

APPROVED

[2021] IEHC 11

THE HIGH COURT  
JUDICIAL REVIEW

2019 No. 200 J.R.

BETWEEN

EMMETT CORCORAN  
ONCOR VENTURES LIMITED T/A “THE DEMOCRAT”

APPLICANTS

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA  
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 4 January 2021**

**INTRODUCTION**

1. The principal judgment in these proceedings was delivered on 11 September 2020, *Corcoran v. Commissioner of An Garda Síochána* [2020] IEHC 382. This supplementary judgment addresses a number of consequential matters, including (1) the precise form of order, (2) the allocation of costs, and (3) the form of stay pending an appeal. These issues are addressed in sequence under separate headings below.
2. The parties filed submissions on these issues on 6 November 2020, and 14 December 2020, respectively.

NO REDACTION REQUIRED

**(1) FORM OF ORDER**

3. The form of order proposed in the principal judgment had been a declaration to the effect that the examination of the content of the journalist's mobile telephone is to be limited to specified content created during the period 11<sup>th</sup> – 17<sup>th</sup> December 2018 (both dates inclusive). However, it now appears from the written submissions filed on behalf of An Garda Síochána that the actual logistics of accessing the content of a mobile telephone are more complex than I had appreciated. In particular, it seems that it is not technically possible to download *part only* of the content of a mobile telephone. Instead, it will be necessary to download and decode the full file system. A separate report will then be prepared identifying the relevant content over the period 11<sup>th</sup> – 17<sup>th</sup> December 2018.
4. For the avoidance of any doubt, the report is not to include contact details (such as names, telephone numbers, email addresses etc.) saved on the mobile telephone.
5. This report will be transferred on an encrypted drive to a nominated member with the rank of Chief Superintendent. The Chief Superintendent is independent from, and not connected to, the Garda investigation into the events at Falsk, Strokestown, Co. Roscommon on 16 December 2018. The report will be supplied by the Chief Superintendent to the investigating team. A copy of the report is also to be supplied to the applicants' solicitor.
6. The downloaded version of the mobile telephone's full file system will next be deleted from the computer system in Garda Headquarters, with the consequence that the only data retained by An Garda Síochána will be that on the encrypted drive. It is also proposed that An Garda Síochána will retain the mobile telephone device itself; presumably this is because it may be necessary to produce the device as evidence in the pending criminal proceedings. The device is to be held by the Chief Superintendent.

7. Given that the process of examining the mobile telephone is more involved than had been appreciated at the time the principal judgment was delivered, it is necessary to revise the proposed order. The order will take the form of an injunction, restraining An Garda Síochána from accessing and examining the content of the mobile telephone other than in accordance with the procedure outlined above. Both parties will have liberty to apply. As discussed presently, the order will be stayed pending appeal. If the appeal is unsuccessful, the parties will have liberty to apply to the High Court to finetune the precise form of the order in the light of any technological advances in the interim.
8. In circumstances where the order will take the form of an injunction, and is thus subject to enforcement by the court, the order will not recite that the judicial review proceedings have been dismissed.

## **(2). ALLOCATION OF COSTS**

9. The submissions of both parties approach the question of costs by reference to Part 11 of the Legal Services Regulation Act 2015 (“*the LSRA 2015*”). This pragmatic approach makes it unnecessary for the court to make a formal determination on the extent, if any, to which the new costs regime has retrospective effect, i.e. applies to costs incurred prior to the commencement of the relevant provisions of the Act on 7 October 2019. As it happens, most of the costs the subject of this judgment were incurred after this date: the three-day hearing took place in July 2020; and thus the issue of retrospective effect might well be academic in this case.
10. Part 11 of the LSRA 2015 draws a distinction between a party who is “entirely successful” in proceedings, and a party who has only been “partially successful”. The default position is that a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings unless the

court, in the exercise of its discretion, orders otherwise. The reasons for such an order must be stated. A non-exhaustive list of the factors to be taken into account by a court in exercising its discretion are enumerated under section 169(1).

11. No such default position applies in respect of a party who has only been “partially successful”. As explained by Murray J. in *Higgins v. Irish Aviation Authority* [2020] IECA 277 (at paragraph 10), such a party may nevertheless be entitled to recover all of their costs in an appropriate case.

“[...] it is particularly important to bear in mind that whether a party is ‘entirely successful’ is primarily relevant to where the burden lies within process of deciding how costs should be allocated. If a party is ‘entirely successful’ all of the costs follow unless the Court exercises its discretion to direct otherwise having regard to the factors enumerated in s.169(1). If ‘partially successful’ the costs of that part on which the party has succeeded may be awarded in its favour, bearing in mind those same factors. Indeed, having regard to the general discretion in s.168(1)(a) and O.99 R.2(1) a party who is ‘partially successful’ may still succeed in obtaining all of his costs, in an appropriate case.”

12. The judgment in *Higgins* goes on to explain that in determining whether a party has been “entirely successful” for the purposes of section 169(1), the correct approach is to look beyond the overall result in the case and to consider whether the proceedings involve separate and distinct issues. If so, it is appropriate to determine which side succeeded on those issues.
13. The Court of Appeal has confirmed in *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183 that even where a party has not been “entirely successful”, the court should still have regard to the matters set out in sub-section 169(1) when deciding whether to award costs.
14. Applying these principles to the circumstances of the present case, the applicants certainly cannot be said to have been “entirely successful” in the proceedings. The objective of the proceedings had been to restrain An Garda Síochána from examining

any of the content of the journalist's mobile telephone. This relief was refused in the principal judgment.

15. It is less clear-cut whether the applicants might be said to have been "partially successful". The institution of the proceedings appears to have conferred some benefit upon the applicants in that An Garda Síochána, by letter dated 10 May 2019, offered to limit their examination of the mobile telephone to activity over the course of a specified period spanning the date of the incident at the repossessed property on 16 December 2018.
16. I am satisfied that the applicants would be entitled to their costs up and until the date of that offer. But for the institution of the proceedings, the applicants could have had no assurance that a more extensive examination of the mobile telephone would not have taken place.
17. The question then becomes whether it was reasonable for the applicants to continue to pursue the proceedings after receipt of the letter of 10 May 2019. For the reasons which follow, I have concluded that it was, and that the applicants are entitled to recover their costs of the proceedings.
18. These proceedings raise important issues of principle in relation to freedom of expression, and, in particular, the protection of journalistic sources. More specifically, the proceedings required consideration of the difficult question of how the public interest in the proper investigation and prosecution of criminal offences is to be balanced against the public interest in a free press. Notwithstanding that the applicants were ultimately unsuccessful in obtaining all of the relief sought, the taking of the proceedings was nevertheless in the public interest. The issues of principle presented by these proceedings transcend the facts of the case and are of general public importance. These proceedings appear to have been the first proceedings in which the question of the seizure of a

journalist's mobile telephone in the context of ongoing criminal investigations has been addressed in a written judgment of the High Court. It appears that the applicants intend, as is their absolute right, to pursue the matter further by way of an appeal. It is in the public interest that these matters be clarified by an appellate court.

19. The courts have a discretion, to be exercised on a case-by-case basis, to depart from the general rule that a successful party is entitled to its costs. One of the factors to be considered, under section 169(1), is the "particular nature and circumstances of the case". The statutory language is broad enough to allow the court to consider whether the issues raised in the proceedings were of general public importance, and, if so, whether this justifies a modified costs order. In exercising its discretion in respect of costs, a court must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing litigation of a type which—although ultimately unsuccessful—nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime.
20. In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights.
21. The nature of the constitutional right at issue in these proceedings, namely freedom of expression, is such that the risk of exposure to have to pay the other side's legal costs

may well have a deterrent effect. The costs of a three-day hearing before the High Court would be measured in tens of thousands of euro. An adverse costs order would be financially ruinous for all save the very wealthy. It would be unreasonable to expect an individual journalist to have to shoulder this financial risk in terms of costs in order to vindicate what is, in a very real sense, a public, rather than a personal, right.

22. Were the general rule that the successful party is entitled to its costs to be applied in this context, it might have the unintended consequence that proceedings, which raise important questions as to the role of the media in a constitutional democracy, would not be brought forward for the want of a litigant with a large enough financial interest in the outcome of the proceedings to justify his or her incurring the risk on costs. This might skew constitutional litigation towards cases the outcome of which has significant financial implications for the litigants, such as, for example, cases asserting property rights in land or in commercial contracts. Those with more modest concerns might not be able to afford to litigate. This would be unfortunate: the importance of constitutional rights cannot be measured in monetary terms. The constitutional issues raised by the applicants in these proceedings touch upon a core democratic value, namely freedom of expression and the role of the free press, and it is in the public interest that these issues be clarified. In particular, the case has indirectly highlighted a potential deficiency in the protections afforded to journalists' confidential sources under domestic law. The interpretation of the legislative provisions governing search warrants contended for by both parties has the consequence that there is, arguably, no statutory procedure prescribed under domestic law whereby the right to protection of journalistic sources is attended with legal procedural safeguards commensurate with the importance of the principle at stake. This might well represent a breach of the European Convention on Human Rights

(as interpreted in cases such as *Sanoma Uitgevers B.V. v. The Netherlands* (Application No. 38224/03)).

23. For the reasons explained in the principal judgment, I found that no such breach occurred on the peculiar facts of this case. This finding might ultimately be set aside on appeal. Even if it is not, there was nevertheless a public interest in having the issue litigated.
24. In deciding where the incidence of costs should fall in this case, I have not lost sight of the fact that An Garda Síochána made an offer to compromise the proceedings on certain terms on 10 May 2019. These terms were further clarified by letter dated 1 November 2019. In allocating costs, a court is obliged to take into account whether a party made an offer to settle the matter the subject of the proceedings, and, if so, the date, terms and circumstances of that offer (section 169(1)(f) of the LSRA 2015). It is necessary, therefore, to consider the terms of the offer made by An Garda Síochána, with a view to determining whether the applicants achieved any additional benefit in pursuing the case to full hearing. Two aspects of An Garda Síochána's approach to the proceedings are relevant in this regard.
25. First, the offer to settle the proceedings was not unconditional in its terms. An Garda Síochána expressly stated that their proposal was made without prejudice to their entitlement to seek to extract *further* information from the mobile telephone for appropriate investigative purposes relating to the on-going investigations being carried out into events in Falsk, Strokestown, Co. Roscommon and other inquiries arising out of that investigation. The offer to settle the proceedings also indicated that both sides would bear their own costs.
26. Secondly, part of An Garda Síochána's defence to the proceedings comprised a submission to the effect that the High Court (rather than the District Court which had issued the search warrant) was the appropriate forum before which the competing public



interests could be balanced. See, in particular, paragraphs 19 and 20 of the statement of opposition as follows.

“19. Without prejudice to the foregoing pleas and further to the matters outlined above, in the event (which is denied) that this Honourable Court determines that the Applicants herein have an interest in the contents of the said phone being protected, which must then be weighed against the public interest in the investigation and prosecution of criminal offences being carried out by An Garda Síochána, the extent of the examination of the phone in question ought to be determined by this Honourable Court.

20. Further to the foregoing plea, this Honourable Court can give directions to the parties in relation to any process of adjudication of the extent of the examination of the phone as seems appropriate in the circumstances.”

27. Counsel for An Garda Síochána had placed much emphasis on the fact that the content of the mobile telephone had not been accessed prior to the institution of these proceedings, and, accordingly, the judicial review proceedings were said to represent a meaningful remedy for any alleged breach of the journalist’s rights (especially his rights under the European Convention on Human Rights). Reliance was placed on the judgment in *CRH plc v. Competition and Consumer Protection Commission* [2017] IESC 34; [2018] 1 I.R. 521 as providing “a useful instance of a situation where a court can oversee the Search Warrant process even after the warrant has been executed”.

28. Having regard to all of the foregoing, I have concluded that the applicants acted reasonably in continuing to pursue the proceedings notwithstanding the offer of settlement. Had the applicants accepted the terms of settlement, they would have been in a worse-off position than they are now, having pursued the proceedings to full hearing. The terms of the court’s order are more restrictive than the terms of settlement, which had expressly left over the possibility of extracting further information from the mobile telephone. Insofar as costs were concerned, the applicants were, at the very least, entitled to the costs of the leave application given the precipitous manner in which the device was

seized. Given that the offer of settlement did not undertake to pay even these costs, the applicants acted reasonably in rejecting same.

29. More generally, it was reasonable for the applicants to pursue the proceedings in circumstances where An Garda Síochána's position was that any balancing of the competing public interests engaged in the seizure of a journalist's mobile telephone was a matter for the High Court rather than the District Court.
30. In summary, therefore, the court will make an order directing An Garda Síochána to pay the applicants' costs of the proceedings. The costs are to include the leave application; the three-day hearing in July 2020; two sets of written legal submissions; and all reserved costs. The costs are for solicitor and two counsel. The costs are to be measured by the Office of the Legal Costs Adjudicator in default of agreement between the parties.

**(3). STAY PENDING AN APPEAL**

31. Having settled the terms of the substantive orders which this court proposes to make, it is necessary next to consider the terms of a stay, if any, to be placed upon these orders pending the intended appeal.
32. The considerations relevant to the grant of a stay pending an appeal have recently been considered by the Supreme Court in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42. As explained in that judgment, a risk of injustice will often arise in the case of an appeal because of the unavoidable time which must elapse between the determination of the High Court and an appellate hearing and decision. In the event that the order made on the stay application is *different* to the order made on the outcome of the appeal proper, then one of the parties may have suffered injustice in the interim. This risk can be reduced, but cannot always be eliminated. One approach is to seek to align

the decision on a stay application, so far as possible, with the likely outcome of the appeal.

33. Factors to be taken into consideration in deciding whether or not to impose a stay include, *inter alia*, the strength of the grounds of appeal, and the public interest in the enforcement of the law.
34. Applying these principles to the present case, the balance of justice clearly lies in favour of granting a stay. The precise purpose of the appeal is to prevent any examination of the mobile telephone. If the applicants were to succeed in their appeal, then they would have established that they have a right to withhold the content of the journalist's mobile telephone. The applicants' right of appeal would be rendered nugatory were the mobile telephone to have been examined by An Garda Síochána in the interim. There is no meaningful order which the appellate court could make *ex post facto* which would vindicate that right. As pithily observed in the written legal submissions filed on behalf of the applicants, a source, once identified, cannot subsequently be unidentified.
35. This is not a case where, for example, the absence of a stay results only in temporary financial loss or the temporary disruption of amenity pending the hearing and determination of the appeal. Rather, the consequences of refusing a stay would be permanent and irreparable: the very objective of the appeal would have been undone.
36. The respondents have suggested that only a short stay of fourteen days is appropriate, and that the continuation of any such stay should be determined by the Court of Appeal at the first directions hearing before that court. With respect, this timeframe is unnecessarily restrictive given the fact that the criminal proceedings, in aid of which the content of the mobile telephone is sought, are not listed for hearing until May 2022. The suggested timeframe does not even allow the applicants the twenty-eight day period prescribed under the Rules of the Superior Courts for the filing of an appeal.

37. I propose to grant a stay in the following terms. The orders (including the costs order) will be stayed for a period of twenty-eight days from the date of perfection of the orders. In the event that an appeal or an application for leave to appeal is filed with the Court of Appeal or the Supreme Court, respectively, within that twenty-eight day period, the stay will continue until the determination of the appeal or until such date as may otherwise be directed by the appellate court.

### **CONCLUSION AND FORM OF ORDER**

38. Given that the process of examining the mobile telephone is more involved than had been appreciated at the time the principal judgment was delivered, it is necessary to revise the proposed order. The appropriate order will take the form of an injunction, restraining An Garda Síochána from accessing and examining the content of the mobile telephone other than in accordance with the procedure outlined at paragraphs 3 to 8 above. The parties have liberty to apply.
39. There will also be an order directing An Garda Síochána to pay the applicants' costs of the proceedings. The costs are to include the leave application; the three-day hearing in July 2020; two sets of written legal submissions; and all reserved costs. The costs are for solicitor and two counsel. The costs are to be measured by the Office of the Legal Costs Adjudicator in default of agreement between the parties.
40. The orders (including the costs order) will be stayed for a period of twenty-eight days from the date of perfection of the orders. In the event that an appeal or an application for leave to appeal is filed with the Court of Appeal or the Supreme Court, respectively, within that twenty-eight day period, the stay will continue until the determination of the appeal or until such date as may otherwise be directed by the appellate court.

*Appearances*

Michael McDowell, SC and Morgan Shelley for the Applicants instructed by Carter Anhold & Co. Solicitors

Frank Callanan, SC and Tony McGillicuddy for An Garda Síochána instructed by the Chief State Solicitor

Approved  
Gemma S. Moss