules 2018 (S.I. No. 659/2018); and s. 157 of the Act of 2018.

The relevant provisions of the Rules of the Superior Courts

109. The relevant provisions of the Rules of the Superior Courts are those contained in Order 123, Rules 2 and 9, respectively and Order 125, Rule 1.

110. Order 123, Rule 2 provides:

“2. At the trial or hearing of any cause or matter, any party may, with the Court’s permission and subject to and in accordance with any direction of the Court, make or cause to be made a record of the proceedings, which record shall (subject, in the case of criminal proceedings, to rule 14(2) of Order 86) include:

(a) the oral evidence;

(b) in the case of an action tried by a Judge and jury, the Judge’s charge and directions to the jury, and the submissions and requisitions made to the judge and his ruling thereon;

(c) in any case tried by a Judge without a jury, the Judge’s judgment (unless it be a written judgment)”.

111. Order 123, Rule 9 provides:

*“(1) Any party or person who seeks access to any part of a record of proceedings (in this rule referred to as the “**relevant record**”) which is held by or for the Supreme Court, the Court of Appeal or the Court, as the case may be (in this rule referred to as the “**relevant court**”) may apply to the relevant court by motion in the proceedings concerned on notice to the other party or the parties to those proceedings, grounded upon an affidavit.*

(2) On the date first fixed for the hearing of the motion, the relevant court may:

(a) direct that copies of the notice of motion and affidavit be served on any other person who the relevant court considers has a sufficient interest in or may be affected by the application;

(b) fix time limits for the delivery of any replying affidavit.

(3) *The relevant court may, for the purposes of considering any such application, review privately the contents of the relevant record.*

(4) *Subject to sub-rule (5), the relevant court may, where it considers it necessary in the interests of justice so to do, permit the applicant to have such access to all or such part of the relevant record concerned as is specified in the order made on the application, by such means and at such time or times as may be specified in that order and on such terms and under such conditions (including terms restraining the publication, dissemination or further disclosure of all or any part of the relevant record by the applicant, and the giving of an undertaking to such effect) as the relevant court may direct.*

(5) *Unless the relevant court otherwise directs, access to the relevant record concerned shall, where permitted under sub-rule (4), be afforded solely by the provision to the applicant of a transcript of all or any part of that record, on payment by the applicant to the transcript writer of the transcript writer's fee for producing the transcript".*

112. Order 125 Rule 1 of the Rules of the Superior Courts, entitled "*Interpretation and Forms*" provides that:

"In these Rules, unless there is anything in the subject or context repugnant thereto, the several words and expressions hereinafter mentioned shall have or include the meanings following:

[...]

"record" means a contemporaneous record of the proceedings concerned made by any one or more means, including, without limitation:

any shorthand or other note, whether written, typed or printed, and

any sound recording or other recording, capable of being reproduced in legible, audible or visual form, approved by the court".

The relevant provisions of the Data Protection Act 2018 (Section 159(1)) Rules 2018 - (S.I. No. 659/2018)

113. The relevant provisions of these rules provide:

"Scope

2. *These Rules (being processing rules, within the meaning of section 159(9) of the 2018 Act) shall apply to the processing of personal data:*

(a) of which a superior court of record, when acting in a judicial capacity, is a controller, and

(b) which are personal data contained in a record of that court,

where such personal data are processed on behalf of such controller by any processor, including any other processor engaged by a processor for carrying out specific processing activities on behalf of the controller.

Interpretation

3. *(1) In these Rules:*

“2018 Act” means the Data Protection Act 2018;

“court record” means a record of a superior court of record;

“Data Protection Regulation” means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);

“Directive” means Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA;

in relation to personal data of which a court is the controller, “judge” , in the case of any proceedings the hearing of which has not been assigned to any judge or panel of judges or, in any case where the judge concerned is no longer a member of that court or the panel concerned can no longer be constituted, shall mean the Chief Justice in relation to a judge of the Supreme Court, the President of the Court of Appeal in relation to a judge of the Court of Appeal or, as the case may be, the President of the High Court in relation to a judge of the High Court;

“Processor” means a processor of personal data of which a superior court of record is the controller and includes without limitation, any court officer, any member of the staff of the Courts Service for the time being employed in a court office and any contractor of the Courts Service (including any employee or person working under the direction of such contractor) who is processing personal data of which a superior court of record is the controller.

(2) In these Rules, save as expressly provided otherwise, terms defined in the Data Protection Regulation or the Directive shall have the meanings given to them in the Data Protection Regulation or, as the case may be, the Directive.

Processing of personal data

4. (1) Where a Processor shall process personal data on behalf of any superior court of record or judge of such court, the subject matter, duration, nature and purpose of the processing, the type of personal data to be processed and the categories of data subjects to whom the personal data relate shall be as set out in this rule.

Subject matter of processing

(2) The subject matter of processing to which these Rules apply consists of personal data included, by or on behalf of a party to proceedings before a court, or any other person, in and, subject to any order of the court concerned, retained in, a court record, in accordance with the provisions of statute, the Rules of the Superior Courts, any applicable practice direction of the court concerned and any order of that court, for the purposes of the conduct of those proceedings.

(3) Personal data contained in a court record may be held securely in hard copy or in electronic form by a court officer or member of the staff of the Courts Service for the time being employed in a court office at an office of or attached to the court concerned or by a contractor of the Courts Service notified to the president of the court concerned, at premises or in a system used by the Courts Service or, as the case may be, by that contractor.

(4) *A Processor may collect, record, organise, structure, store, retrieve, consult and use personal data in accordance with the Rules of the Superior Courts, any applicable practice direction of the court concerned and any order of that court, for the purposes of the court or the proceedings to which they relate.*

(5) *A Processor may, subject to the provisions of statute, the Rules of the Superior Courts, any applicable practice direction of the court concerned and any order of that court, disclose by transmission, dissemination or otherwise, personal data contained in a court record:*

- (a) *to a party to the proceedings to which such personal data relate, at the request of that party or by direction of the court concerned;*
- (b) *to a legal representative of such party on record as acting in the proceedings, at the request of that legal representative or by direction of the court concerned;*
- (c) *by direction of the court concerned to a member of An Garda Síochána or a prosecuting authority, for the purposes of —*
 - (i) *the investigation of, or*
 - (ii) *use as evidence in the prosecution of**an offence alleged;*
- (d) *to any other person or persons (including an artificial legal person(s)) directed by the court concerned for any other purpose which the court concerned may determine to be appropriate having regard to the provisions of the Data Protection Regulation, the Directive and the 2018 Act;*
- (e) *to any other court or officer of a court for the purposes of an appeal or any other proceedings relating to the proceedings to which the personal data relate;*
- (f) *to any person in compliance with an order or direction of a court requiring production or discovery of the personal data concerned; and*
- (g) *to a bona fide member of the Press or broadcast media in accordance with rules made under section 159(7) of the 2018 Act.*

Duration of processing

(6) Personal data contained in a court record shall be retained for the purposes of the proceedings including any appeal and enforcement action and for archiving purposes following the determination of the proceedings to which the personal data relate (including by way of appeal), prior to transfer of the court record to the National Archives in accordance with the provisions of the National Archives Act 1986 save where the court record concerned is the subject of an authorisation under the provisions of section 7 of the National Archives Act 1986, in which case the court record shall be disposed of in accordance with such authorisation.

Purpose of processing

(7) Personal data contained in a court record may be processed —

- (a) in accordance with the provisions of statute, the Rules of the Superior Courts, any applicable practice direction of the court concerned and any order of that court, for the purposes of the proceedings to which they relate, or*
- (b) in accordance with an order of that court or of another competent court, for the purposes of proceedings before the last-mentioned court.*

Type of personal data to be processed and data subjects to whom the personal data relate

(8) Subject to the requirements of statute, the Rules of the Superior Courts, rules made under section 159(7) of the 2018 Act, any applicable practice direction of the court concerned and any order of that court, personal data of any type and which relate to any data subject in a court record are liable to be processed where such data have been included in such record.

Obligations of the Processor

5. In respect of any processing of personal data contained in a court record, the Processor shall:

- (a) act only on a direction or directions given by or on behalf of the court concerned (including such directions made under these Rules or the Rules of the Superior Courts or comprised in any practice direction of that court) in relation to the processing, except in so far as European Union law or the applicable law of a Member State of the European Union requires the Processor to act otherwise;*

- (b) *ensure that any person authorised by the Processor to process the personal data has undertaken to maintain the confidentiality of the personal data or is under an appropriate statutory obligation to do so;*
- (c) *assist the court in ensuring compliance with the court's obligations under applicable data protection law in respect of data subject rights;*
- (d) *in the case of a Processor who is a contractor of the Courts Service, on the conclusion of the contract or at any other time in accordance with the provisions of the contract, upon completion of the processing services carried out by the Processor on behalf of the court*
 - (i) *return to the court as directed by the Courts Service on behalf of the court, or*
 - (ii) *where the data are contained in records which are the subject of an authorisation under the provisions of section 7 of the National Archives Act 1986 authorising the disposal of such records, erase*

all personal data, and erase any copy of the data, unless the Processor is required by European Union law or the law of a Member State of the European Union to retain the data;
- (e) *in the case of a Processor who is an officer of the court concerned or a member of staff of the Courts Service employed in an office of or attached to the court, maintain all personal data subject to the direction of the judge or, as the case may be, the senior of the judges referred to in section 65(3) of the Court Officers Act 1926 and otherwise in accordance with rule 4(6);*
- (f) *make available to the court concerned all information necessary to demonstrate compliance by the Processor concerned with its obligations as a processor under these Rules and under law, including under Article 28 of the Data Protection Regulation and under the 2018 Act, as applicable, and allow for and contribute to audits, including inspections, conducted by an auditor on behalf of the court concerned;*
- (g) *not engage any other processor (who is not a court officer or a member of the staff of the Courts Service for the time being employed in a court office) otherwise than in accordance with the prior specific or general written authorisation of the president of the court concerned; in the case of any*

general authorisation, the Courts Service shall inform the president of the court in advance of any intended changes concerning the addition or replacement of any other processor who is not a court officer or employed in a court office;

- (b) ensure that where another processor (who is not a court officer or a member of the staff of the Courts Service for the time being employed in a court office) is engaged to process personal data on behalf of the court concerned, that other processor shall be subject to these Rules or a written contract shall exist between the Processor and such other processor containing obligations equivalent to those imposed on the Processor in these Rules; in the event that any such other processor fails to meet its data protection obligations in respect of any such processing, the Processor shall be fully liable to the court for the performance of its obligations in accordance with statute, the Rules of the Superior Courts, any applicable practice direction of the court concerned, any order of that court, and these Rules;*
- (i) implement such technical and organisational security measures as are required to comply with the data security obligations under applicable data protection law;*
- (j) inform the president of the court concerned immediately if, in the Processor's opinion, it receives an instruction from the court which infringes the Data Protection Regulation, the Directive or the 2018 Act;*
- (k) notify the president of the court concerned immediately after becoming aware of any personal data breach and provide the court concerned with such cooperation and assistance as may be required to mitigate against the effects of, and comply with any reporting obligations which may apply in respect of, any such breach, and*
- (l) assist the court in complying with the court's obligations under applicable data protection law in respect of data protection impact assessments".*

Section 157 of the Act of 2018

114. Section 157 of the Act of 2018 provides:

“(1) The judge (“assigned judge”) for the time being assigned for that purpose by the Chief Justice shall be competent for supervision of data processing operations of the courts when acting in their judicial capacity.

(2) The assigned judge shall, in particular—

(a) promote awareness among judges of the provisions of the Data Protection Regulation, the Directive and any enactment, rule made under section 158 (3) or other rule of law that gives further effect to the Data Protection Regulation or effect to the Directive, and ensure compliance with those provisions, and

(b) handle, and investigate to the extent appropriate, complaints in relation to data processing operations of the courts when acting in their judicial capacity”.

115. The assigned judge on the 7th of March 2023 and at all times since then and up to and including the date of this judgment is the Honourable Ms. Justice Marie Baker of the Supreme Court.

116. The necessity for s. 157 of the Act of 2018, and the legislative backdrop to it, is succinctly and accurately stated in the following passage which appears on p. 1 of a FullGuidance Note published and made available by the Data Protection Commission on their website entitled “*The supervision of personal data in the courts and certain statutory bodies exercising decision-making functions*” (see: <https://www.dataprotection.ie/en/dpc-guidance/supervision-personal-data-courts-and-certain-statutory-bodies-exercising-decision-making-functions#supervision>)

“Data protection and the courts when acting in their judicial capacity

Although the Data Protection Commission (DPC) is the supervisory authority for data protection laws in Ireland, special rules apply where the courts are engaging in personal data processing activities. These special rules come from Article 55(3) of the General Data Protection Regulation (GDPR), which prevents the DPC, like other EU data protection authorities, from supervising the data processing operations of the courts when they are acting in their judicial capacity. This is to ensure the independence of the judiciary in the performance of its judicial tasks, including decision-making.

Sections 157 to 160 of the Data Protection Act 2018 (2018 Act) along with the relevant Rules of Courts provide for how the Irish courts must process personal data and how certain data protection rules in the GDPR should be given effect. This includes a provision that a specific judge be assigned by the Chief Justice of Ireland to act as the data protection supervisor in relation to the processing of personal data, which occurs when the Irish courts are acting in their judicial capacity [...]”.

The Court’s Decision and its Reasons Therefor

Has the Court Jurisdiction to Make the Order Sought?

117. Although I have considered them in detail, none of the authorities to which we have been referred seem to me to be directly on point. Nevertheless, I am satisfied that in the circumstances of this case the Court does have jurisdiction to make the Order sought, both under Order 123, Rule 9, and pursuant to the Court’s inherent jurisdiction.

118. Order 123 is entitled “*Record of Proceedings*”. Rule 9 thereof governs applications for access to any part of a record of proceedings (i.e., “*the relevant record*”). What comprises a record is defined in Order 125, Rule 1. However, what constitutes “*proceedings*” is not defined in terms.

119. The word “*proceedings*” appears throughout the rules, and in its widest scope embraces a course of litigation in the Superior Courts in any cause or matter from its commencement until its conclusion. Accordingly, Order 1 of the Rules of the Superior Courts is concerned with the “*commencement of proceedings*”, and provides in the case of civil proceedings in the High Court that this should be done by an originating summons (save where otherwise provided for).

120. However, the word “*proceedings*” in Order 123, Rule 9 may, in my view, be treated as being narrower in scope. Order 123 must be considered as a whole, and in my assessment Rule 9 must be read in conjunction with Rule 2 which is cast in terms that, “[a]t the trial or hearing of any cause or matter, any party may, with the Court’s permission and subject to and in accordance with any direction of the Court, make or cause to be made a record of the proceedings”. In my judgment, the word “*proceedings*” used in this context is correctly to be interpreted as referring to events occurring during or proximately associated with *a trial or the hearing of any cause or matter by a court*. Moreover, I believe

that this interpretation is consonant with the definition of what constitutes a record in Order 125, in circumstances where that rule speaks of “*a contemporaneous record of the proceedings*”.

121. If “*proceedings*” used in this context is correctly to be interpreted as referring to events occurring during or proximately associated with a trial or the hearing of any cause or matter by a court, then it begs the question: what are the temporal parameters of such proceedings? Are they to be strictly confined to when the judges are present in court? Do they commence with the emergence onto the bench of the judge or judges, or alternatively only when the Registrar actually calls the cause or matter? Do they conclude when the judge or judges cease dealing with the cause or matter, or when the judges rise? What if the judges have been unlawfully interrupted and have not ceased dealing with the cause or matter, but have felt it necessary to leave the bench due to the disruption? Do the circumstances in which the judge or judges has or have had to leave the bench have any relevance in determining the temporal parameters of the proceedings? The rules are silent as to how the temporal parameters of the proceedings are to be determined.

122. The Rules of the Superior Courts are secondary legislation, to which the Interpretation Acts 1937-2005 apply. In that regard, s. 5(2) of the Interpretation Act 2005 provides:

“In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made, the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment”.

123. Order 123 of the Rules of the Superior Courts provides neither for a penal or other sanction.

124. I am satisfied that Order 123, Rule 9 is obscure to the extent that it provides no assistance in determining the temporal parameters of the “*proceedings*” to which it refers. Accordingly, I am obliged by s. 5(2)(a) of the Interpretation Act 2005 to give that provision a purposive construction, i.e., one that reflects the plain intention of the makers of the instrument if that intention can be ascertained from the instrument as a whole in the context of that enactment.

125. Can the intention of the makers of the instrument, i.e., Order 123, Rule 9 RSC, be ascertained from Order 123 as a whole in the context of the enactment which is the Rules of the Superior Courts? I am satisfied that it can be. The intention of the makers of the instrument was to make provision for the creation of a formal record of proceedings of a superior court, and the granting by such court of access to that record in appropriate circumstances. What was envisaged was that the Court, and the Court alone, would have control both of the circumstances in which such a record would be created and over who might be afforded access to it. Moreover, this arrangement has to be seen in a wider context.

126. The administration of justice is a solemn process fundamental to any form of governance based upon respect for the rule of law. The Constitution provides in Article 34.1 that “*[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution [...]*”. The people of Ireland, in adopting Article 34.1, have said that this is how they wish justice to be administered in Ireland. Solemnity in the courts process and in court proceedings is therefore expected, not out of respect for the judges, but out of respect for the will of the people. Formality, procedures, ritual, and decorum in court proceedings are important because they serve to emphasise the solemnity and gravity of what is taking place, and the importance of the decisions being taken. It is no exaggeration to say that the outcome of litigation may sometimes have life-changing consequences for the litigants involved, particularly if they are individuals, and/or are economically or otherwise disadvantaged.

127. The Rules of the Superior Courts have been enacted in that framework, namely to provide a scaffolding of formal procedures by means of which the courts can conduct their business with the appropriate level of solemnity, gravitas and formality. This scaffolding is buttressed or supplemented by long-standing rituals, and by custom and convention as to behaviour or decorum expected of those who have business to transact with the courts, or who wish to attend court in exercise of their entitlement to do so. Ultimately, however, a court is entitled to control its own process; and it has, by way of inherent jurisdiction, both the power and the means of ensuring that it is shown the necessary respect; not out of self-regard, or any expectation of deference for the person/personages of the judge or judges concerned, but rather out of deference to the importance of the Rule of Law itself. The fact that the courts and the courts alone have control of records of their proceedings, both in respect of the circumstances in which such records are created, and over who might be afforded access to them, is but an aspect of each court's entitlement to control its own process. I am satisfied that the intention of the makers of the Rules of the Superior Courts, and Order 123 in particular, can only have been to provide a scaffolding of formal procedures for the exercise of that entitlement, and that it was not their intention to seek to constrain or limit the extent of that entitlement.

128. I am satisfied that where a court is scheduled to sit, or has sat, in connection with a trial or the hearing of any cause or matter, the required solemnity expected in connection with the administration of justice, and the formalities and decorum expected of persons with business to transact in, or otherwise attending a court sitting, does not begin precisely with the arrival of a judge or judges onto the bench and end with a judge or judges' departure from the bench. It extends to an expectation of respectful conduct both in temporal and physical proximity with the court, not just when the judges are actually on the bench, but also in the environs of the building where the court is sitting, both before and after the judge or judges arrive onto and leave the bench. I am satisfied that for so long as that expectation subsists, there are proceedings in being which the court has power to intervene to control or take action in respect of. As to whether

there has been a breach of that expectation in any instance will depend on the circumstances of the case. The circumstances of the present case, however, admit of no doubt.

129. I have no hesitation in concluding that the submission made to us by counsel for the applicant, and supported by counsel for the third notice party, to the effect that the disruptive and disrespectful conduct by some persons attending the Court of Appeal hearing on the 7th of March 2023, which caused the Court to have to rise, and ultimately to have to abandon judgment delivery in open court in favour of later delivery by electronic means, and which conduct continued in the courtroom and its environs for some time after the Court had risen, represented an uninterrupted continuum of unacceptable behaviour which is properly to be regarded as part of the proceedings before the Court on that day. During its continuance, audio of the disruption was captured and recorded by the ambient DAR. I am in no doubt that this recording constitutes a contemporaneous record of those proceedings.

130. I am therefore satisfied that, if it is appropriate to do so in all the circumstances of the case, this Court has the necessary jurisdiction, both under Order 123, Rule 9 RSC, and by virtue of the Court's inherent jurisdiction to control and protect its own process, to grant access to the ambient DAR record at issue in this application to the applicant.

Should access to the ambient DAR be granted to

GSOC in the circumstances of this case?

131. The first question to be asked in this context is whether access to the ambient DAR, being a record of the Court's proceedings, is being sought for a legitimate purpose. I am satisfied that it is.

132. The applicant, GSOC, is an independent statutory body, established under the Garda Síochána Act 2005, to provide efficient, fair and independent oversight of policing in Ireland. It has an investigative role in relation to complaints made by members of the public concerning the conduct of members of An Garda Síochána in circumstances, *inter alia*, where it appears that the conduct of a Garda is alleged to constitute misbehaviour (which is defined as conduct that

constitutes an offence or breach of discipline). The affidavit of Mr. David Power established that complaints were received by GSOC from members of the Burke family, albeit not specifically from the appellant, Mr. Enoch Burke, alleging misbehaviour by various members of the gardaí in their use of physical force in ejecting some members of the Burke family from Courtroom No. 1, Court of Appeal Building, Four Courts on the 7th of March 2023 after the judges had left the bench following persistent interruptions by a member or members of the Burke family of Birmingham P., while the President was giving his judgment; and in the circumstances attendant upon the arrest of Mr. Simeon Burke on suspicion of committing an offence contrary to s. 6 of the Criminal Justice (Public Order) Act 1994.

133. The applicant, GSOC, is obliged, pursuant to its statutory remit, to thoroughly investigate the circumstances surrounding the alleged misbehaviour the subject matter of the complaints made to them. In that regard, it is in the same position as An Garda Síochána in terms of the duties owed by virtue of its investigative role. Counsel for the applicant relied in his submissions on the oft' quoted passage from the judgment of Hardiman J. in *Braddish v. Director of Public Prosecutions* (previously cited), but the passage in question bears re-iteration:

“It is the duty of the gardaí, arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence. This is so whether the prosecution proposes to rely on the evidence or not, and regardless of whether it assists the case the prosecution is advancing or not”.

134. The affidavit of Mr. Power asserted that the recordings to which access is sought by the applicant *“are likely to provide objective and reliable evidence of certain aspects of what is alleged to have occurred and to materially assist in the investigation of the conduct alleged”*. This establishes to my satisfaction that access to the ambient DAR is being sought for a legitimate purpose connected with the discharge by the applicant, GSOC, of its statutory remit.

135. The next question is whether it is necessary and proportionate to grant the applicant access to the record at issue, being the ambient DAR, in circumstances where (i) I am satisfied,

having heard the matter argued, and in circumstances where the parties are *ad idem* on the issue, that the Court is a relevant data controller; (ii) that the record at issue may contain personal data; (iii) that the data was collected for a lawful purpose, namely as a back-up recording of proceedings; (iv) where the granting of the access would constitute a processing of the personal data in question, and; (v) where that processing of personal data would be for a purpose other than the purpose for which the data had been collected.

136. Section 41 of the Act of 2018 is relevant in this context. That section expressly deems lawful the processing of personal data for a purpose other than the purpose for which the data has been collected to the extent that such processing is necessary and proportionate for the purposes, *inter alia*, of preventing, detecting, investigating or prosecuting criminal offences.

137. The provisions of S.I. No. 659/2018 - Data Protection Act 2018 (Section 159(1)) Rules 2018 are also relevant in this context, in particular Rule 5(c) thereof. As has been seen, these rules under S.I. No. 659/2018 also provide that a processor may, subject to the provisions of statute, the Rules of the Superior Courts, any applicable practice direction of the court concerned and any order of that court, disclose by transmission, dissemination or otherwise, personal data contained in a court record by direction of the court concerned to a member of An Garda Síochána or a prosecuting authority, for the purposes of —

- “(i) *the investigation of, or*
- (ii) *use as evidence in the prosecution of*
an offence alleged”.

138. The complaints made to GSOC allege the use of excessive force by certain gardaí against members of the Burke family thereby causing them injury, i.e. assault causing harm. I am therefore satisfied that criminal offences are being investigated. I am further satisfied that the ambient DAR may contain objective evidence potentially pointing to the guilt or innocence of those being investigated. Moreover, I am further satisfied that the personal data involved would be the voices of those who may have spoken, or issued utterances, during the incident and

nothing more. Relevant in that regard is that the timeframe involved is bracketed by the judges leaving the court in response to the interruption of judgment delivery and the expulsion of the members of the Burke family considered to be involved by members of An Garda Síochána.

Taking all of that into account, I consider that the taking up of the ambient DAR record by the applicant is necessary to the criminal investigation being conducted.

139. On the issue of proportionality, the appellant, Mr. Burke, has argued that GSOC's investigation does not involve the investigation of serious crime. I beg to differ. It is a matter of profound seriousness. Assault causing harm is a serious criminal offence, carrying a fine of up to €1,500 and/or imprisonment for up to twelve months if prosecuted summarily; alternatively an unlimited fine and/or a potential prison sentence of up to 10 years if prosecuted on indictment. In addition, for a member of An Garda Síochána such a conviction might well lead to their subsequent dismissal from the force with consequent loss of livelihood.

140. Also relevant to proportionality is the nature of the personal data at issue in the present application, and the circumstances of its capture. Despite the attempts of the appellant to emotively characterise the ambient DAR as covert surveillance, it is nothing of the sort. It is a backup system of recording of the proceedings of a court. A disrupter or disrupters of court proceedings on public court premises, whose publicly spoken words (or utterances or conversations engaged in) in the course of their disruption are captured on the record of proceedings, can have no expectation of privacy. I have no difficulty with the proposition that Mr Burke or any other person has a right to privacy in respect of his private communications and confidential exchanges in the courtroom when the Court is not in session. However, there is simply no evidence before us that Mr. Burke was engaged in private communications and confidential exchanges in the bracketed period of time under discussion, or that any such data was recorded. It is notable that in the present application the appellant has not asserted that any utterance of his was actually available to be captured by the ambient DAR. He has not asserted in his evidence that he said anything, the capturing of which could amount to a breach of a right to

privacy enjoyed by him, whether arising under the Constitution, under statute or under European law. He has abstractly suggested that the ambient DAR recording could breach his right to privacy in respect of his private communications and confidential exchanges in the courtroom or that it could breach legal professional privilege. However he has not said that he said anything to anyone, much less a lawyer or advisor acting for him, or that such a lawyer or advisor said anything to him, during the currency of the ambient DAR recording at issue. The breach he postulated in that respect is entirely theoretical. It is not possible for him to assert potential breaches of his rights in the abstract. A person asserting a breach or potential breach of their rights must engage with the facts of the situation in which a breach of rights is alleged to have occurred, or is apprehended, and show in a concrete way how they have been or will be affected. The appellant, Mr. Burke, does not do so in his affidavit.

141. Neither is it possible for the appellant to assert the rights of others. It is relevant in the context of the appellant's objection to the application that none of the complainants to GSOC have joined him as objectors, nor have they asserted that their rights have been or may be breached, and on that basis applied to be added as additional notice parties. He can only speak to his own situation, and he must provide an evidential basis for suggesting that his rights have been breached, or will be breached, if access to the record at issue is granted. He suggested that the ambient DAR is unlawful as being "*a wholly excessive intrusion on liberty*", and because it may potentially capture private consultations and confidential exchanges. The Court of Appeal has appellate jurisdiction only and accordingly I believe that this Court is not the appropriate forum before which to make such a claim. However, and in any event, even if he was in the right forum, he would have to demonstrate that as a matter of likelihood the recording at issue captured some of his personal data in order to show that an issue as to the lawfulness of the ambient DAR was even engaged. Court time is a valuable resource and as a long-standing general rule the courts will not issue advisory opinions on abstract or theoretical problems, nor will they decide issues that are moot. He has not said that he uttered a single word, or that something was said to him, much

less in either case something that would attract a right to privacy or confidentiality, during the incident that is currently being investigated. He has not asserted that he was engaged in a private consultation with anyone during the incident the details of which were potentially captured. He has not asserted that he was engaged in confidential exchanges with anyone during the incident that potentially were captured. His concerns are raised on an entirely conjectural basis. It is legitimate to say that, insofar as Mr. Burke has sought to question the lawfulness of the ambient DAR, such concerns as he has raised are not grounded in concrete circumstances that can be shown on the evidence to affect him personally.

Are alleged breaches of the rights of a data subject, or potential future breaches of the rights of a data subject, justiciable by the Court of Appeal in the context of an application such as the present?

142. In circumstances where Mr Burke has not been able to demonstrate on the evidence before the Court that his personal data protection rights have been engaged in any concrete way, rendering such concerns as he has raised theoretical and abstract, we find it unnecessary to express a definitive view on this.

143. It is, of course, the position that every court, and the judge or judges comprising it, must uphold the Constitution and the laws, including applicable data protection laws. The parties to any cause are statutory notice parties for the purposes of an application pursuant to Order 123 Rule 9, and we recognise that where such a party can show that their personal data protection rights are engaged in a concrete way, that such circumstances might indeed provide a legitimate basis for articulating an objection to a proposed Order for the release of a DAR record, and one that a Court might have to engage with substantively. However, for the reasons stated, the need to do so does not arise here.

144. The extent to which substantive engagement might be required by a Court such as ours is a matter that will remain to be determined in an appropriate future case. We would simply observe that, in general, the GDPR entrusts supervision of the activities of public bodies and

public authorities to a supervising authority in the Member State where the public body or public authority is located, and the competence of such a supervising authority is regulated by Article 55(2) GDPR. In Ireland, the relevant supervising authority for all public bodies, except the judiciary, is the Data Protection Commission. However, as has been pointed out, special rules apply to courts in order to protect the independence of the judiciary. Article 55(3) GDPR exempts a supervising authority (such as the Data Protection Commission) from supervising the activities of courts and other judicial authorities when they are acting in their judicial capacity. This does not mean that their activities are not subject to the GDPR, but simply that the monitoring of the control and processing of personal data by the judiciary should be entrusted to a specific body within the judicial system of the Member State concerned. In Ireland, effect is given to this by s. 157 of the Act of 2018.

145. Pursuant to s. 157 of the Act of 2018 the Chief Justice has assigned a judge of the Supreme Court as the assigned judge with competence for supervision of data processing operations of the courts when acting in their judicial capacity. At present it is the Honourable Ms. Justice Baker, although she is due to retire shortly. The assigned judge has power to receive, handle and investigate, to the appropriate extent, complaints in relation to data processing operations of the courts when acting in their judicial capacity.

146. A person who believes that he has either been the victim of a breach of his rights as a data subject by the operation of the data processing operations of the courts to-date, or that he may potentially suffer a breach of his rights as a data subject by a further data processing operation of the courts, may complain to the assigned judge as the relevant supervising authority in the first instance, and seek her ruling on the issue.

147. It seems to us that personal data protection concerns, such as those voiced by the appellant in support of his objection to GSOC's application, were matters that he could have raised with the assigned judge, as has been submitted by the other parties to this matter.

However, Mr. Burke did not opt to do this.

Conclusion

148. In circumstances where I am satisfied that the Court of Appeal does have jurisdiction to grant access to a record of proceedings of this Court, comprised of an ambient DAR recording, to a body such as GSOC in an appropriate case; and in circumstances where I am satisfied that this is an appropriate case in which to grant such access for the reasons stated above, I am disposed to accede to the application.

McCarthy J.:

I agree.

Burns J.:

I also agree.