

THE HIGH COURT

[2020 No. 85 MCA]

IN THE MATTER OF S. 902A TAXES CONSOLIDATION ACT 1997 AND IN THE MATTER OF REGULATIONS 12 AND 14 OF THE EUROPEAN UNION (ADMINISTRATIVE COOPERATION IN THE FIELD OF TAXATION) REGULATIONS 2012 (S.I. NO. 549 OF 2012) AND COUNCIL DIRECTIVE 2011/16/EU RE: EXCHANGE OF INFORMATION REQUEST DATED 26TH DECEMBER, 2016 FROM FRANCE

BETWEEN

DAVID O'SULLIVAN

APPLICANT

AND

A COMPANY

RESPONDENT

THE HIGH COURT

[2020 No. 86 MCA]

IN THE MATTER OF S. 902A TAXES CONSOLIDATION ACT 1997 AND IN THE MATTER OF THE AGREEMENT BETWEEN IRELAND AND THE FEDERAL REPUBLIC OF GERMANY FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL RE: EXCHANGE OF INFORMATION REQUEST DATED 19TH APRIL, 2016 FROM GERMANY

BETWEEN

DAVID O'SULLIVAN

APPLICANT

AND

A COMPANY

RESPONDENT

THE HIGH COURT

[2020 No. 87 MCA]

IN THE MATTER OF S. 902A TAXES CONSOLIDATION ACT 1997 AND IN THE MATTER OF THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS RE: EXCHANGE OF INFORMATION REQUEST DATED 4TH MARCH, 2019 FROM THE REPUBLIC OF KOREA

BETWEEN

DAVID O'SULLIVAN

APPLICANT

AND

A COMPANY

RESPONDENT

THE HIGH COURT

[2020 No. 88 MCA]

IN THE MATTER OF S. 902A TAXES CONSOLIDATION ACT 1997 AND IN THE MATTER OF THE CONVENTION BETWEEN IRELAND AND THE REPUBLIC OF ICELAND FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL AND IN THE MATTER OF THE MULTILATERAL CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS RE: EXCHANGE OF INFORMATION REQUEST DATED 24TH APRIL, 2019 FROM THE REPUBLIC OF ICELAND

BETWEEN

DAVID O'SULLIVAN

APPLICANT

AND

A COMPANY

RESPONDENT

(No. 1)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 22nd day of June, 2020

1. In these cases, the Revenue Commissioners acting on behalf of foreign tax authorities seek orders against an Irish-based company to obtain information relevant to the financial affairs of foreign taxpayers. The notice of motion in each case seeks "*an order pursuant to s. 902A(4) [of the] Taxes Consolidation Act 1997 (as amended) that the respondent do furnish the applicant within such time as the court may direct the information contained in the schedule hereto*", with the schedule setting out specific information regarding the financial affairs of certain categories of taxpayers in foreign countries. The precise contours of the information sought have also been refined in subsequent evidence.
2. The four applications relate respectively to France, Germany, the Republic of Korea and Iceland. A further application was instituted [2020 No. 89 MCA] regarding Australia, but that was struck out by consent with no order.
3. I have received helpful submissions from Ms. Alison Keirse B.L. for the applicant (who is an official of the Revenue Commissioners acting on their behalf) and from Ms. Bernadette Quigley B.L. (with Mr. Frank Mitchell S.C.) for the respondent.

***In camera* order**

4. An application to the court for information from a third-party in relation to the affairs of a taxpayer of the type launched here must be made *in camera*: s. 902A(7) of the Taxes Consolidation Act 1997. Prior to instituting the present applications, the Revenue Commissioners obtained orders from Meenan J. on 13th May, 2020 entitled in intended actions, the first one being 2020 No. 33 IA, to anonymise the pleadings.
5. While Murphy J. commented *obiter* in *Carey v. A Company* [2019] IEHC 90 (Unreported, High Court, 16th January, 2019), that if the respondent was on notice of the application there might be no basis from departing from the general rule that justice is administered in public, that was more in the nature of an observation as to a hypothetical, whereas here there has been more full argument on this particular point. Ms. Keirse submits here, and I accept, that the reason for the *in camera* order is not to protect the rights of the respondent as such, but to preserve the integrity of the investigative process in relation to the taxpayers whose affairs are ultimately the subject of inquiry. The fact that the respondent is on notice of the present application in no way dilutes the need for the *in camera* order, because the taxpayers whose activities are under investigation should not be alerted to the application.
6. Ms. Quigley did invite me, if I was to be satisfied to make orders in favour of the Revenue, to make an order clarifying the extent of the respondent's obligations having regard to the *in camera* nature of the proceedings and having regard to what she saw as the inevitability of enquiries from the taxpayers and regulators abroad. She sought an order that the respondent would have liberty to refer to the existence of any order, but not the terms of the order, as well as to the *in camera* nature of the proceedings, for the

purposes of replying to queries from individuals and entities whose information had been furnished, and from regulatory and law enforcement authorities. The parties here agreed that such an order was appropriate; what the parties were also agreed on is that such an order doesn't give the respondent an entitlement to make public statements and the like, as opposed to answering individual or regulatory queries.

7. For the avoidance of doubt, Ms. Keirse has also sought an order to allow the applicant to keep the relevant competent authorities abroad fully abreast of the proceedings. That is not necessary seeing as the applicant is acting on behalf of the Revenue Commissioners who in turn are acting in effect on behalf of foreign tax authorities; and the *in camera* rule does not preclude full communication with one's own client or entities on whose behalf one acts. So it cannot be said to preclude full communication with those foreign tax authorities. But, if it's felt advantageous to state expressly what is implicit by including such a clause in the order, I would be prepared to facilitate that as long as it's clear that such communication is legitimate even without an express order.

Procedure by originating notice of motion

8. Order 84B, r. 2(1) of the Rules of the Superior Courts provides that "*Save where the application is authorised by the relevant enactment to be made ex parte, it shall be made by originating notice of motion*".
9. Murphy J. referred to this rule in *Carey v. A Company* at para. 65 by way of a postscriptual clarification of an earlier suggestion at para. 53 that perhaps an *ex parte* type procedure was more appropriate. The logic of her postscriptual point that O. 84B applies, a point with which I respectfully agree, is that notice to the respondent is indeed the correct default procedure. Section 902A of the 1997 Act doesn't allow the application to be made *ex parte*, so the default procedure is an originating notice of motion in accordance with O. 84B, r. 2(1). Of course O. 84B like any Rule of Court can be dispensed with by the court, so it is not utterly inflexible. If, in a particular case, Revenue thought that there was an objective reason for an *ex parte* application under s. 902A, they could apply for O. 84B, r. 2(1) to be dispensed with.
10. In *Child and Family Agency v. M.O'L.* [2019] IEHC 917, [2019] 12 JIC 2701 (Unreported, High Court, 27th December, 2019) at para. 13, I noted that *originating* notices of motion should be headed as such rather than simply as "*Notice of Motion*", to distinguish them from a garden variety motion brought within pre-existing proceedings. On Ms. Keirse's application I will dispense with that requirement here, but perhaps the correct procedure might be noted by Revenue for future reference.

The legal context

11. The legal context for the orders sought in relation to the four different jurisdictions concerned arises under separate legal instruments in each jurisdiction. Identifying the precise legal jurisdictional prerequisites has the feel of fighting one's way through a statutory thicket and certainly illustrates the proposition that if too much time is allowed to elapse without ongoing consolidation of the law, interpretative complexities arise and the process of litigation is complicated. Maybe the present application could be modestly

offered as a possible case study for the need for simplicity, consolidation and transparency in legal provisions. The only realistic way to untangle the sequence of legal instruments involved is to deal with them in chronological order.

The 1988 Council of Europe and OECD Convention

12. Our story begins in 1988. The Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters was done at Strasbourg on 25th January, 1988. The agreement, as amended, is registered as Irish Treaty Series No. 9 of 2014 and provides *inter alia* for exchange of information between the contracting parties relevant to the administration or enforcement of their domestic tax law. Article 27(1) preserves other international agreements or instruments. Article 28(1) allows Member States of the Council of Europe and the OECD to sign and ratify the agreement and art. 28(5) allows non-members to be invited to also sign and ratify the Convention.

The 1997 Act

13. As enacted, s. 826 of the Taxes Consolidation Act 1997 allowed the Government by order to declare that arrangements had been made with other governments in relation to relief from double taxation. Those arrangements would then have the force of law notwithstanding any other enactment apart from a specified provision of the 1997 Act itself. Section 826 of the 1997 Act was later to be somewhat restructured (as we shall shortly see) and extended to agreements with other states regarding exchange of information.

The 1999 Finance Act

14. Section 207(d) of the Finance Act 1999 inserted s. 902A in the 1997 Act. The new section confers a power on the court to grant an order compelling a third-party such as the respondent here to deliver information to the Revenue in relation to the affairs of a taxpayer.

The 2003 agreement with Iceland

15. A double taxation agreement was entered into between Ireland and Iceland on 17th December, 2003 and registered as Irish Treaty Series No. 5 of 2006. The version on the Irish Treaty series website has no signature line, but, in the copy produced to me, the signatories are Tom Parlon and Sverrir Haukur Gunnlaugsson. Article 26 of that agreement provides for exchange of information between the contracting States.

The 2004 order regarding Iceland

16. The Government made an order under ss. 826(1) and 828 of the 1997 Act giving effect to the 2003 agreement with Iceland in the form of the Double Taxation Relief (Taxes on Income and on Capital) (Republic of Iceland) Order 2004 (S.I. No. 775 of 2004). At the time of making that order, the order itself did not have to be listed specifically in primary legislation, but this procedure was later changed.

The 2007 Finance Act

17. Section 35(1) of the Finance Act 2007 amended s. 826 of the 1997 Act *inter alia* including a new subsection (1)(a)(ii) which allowed the Government orders to also cover arrangements agreed regarding "*exchanging information for the purposes of the prevention and detection of tax evasion*"

18. The Act also inserted a new schedule 24A into the 1997 Act and provided that where the Government by order declared that arrangements had been made with another government (s. 826(1)(a)) and that such an order was referred to in Part 1 of Schedule 24A (sub-s. (1)(b)) then the arrangements would have the force of law as if each order were an Act of the Oireachtas as and from either the insertion of schedule 24A into the 1997 Act (inferentially in relation to the existing arrangements that were in place in 2007 and thus were listed in schedule 24A on the date of its insertion) or on the insertion of a reference to the order into Part 1 of schedule 24A (sub-s. (1)(b)) (that is, new orders made after the 2007 Act).
19. In the original version of schedule 24A, the 2004 order regarding Iceland is listed at para. 17, thus enabling that order to have the force of law in line with the re-worded s. 826 of the 1997 Act.

The 2010 protocol to the Council of Europe and OECD Convention

20. The 1988 Council of Europe and OECD Convention was amended by a protocol on 27th May, 2010. No separate text of the protocol was made available to me. The version of the 1988 Convention as amended in 2010 is what is published as the relevant entry in the Irish Treaty Series and what is scheduled to the relevant order under s. 826 of the 1997 Act.

The 2010 Finance Act

21. The Finance Act 2010 extended s. 826 further. Section 157(b) extended the purposes of the possible agreements with other governments to include agreements regarding *"collecting and recovering tax (including interest, penalties and costs in connection with such tax) for the purposes of the prevention of tax evasion"* and s. 157(c) inserted a new subsection (1C) in s. 826 of the 1997 Act, specifically allowing the Government to make an order giving legal effect to the 1988 Convention referred to above. That was later to be implemented in 2013.

The 2011 Directive

22. Council Directive 2011/16/EU on administrative cooperation in the field of taxation was designed to provide for procedures under which Member States would cooperate with each other with a view to exchanging information foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning almost all taxes: see arts. 1(1) and 2(1). The CJEU has held that foreseeable relevance of the information is a condition for utilisation of the directive: see *Berlioz Investment Fund SA v Directeur de l'administration des contributions directes* C-682/15 (Court of Justice of the European Union, 16th May, 2017).
23. The directive also includes a saver for agreements between Member States providing at art. 1(3) that *"This Directive shall not affect the application in the Member States of the rules on mutual assistance in criminal matters. It shall also be without prejudice to the fulfilment of any obligations of the Member States in relation to wider administrative cooperation ensuing from other legal instruments, including bilateral or multilateral agreements."*

24. Article 4(1) requires each Member State to designate a competent authority, and art. 5 requires each requested authority to communicate any information referred to in art. 1(1) that it has in its possession or that it obtains as a result of administrative enquiries at the request of a requesting authority. The transfer of information doesn't require a court order; that is done under the authority of the directive. The obtaining of the information may, however, require such an order in a particular Member State. Article 18(1) of the directive contains the important requirement for present purposes that if information is requested by a Member State, the requested Member State shall use its measures aimed at gathering information to obtain the requested information even though that Member State may not need such information for its own tax purposes. Under art. 29(1) the directive was to be transposed by 1st January, 2013.

The 2011 agreement with Germany

25. A double taxation agreement with Germany was entered into on 30th March, 2011 signed by Michael Noonan and Busso von Alvensleben for the contracting parties and later registered as Irish Treaty Series No. 16 of 2013. Article 26 provides for mutual assistance in the exchange of information and more specifically art. 26(4) imposes a duty corresponding to that in the directive that, if information is requested by a contracting State, *"the other Contracting State shall use its information gathering measures to obtain the requested information"*.

The 2011 first protocol regarding Germany

26. Article 31 of the 2011 agreement with Germany provides that *"The attached Protocol shall be an integral part of this Agreement"*. The 2011 agreement was accompanied by a protocol also signed on the same date in 2011. The text of the protocol is attached at the end of the text published as Irish Treaty Series No. 16 of 2013.

The 2012 order regarding Germany

27. On 24th January, 2012 the Government made the Double Taxation Relief (Taxes on Income and on Capital) (Federal Republic of Germany) Order 2012 (S.I. No. 22 of 2012) giving effect to the 2011 Agreement and the first protocol.

The 2012 Finance Act

28. Section 137(1)(a) of the Finance Act 2012 inserted a new para. 14A in Part 1 of Schedule 24A which allowed legal effect to be given to the 2012 order, although you'd have trouble finding that information because I should perhaps note at this point that the list of amendments to the Tax Consolidation Act 1997, in particular Schedule 24A of that Act, as set out on www.irishstatutebook.ie is somewhat sub-optimal. Perhaps this is something that the Revenue Commissioners might take up with the Law Reform Commission who are responsible for the listings of amendments on the Irish Statute Book online, pending any broader consolidation which is perhaps also something they should consider, at least of this particular area.

29. It may be worth setting out the current state of the amendment material online so that this can be made clearer. At time of preparing this written version of the judgment (6th July, 2020), the amendments listed to schedule 24A on irishstatutebook.ie are as follows:

Sch. 24A inserted	11/2007, s. 35(1)(b), 35(3)
Sch. 24A, pt. 1 amended	S.I. No. 460 of 2019
	S.I. No. 459 of 2019
	S.I.s No. 30-34 of 2011
	S.I.s No. 17-21 of 2011
	S.I. No. 25 of 2010
	S.I. No. 24 of 2010
	S.I.s No. 17-20 of 2010
Sch. 24A, pt. 1, para. 10A inserted	8/2013, ss. 104(1)(a), 104(2)
Sch. 24A, pt. 1, para. 1A inserted	6/2011, ss. 80(1)(a), (2)
Sch. 24A, pt. 1, para. 1AA inserted	9/2012, s. 137(1)(a)(i), (2)
Sch. 24A, pt. 1, para. 2 substituted	6/2011, ss. 80(1)(b), (2)
Sch. 24A, pt. 1, para. 2A inserted	5/2010, ss. 158(1)(a)(i), 158(2)
Sch. 24A, pt. 1, para. 2B inserted	37/2014, s. 96(b)
	5/2010, ss. 158(1)(a)(i), 158(2)
Sch. 24A, pt. 1, para. 3 substituted	37/2014, s. 96(a)
Sch. 24A, pt. 1, para. 3A inserted	5/2010, ss. 158(1)(a)(ii), (2)
Sch. 24A, pt. 1, para. 5A inserted	3/2008, s. 141 & sch. 8, par. 1(u) & 7(a)(ii)
Sch. 24A, pt. 1, para. 10 substituted	37/2014, s. 96(c)
Sch. 24A, pt. 1, para. 11A inserted	52/2015, s. 80(a)(i)
Sch. 24A, pt. 1, para. 13A inserted	5/2010, ss. 158(1)(a)(iii), (2)
Sch. 24A pt. 3 amended	S.I.s No. 22-29 of 2011
	S.I. No. 26 - 30 of 2010
	S.I.s No. 21 -23 of 2010
	25/2008, s. 99, schedule 6, paras. 1(d)(ii),

	7(a)(iii)
Sch. 24A, pt. 3, para. 1 renumbered as para. 6	5/2010, ss. 158(1)(b)(i), (2)
Sch. 24A, pt. 3, para. 1 inserted	5/2010, ss. 158(1)(b)(ii), (2)
Sch. 24A, pt. 3, para. 1A inserted	6/2011, ss. 80(1)(k), (2)
Sch. 24A, pt. 3, para. 1AA inserted	52/2015, s. 80(b)(i)
Sch. 24A, pt. 3, para. 1AB inserted	52/2015, s. 80(b)(ii)
Sch. 24A, pt. 3, para. 1B inserted	6/2011, ss. 80(1)(k), 80(2)
Sch. 24A, pt. 3, para. 2A inserted	6/2011, ss. 80(1)(l), (2)
Sch. 24A, pt. 4 inserted	8/2013, s. 104(1)(g), (2)
Sch. 24A, pt. 3, para. 2 inserted	5/2010, ss. 158(1)(b)(ii), (2)
Sch. 24A, pt. 3, para. 3 inserted	5/2010, ss. 158(1)(b)(ii), (2)
Sch. 24A, pt. 3, para. 3A inserted	6/2011, ss. 80(1)(m), (2)
Sch. 24A, pt. 3, para. 3B inserted	41/2013, s. 83(b)(i)
Sch. 24A, pt. 3, para. 4 inserted	5/2010, ss. 158(1)(b)(ii), 158(2)
Sch. 24A, pt. 3, para. 4A inserted	9/2012, s. 137(1)(b)(i), 137(2)
Sch. 24A, pt. 3, para. 7 inserted	5/2010, ss. 158(1)(b)(iii), 158(2)
Sch. 24A, pt. 3, par. 8 inserted	5/2010, ss. 158(1)(b)(iii), (2)
Sch. 24A, pt. 3, para. 5 inserted	5/2010, ss. 158(1)(b)(ii), (2)
Sch. 24A, pt. 3, par. 8A inserted	6/2011, ss. 80(1)(n), (2)
Sch. 24A, pt. 3, par. 8AA inserted	41/2013, s. 83(b)(ii)
Sch. 24A, pt. 3, para. 8AB inserted	52/2015, s. 80(b)(iii)
Sch. 24A, pt. 3, para. 8AC inserted	41/2017, s. 81(b)
Sch. 24A, pt. 3, par. 8B inserted	6/2011, ss. 80(1)(n), 80(2)
Sch. 24A, pt. 3, par. 8C inserted	6/2011, ss. 80(1)(n), 80(2)

Sch. 24A, pt. 3, par. 8D inserted	6/2011, ss. 80(1)(n), 80(2)
Sch. 24A, pt. 3, par. 8E inserted	8/2013, s. 104(1)(e), 104(2)
Sch. 24A, pt. 3, par. 9 inserted	5/2010, ss. 158(1)(b)(iii), 158(2)
Sch. 24A, pt. 3, par. 9A inserted	8/2013, s. 104(1)(f), (2)
Sch. 24A, pt. 3, par. 10 inserted	9/2012, s. 137(1)(b)(ii), (2)
Sch. 24A, pt. 1, para. 14 substituted	6/2011, ss. 80(1)(c), (2)
Sch. 24A, pt. 1, para. 14A inserted	52/2015, s. 80(a)(ii)
	9/2012, s. 137(1)(a)(ii), (2)
Sch. 24A, pt. 1, para. 15A inserted	6/2011, ss. 80(1)(d), (2)
Sch. 24A, Pt. 1, para. 21A inserted	41/2017, s. 81(a)
Sch. 24A, pt. 1, par. 22A inserted	6/2011, ss. 80(1)(e), 80(2)
Sch. 24A, pt. 1, para. 25 substituted	37/2014, s. 96(d)
Sch. 24A, pt. 1, par. 25A par. inserted	25/2008, s. 99 & sch. 6, paras. 1(d)(i)(I), 7(a)(iii)
Sch. 24A, pt. 1, par. 26 substituted	6/2011, ss. 80(1)(f), (2)
Sch. 24A, pt. 1, par. 26A par. inserted	25/2008, s. 99 & sch. 6, paras. 1(d)(i)(II) 7(a)(iii)
Sch. 24A, pt. 1, par. 27A inserted	5/2010, ss. 158(1)(a)(iv), (2)
Sch. 24A, pt. 1, par. 27B inserted	6/2011, ss. 80(1)(g), (2)
Sch. 24A, pt. 1, par. 27C inserted	6/2011, ss. 80(1)(g), (2)
Sch. 24A, pt. 1, para. 31 substituted	52/2015, s. 80(a)(iii)
Sch. 24A, pt. 1, par. 31A inserted	9/2012, ss. 137(1)(a)(iii), 137(2)
Sch. 24A, pt. 1, par. 33A inserted	8/2013, ss. 104(1)(b), 104(2)
Sch. 24A, pt. 1, par. 35A inserted	5/2010, ss. 158(1)(a)(v), 158(2)
Sch. 24A, pt. 1, par. 35AA inserted	9/2012, s. 137(1)(a)(iv), (2)
Sch. 24A, pt. 1, para. 35B inserted	6/2011, ss. 80(1)(h), (2)

Sch. 24A, pt. 1, para. 38 substituted	6/2011, ss. 80(1)(i), (2)
Sch. 24A, pt. 1, para. 41 substituted	45/2019, ss. 73(b), 76(9)
	8/2013, s. 104(1)(c), (2)
Sch. 24A, pt. 1, para. 41A inserted	25/2008, s. 99 & sch. 6, paras. 1(d)(i)(III) 7(a)(iii)
Sch. 24A, pt. 1, para. 41AA par. inserted	41/2013, s. 83(a)
Sch. 24A, pt. 1, para. 41AB inserted	37/2014, s. 96(e)
Sch. 24A, pt. 1, para. 41B inserted	6/2011, ss. 80(1)(j), (2)
Sch. 24A, pt. 1, para. 43A inserted	25/2008, s. 99 & sch. 6, paras. 1(d)(i)(IV) 7(a)(iii)
Sch. 24A, pt. 1, para. 43AA inserted	8/2013, s. 104(1)(d), (2)
Sch. 24A, pt. 1, para. 44 substituted	52/2015, s. 80(a)(iv)
Sch. 24A, pt. 5 amended	30/2018, s. 61
Sch. 24A, pt. 5 inserted	41/2017, ss. 80(2), 80(3)

30. The problems are fairly self-evident, but for the avoidance of doubt they include the following:
- (i). unspecific amendments to part 1 are listed first – but the secondary instruments listed don't actually amend part 1. Only the later primary enactments that amend the schedule do so;
 - (ii). the specific amendments begin with para. 10A and then jump back to para. 1A;
 - (iii). after part 1 para. 13A, the list jumps to unspecific amendments to part 3, most of which don't actually amend part 3, but which are followed up by later primary legislation that does;
 - (iv). the reference at that point to s. 7 of the Finance (No. 2) Act 2008 relates to bicycle relief and doesn't seem to have anything to do with double taxation agreements;
 - (v). moving on to part 3, the table deals with insertion of para. 2A, then jumps to the insertion of part 4;
 - (vi). the list then jumps then back to para. 2, and then forwards to para. 3;

- (vii). part 3 para. 5 appears between paras. 8 and 8A;
 - (viii). after part 3 para. 10 we jump back to part 1, para. 14;
 - (ix). coming to part 1 para. 14A which is the relevant one for the present agreements, the table states that it was "*inserted*" in 2015 with a separate reference to the 2012 Act. That is not correct – it was inserted in 2012 and substituted in 2015;
 - (x). part 1 para. 43B is inserted before paras. 43A and 43AA; and
 - (xi). part 5 is amended before it is inserted.
31. The reader need not worry – she isn't missing anything. The layout is simply the result of human error, a problem that haunts any human activity, including judging, I can say with some first-hand confidence.

The 2012 Regulations

32. In December 2012, the Minister for Finance made the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012 (S.I. No. 549 of 2012) implementing the 2011 directive. Regulation 6 allows the Revenue to disclose information to a requesting authority of another Member State in accordance with the directive. The most notable provision for present purposes is reg. 14, which seems to have been primarily designed to give effect to art. 18 of the directive noted above. Regulation 14 amends s. 902A and other sections of the 1997 Act for the purposes of compliance with the directive so that the section would have effect "*as if*" it were worded differently. By virtue of regs. 14(2) and (3) it would have effect:
- (i). as if references to tax included references to foreign tax;
 - (ii). as if references to liability in relation to a person included liability to foreign tax;
 - (iii). as if references to tax were references to foreign tax; and
 - (iv). as if any provision of the "*Acts*" were references to any provision of the law of a territory other than the state in accordance with which foreign tax is charged or collected.
33. Without taking away from the strict entitlement of the Minister for Finance to make regulations of this kind, one might perhaps offer two modest drafting observations: first of all, non-textual amendments such as "*as if*" provisions are generally deprecated in modern drafting; and secondly, amendment to primary legislation by way of secondary legislation even in an EU context is very much a second-best option and on one view it might be better if reg. 14 were to be incorporated into primary legislation with wording to allow the amendments to be made as textual rather than non-textual in form.

The 2013 order regarding the Council of Europe and OECD Agreement

34. The Mutual Assistance in Tax Matters Order 2013 (S.I. No. 34 of 2013) was made under s. 826(1C) of the 1997 Act to give effect to the 1988 Convention as amended in 2010.

The 2013 Finance Act

35. Section 104 of the Finance Act 2013 inserted the 2013 order into a new Part 4 of Schedule 24A of the 1997 Act thus enabling it to have the force of law.

The 2014 second protocol with Germany

36. Ireland and Germany entered into a second protocol to the double taxation agreement which was done in Dublin on 3rd December, 2014 and signed by Simon Harris, Minister of State, and by the Ambassador of Germany, His Excellency Matthias Hoepfner. The second protocol was published as Irish Treaty Series No. 18 of 2015.

The 2015 order regarding Germany

37. An order was made under "s. 826(1) (as amended by s. 157 of the Finance Act 2010) ... of the Taxes Consolidation Act 1997" in 2015 in order to give effect to the 2014 second protocol regarding Germany. This was the Double Taxation Relief (Taxes on Income and on Capital) (Federal Republic of Germany) Order 2015 (S.I. No. 438 of 2015). The words of enactment of the order use the (to my mind not invariably helpful) drafting affectation that only the last amendment to a section is cited rather than the most pertinent amendment. But even allowing for that, strictly speaking the reference should have been to sub-s.(1) as substituted by the Finance Act 2007 and as amended by the Finance Act 2010.

The 2015 Finance Act

38. Section 80(a)(ii) of the Finance Act 2015 concludes our legislative chronology for present purposes by substituting para. 14A of Part 1 of schedule 24A of the 1997 Act to add the 2015 double taxation order regarding Germany, allowing that order to have the force of law.

Prerequisites for making an order under s. 902A

39. Murphy J. suggested *obiter* in *Carey v. A Company* (at para. 52) that under the section "the court has no power to determine substantive issues of fact or law". However that seems to relate to her initial suggestion that the procedure might be *ex parte* which was then subject to a postscriptual clarification. Taking the implication of the latter starting point to the effect that the application should be made on notice removes the problem with the court making findings of fact or law. The postscriptual approach thus removes the need for the suggestion in para. 64 that the respondent should have, in effect, a day in court by way of judicial review or plenary proceedings in open court. As noted above even collateral judicial review proceedings would have to be *in camera* for the reasons discussed in relation to the protection of the integrity of the investigative process. Thus judicial review or plenary action is not a preferable way to resolve issues that might come up in an application of this type, and they can simply be resolved by the court in an application under s. 902A.

40. To make the order sought in the present applications the court must be satisfied of a number of matters. Moriarty J. in *An Inspector of Taxes v. A Firm of Solicitors* [2013] IEHC 67, [2013] 2 I.L.R.M. 1 said, "The section, it seems to me, has been carefully

drafted to incorporate its own checks and balances". Ms. Keirse submitted (and I accept) that there are a number of matters that the court must be satisfied of before making an order under s. 902A. Those matters are as follows:

- (i). that the jurisdictional prerequisites under s. 902A in terms of the statutory architecture have been met: having discussed those at some length above, I am happy that those are satisfied here;
- (ii). the court must be satisfied that the applicant is an authorised officer of the Revenue Commissioners: this is provided for in s. 902A(2) and I am so satisfied on the evidence here;
- (iii). that the applicant has the consent in writing of a Revenue Commissioner: that is provided for in s. 902A(3) and again I am satisfied of that here;
- (iv). that the authorised officer was acting on reasonable grounds in forming the opinion referred to in s. 902A(3): under that heading Moriarty J. referred in *An Inspector of Taxes v. A Firm of Solicitors* (at para. 9) to the "*relatively low threshold of reasonable grounds for suspicion*" and on the evidence here I am satisfied that that was met;
- (v). that the court is satisfied that there are reasonable grounds for the application being made (sub-s. (4)); while that is dealt with separately in the section, there is no massive difference between this heading and the previous heading (probably only a lawyer would see any real difference), and insofar that there is a difference I am satisfied that not only was the authorised officer acting on reasonable grounds in forming his opinion, but also that there are reasonable grounds for the application being made; and
- (vi). that it is appropriate to exercise the court's discretion in favour of making the order: the discretion of the court was recognised by Murphy J. at para. 63 of *Carey*, and in that regard the fundamental point was made by Moriarty J. at para. 11 of *An Inspector of Taxes v. A Firm* that "*it is surely in the public interest, not least in the context of compliant taxpayers ... that the law should take its course*". I follow that approach here.

41. Given the globalised nature of the modern world and the reciprocal nature of the international agreements, there is a strong public interest in cooperating with enquiries by foreign tax authorities. The ancestral adage has it that "*ar scáth a chéile a mhairimid*". That has significant relevance here. The approach of *Attorney General for England and Wales v. Brandon Book Publishers Ltd.* [1986] I.R. 597, to the effect that the Irish public interest was not impacted on by damage to the English public interest in security matters, does not commend itself in a mutually dependent and interconnected modern world. Anyone who thinks that one country is not harmed by tax evasion, wrongdoing or threats to security or other such issues in other countries, especially friendly or nearby countries, might be thinking wishfully.

42. By way of example as to the relevance of the information sought, para. 52 of the applicant's affidavit regarding the French application indicates significant non-declaration of income by the taxpayers being enquired into. At para. 54, the Revenue's deponent correctly makes the important point, worth recording for future purposes in case it might be useful to help to answer the deadening cliché that haunts discovery motions, that "A request for information does not constitute a fishing exercise solely because it is a group request, the members of the group are not individually identified and/or simply because a relatively large number of individuals might fall within such a group". The real issue is whether the request for information has an objective justification; and here such a justification exists.
43. I should note that the respondent's deponent has narrowed the information sought. In the case of Germany, he has prepared a further draft schedule with an alternative possible wording. Ms. Keirse did not have an opportunity to put that on affidavit, so I allowed her without objection to call the applicant to give oral evidence to the effect that Germany will accept the new wording. The applicant had to be recalled later as it turned out that two of the supplementary affidavits had not been filed because the Central Office had difficulty with the form of those affidavits (namely that the blank spaces before the jurats weren't struck through), so he was then recalled to confirm the truth of the contents of those proposed affidavits. He also confirmed in evidence that there was an error in para. 1 of the amended schedule regarding Korea where the word "annual" was used inappropriately in relation to a period that was not quite a calendar year.
44. Ms. Keirse also raised the question of whether an amended notice of motion should be issued in each case, but I don't see it as at all necessary and indeed to do so would be a pointless formality. The prayer for further and other relief has to be allowed to have some meaning (an 18th Century barrister Mr Robins called it "*the best prayer next to the Lord's Prayer*" (*Cook v. Martyn* (1737) 2 Atk. 3), Joseph Story, Commentaries on Equity Pleadings (London, 1838) p. 34), and on any view that plea allows latitude for reasonable evolution of the claim.

Order

45. Accordingly, I will order as follows:
- (i). I will dispense with any requirement for the applicant to amend the notice of motion either by reference to the heading which should have been "*Originating Notice of Motion*" or as to the reliefs in terms of the variation as to the precise information sought;
 - (ii). I will make an order as set out above that the respondent would have liberty to refer to the existence, but not the terms, of the order for the purpose of responding to queries raised by individuals or entities whose information is obtained by competent authorities and in response to queries by regulators or law enforcement authorities;

- (iii). being satisfied of the jurisdictional basis for the order and the other prerequisites and being satisfied that the order is appropriate having regard to all of the circumstances, I will make orders under s. 902A in the terms sought by the applicant as adjusted by the later affidavits and the oral evidence in each case;
- (iv). it is agreed that the respondent would have until 14th August, 2020 to furnish the information sought;
- (v). given the complications in the evolving wording of the information sought, I will request the applicant to prepare the draft orders in each case incorporating the amendments to the reliefs sought contained in:
 - (a). the subsequent filed affidavits of the applicant;
 - (b). the oral evidence of the applicant regarding the amended schedule concerning Germany;
 - (c). the oral evidence of the applicant affirming the contents of the unfiled affidavits; and
 - (d). the oral evidence of the applicant regarding correction of the error concerning the word "*annual*" in relation to the Republic of Korea;
- (vi). I will hear the parties on any issues regarding redaction of this judgment.
- (vii). I will adjourn the question of costs to the 3rd July, 2020 and will direct that if possible the substantive orders be perfected in the meantime.