

THE HIGH COURT

[2021] IEHC 444

[Record No. 2020/377 JR]

BETWEEN

LAURENCE SHIELDS

APPLICANT

AND

THE CENTRAL BANK OF IRELAND

RESPONDENT

AND

AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Barr delivered electronically on the 30th day of June, 2021

Introduction

1. This is a contested leave application, wherein the applicant seeks to set aside a decision of the respondent made on 15th May, 2020, in which it declined to exchange €4,400 damaged bank notes until a separate garda investigation had been concluded.
2. The applicant also applies to join J.T. Flynn & Co., solicitors, as a second applicant. The applicant also seeks leave to rely on an amended statement of grounds.
3. The respondent objects to the grant of leave on the following basis: the applicant, not being the owner of the bank notes, does not have locus standi to challenge the decision; the application should be refused because it is premature to grant leave, as the decision of 15th May, 2020, was only a holding or interim decision, such that no final decision adverse to the interests of the applicant has yet been taken; in relation to the merits of the claim, there is no basis for holding that there is even an arguable case that the respondent has acted unlawfully, or in breach of the applicant's rights.
4. The respondent objects to the proposed joinder of J. T. Flynn & Co. as a second applicant to the proceedings, due to the fact that it is out of time to challenge the impugned decision and no grounds have been put forward as to why the court should extend the time for it to bring judicial review proceedings to challenge that decision.
5. The notice party was joined on the direction of Meenan J., due to the fact that in his amended statement of grounds, the applicant had pleaded that insofar as the respondent may seek to rely on s.33A(J) of the Central Bank Act, 1942 (as amended) (which section provides an immunity to the respondent against a claim for damages in certain circumstances), the applicant would allege that the section was repugnant to the Constitution and in view of the fact that the applicant sought production of communications passing between the respondent and An Garda Síochána in relation to the damaged bank notes.
6. The notice party adopted the arguments of the respondent and submitted that any challenge to the constitutionality of s.33A(J) was premature, as the respondent had not yet raised the section in its defence, as no statement of opposition had yet been filed. In relation to the relief claimed seeking production of communications between the respondent and the gardaí, it was submitted that it was well settled that the courts would

not interfere in operational matters of An Garda Síochána in relation to its investigation of crime; therefore any relief seeking production of communications between the respondent and An Garda Síochána concerning an ongoing investigation, should not be granted.

Background

7. This case is connected to an earlier case brought by the applicant in respect of a separate batch of damaged bank notes. The damaged bank notes the subject matter of these proceedings, and the bank notes the subject of the previous proceedings, had originally been part of the one batch of bank notes, which had been damaged in the same event.
8. In a nutshell, the history of the damage to the notes can be stated as follows: The applicant had a little less than €10,000 in cash in an envelope. The envelope was placed in a furnace by the applicant's partner. The envelope was retrieved before the notes were incinerated.
9. In the previous proceedings, in a letter dated 16th July, 2019, the applicant's solicitor gave the following account as how the damage to the bank notes occurred:

"Our client's partner, while attempting to clean out our client's workshop placed the notes with other items in the furnace utilised in the workshop. Our client has and continues to be engaged in the production and manufacture of fiberglass objects of art. This work of necessity entails the use of chemical products. Acetone is by far the most common cleansing agent utilised for brushes, cleaning moulds, etc. We are instructed that there were some plastic containers placed in the furnace as part of the cleaning process and it may be that the same in some way damaged the notes".

10. On 19th February, 2019, the applicant submitted €4,950 of the damaged notes to the respondent for exchange. The respondent initially refused to exchange the notes. Subsequently, when further explanation for the damage outlined above had been given by the applicant and following further analysis of the notes at an independent laboratory, the respondent reversed its decision. The value of the notes was transferred to the applicant on 13th January, 2020.
11. The full history of the application for the exchange of that batch of notes is set out in the judgment of the court in proceedings bearing title: *Lawrence Shields v. Central Bank of Ireland* (Record No. 2019/565JR), reported at [2020] IEHC 518. That decision is currently under appeal to the Court of Appeal

The Present Proceedings

12. The present proceedings concern damaged bank notes in the sum of €4,400, which were part of the same batch that had been damaged in the furnace.
13. In or about April 2019, the applicant paid his solicitor, Mr. James Flynn, of J.T. Flynn & Co. the sum of €4,400 in cash as part payment of fees due from the applicant to Mr. Flynn in respect of the judicial review proceedings arising out of the refusal by the respondent to exchange the previous batch of damaged bank notes.

14. On 17th April, 2019, an application for exchange of the damaged notes in the sum of €4,400, was submitted by Ms. Sandra Daly, who was a former employee of J.T. Flynn & Co. That application was made in Ms. Daly's own name. The address that she gave, was the address of the firm. However, the name of the firm did not appear on that application form.
15. By letter dated 15th January, 2020 sent from the respondent to Ms. Daly at the firm's address, the respondent informed her that the application form which she had submitted contained an invalid IBAN. She was informed that in order to process the application, it would be necessary to resubmit the application form. She was also informed that it would be helpful if she could provide additional information in relation to how the bank notes were damaged. She was asked to sign the declaration on page three of the form.
16. By letter dated 21st January, 2020, J.T. Flynn & Co wrote to the respondent in response to their letter of 15th January, 2020. They informed the respondent that Ms. Daly was a former employee of the office and had been instructed to lodge the said €4,400 which they had received as fees from the applicant. They enclosed the account details for lodgement of the exchanged notes.
17. J.T. Flynn & Co sent a reminder letter on 13th February, 2020. They sent a further reminder letter on 26th February, 2020 in which they threatened proceedings if the money was not transferred into their account.
18. By letter dated 28th February, 2020, the respondent replied to the correspondence from the firm of solicitors. They indicated that in relation to the application that had been submitted by Ms. Daly for exchange of the damaged notes, they would require written confirmation from her of the following: the capacity in which she had made the application; that she was not the legal owner of the bank notes the subject of the application and that she was withdrawing her application. The letter went on to point out that the application form which had been submitted by the firm in January 2020 had been incomplete. It was pointed out that the declaration at the end of the form must be signed and dated; the quantity and denominations of the bank notes in respect of which the application was made must be set out in the application form and an up-to-date bank statement had to be provided in respect of the account into which the funds were to be transferred.
19. The respondent's letter also went on to raise a number of queries. It was pointed out that in the portion of the application form where the applicant was asked to provide details of how the bank notes were damaged, J.T. Flynn & Co had written "*fees paid by Laurence Shields subject of proceedings record no. 2019/565JR*". The firm was requested to state whether it was their submission that the bank notes had been damaged in the same incident as that described by the applicant in his previous set of proceedings; on what date the damaged notes the subject of the application had been paid to the firm as fees by Mr. Shields; were they correct to understand that the application in January 2020 was an application made by J.T. Flynn & Co on its own behalf; they were asked to advise if the firm had received any damaged bank notes from the applicant other than those

which had been submitted in the application initially made by Ms. Daly and they were asked to advise if any further applications had been made by an individual on behalf of their firm in respect of damaged bank notes received by the firm from the applicant.

20. J.T. Flynn & Co responded to that letter on 2nd March, 2020 confirming that the bank notes the subject matter of their application for exchange had been damaged in the same incident as that concerning the applicant's previous proceedings; they stated that they had received the notes in payment of fees by the applicant on or about 29th April, 2019; they confirmed that the application was being made by J.T. Flynn & Co on its own behalf; they confirmed that they had not received any other damaged bank notes from the applicant and they confirmed that no further applications had been made in respect of bank notes received from the applicant.
21. Presumably due to the fact that the application form which had been submitted by the firm on 21st January, 2020 was unsigned and undated and did not state the total sum in respect of which an exchange was sought, nor the denominations of the damaged notes that had been submitted, a fresh application form was completed by the firm on 26th April, 2020. That application form indicated that the total sum submitted was €4,400. They had been fees paid by the applicant to the firm in respect of his previous judicial review proceedings. The application form was signed on behalf of the firm.

The Impugned Decision

22. The decision which is the subject of the challenge in the present proceedings, was set out in a letter from the respondent addressed to Mr. James Flynn, of J.T. Flynn & Co., Solicitors, which letter was dated 15th May, 2020. That letter was in the following terms:

"Dear Mr. Flynn,

I refer to an application to the Central Bank of Ireland (the 'Central Bank') by J.T. Flynn & Co Solicitors, for the exchange of damaged bank notes.

The damaged bank notes were originally submitted by way of an application in the name of Sandra Daly, received by the Central Bank on 2nd May, 2019. On 21st January, 2020 an application form in the name of J.T. Flynn & Co Solicitors was submitted in respect of the same damaged bank notes, J.T. Flynn & Co Solicitors effectively having taken over the Sandra Daly application. On 30th April, 2020, following correspondence with the Central Bank in relation to certain aspects of the firm's application, you provided a completed application form with the necessary declaration signed.

The Central Bank has been informed by An Garda Síochána that they have commenced an investigation into the source of the funds the subject of the firm's application. Accordingly, pursuant to Article 3(3)(b) of the ECB decision, the Central Bank is not exchanging and is withholding the damaged bank notes. Unless otherwise decided by the competent authorities, the damaged bank notes shall at

the end of the investigation qualify for exchange under the conditions laid down in Articles 3(1) and (2) of the ECB decision.

Yours sincerely,

Lucile Donoghue

Head of Currency Issue Division

Central Bank of Ireland

Dublin

Background to the Present Proceedings

23. On 12th June, 2020, the applicant brought an application seeking leave to institute judicial review proceedings to challenge the respondent's decision of 15th May, 2020. That application was opened before the list judge and was then adjourned. The matter came before the court again on 15th June, 2020 for mention. On 1st July, 2020 when the matter was again before the court for mention, the list judge directed that the respondent should be served with the papers.
24. On 16th September, 2020 a replying affidavit was filed on behalf of the respondent, in which it was submitted, *inter alia*, that the applicant had no standing to bring the within proceedings, as he had transferred ownership of the notes to his solicitor in part payment of fees which he owed to the solicitor.
25. On 24th September, 2020, the matter was again in the list for mention. On 17th November, 2020 a proposed amended statement of grounds was sent to the court and to the respondent. The amendments were sought to be made under O.84, r.20(4) and included the addition of J.T. Flynn & Co as a second applicant.
26. The matter came before the court for mention on 24th November, 2020 at which stage the court directed that Ireland and the Attorney General should be put on notice of the application. This was due to the fact that the applicant had challenged the constitutionality of s.33A(J) of the Central Bank Act 1942 (as amended) in his statement of grounds.
27. The matter was before the court for mention on 26th January, 2021. On 10th February, 2021, a letter was sent to the respondent on behalf of the applicant attaching a "*revised draft application to amend the statement of grounds*" and "*draft motion to add J.T. Flynn & Co Solicitors as a second applicant*". The matter came before the court for mention on 23rd February, 2021, at which stage a hearing date of 3rd June, 2021 was fixed for the contested leave application.
28. On 29th March, 2021, a replying affidavit was filed by Inspector Stephen Meighan, on behalf of An Garda Síochána.

29. The applicant's notice of motion seeking to join J.T. Flynn & Co as an applicant to the proceedings, appears to have issued on or about 26th May, 2021. In support of that application, Mr. James Flynn of J.T. Flynn & Co swore an affidavit on 26th May, 2021. In that affidavit, Mr. Flynn referred to the affidavit that had been sworn on behalf of the respondent, in which Mr. Briscoe had submitted that the applicant did not have standing to bring the within proceedings. In response to that assertion, Mr. Flynn stated as follows at paras. 8 – 10:-

"8. *Whereas the first named applicant's standing is more appropriately a matter for legal submissions, I make this application to join these proceedings as a second applicant in order to enable the honourable court 'effectually and completely to adjudicate upon and settle all the questions involved in the cause of matter' as set out at Order 15.r,13.*

9. *In these circumstances, I respectfully submit that it would be in the interests of justice to permit me to join this action.*

10. *I consent to the applicant's application for an order pursuant to O.15, r.13 of the Rules of the Superior Courts adding J.T. Flynn & Co Solicitors as the second named applicant to the within proceedings."*

30. By consent of the parties, Mr. Flynn was permitted to submit a further affidavit after the hearing of the proceedings herein, which said application was sworn by him on 8th June, 2021. It deals with the nature of the criminal investigation being conducted by An Garda Síochána. From the documentation exhibited to that affidavit, it appears that on 24th March, 2021, Mr. Flynn was invited by the gardaí to attend for a "cautioned interview". In a letter dated 7th May, 2021 from KRW Law, Human Rights Lawyers and Solicitor Advocates of 9/15 Queens Street, Belfast, who were writing on behalf of Mr. Flynn, it was indicated that Mr. Flynn had not been advised of the precise nature of the matter that was being investigated by the gardaí and in respect of which he had been invited to attend for a cautioned interview.

31. In the course of the letter, KRW Law outlined Mr. Flynn's understanding of the matter in the following terms:-

"We now repeat our request that you specify the precise nature of the allegations. We do require an outline of the evidence to base the allegations. What we need is the actual allegation or other allegations which you intend to put to our client. We cannot advise him properly until we are in receipt of this specific indication. Our client understands that a former employee (Ms. Sandra Daly) may have made a statement making allegations about Mr. Flynn citing allegations of money laundering and membership of the PIRA. If this statement constitutes the sole basis upon which to seek an after-caution interview then we appreciate it if you could so state."

32. In response thereto Detective Superintendent Catharina Gunne wrote to Mr. Flynn's solicitors by letter dated 4th June, 2021, in which she indicated that Mr. Flynn had been invited to attend for the purpose of a cautioned voluntary interview by D/Garda Cummins on 8th March, 2021. Mr. Flynn had acknowledged receipt of that letter by letter dated 22nd March, 2021. In relation to the reason why he had been invited to attend for a cautioned interview, D/Supt. Gunne stated as follows: -

"In reply to paragraph number two, the reason that officers attached to the Garda National Economic Crime Bureau invited your client to attend was that they are investigating suspected money laundering contrary to s.7 of the Criminal Justice (Money Laundering and Terrorist Financing) Acts, 2010-2021. Your client is suspected of being directly or indirectly involved in the receipt, movement and disposal of funds which are the subject of this investigation."

33. Later in that letter, D/Supt. Gunne outlined how the gardaí became aware of the damaged bank notes:

"In relation to paragraphs eight and nine, I can confirm that a notification from the Central Bank under section 19 of the Criminal Justice Act, 2011, was received on 24th April, 2020 in respect of the matter under investigation. The main focus of the investigation surrounds €4,400 'Sandra Daly lodgement'. In relation to your reference to the ECB decision, An Garda Síochána is not limited by this decision in regard to the scope of any investigations undertaken. We are acting on foot of a statutory referral from the Central Bank of Ireland and we reject outright any suggestion of impropriety by An Garda Síochána in this regard."

The Contested Leave Application – Submissions of the Applicant

34. The applicant submitted that he had *locus standi* to bring the within proceedings. He had paid the notes to J.T. Flynn & Co as fees. When the respondent had refused to exchange the damaged notes, the applicant was "still on the hook" for the fees; so he had *locus standi* to challenge the decision of the respondent made on 15th May, 2020. He had challenged that decision by opening his *ex parte* application on 12th June, 2020.
35. In the alternative, it was submitted that the provisions of O.15, r.13 were very wide. They permitted the joinder of a party to proceedings where it was in the interests of justice to do so. It was submitted that it was appropriate to join J.T. Flynn & Co as a second applicant in the circumstances outlined in the affidavits. The applicant had indicated that he intended to bring an application to join the firm in correspondence which he had sent to the respondent and the notice party on 17th November, 2020. The notice of motion seeking the joinder of the firm issued on 26th May, 2021 and was made returnable to the hearing of the action on 3rd June, 2021.
36. It was submitted that the interests of justice would be served by ensuring that all relevant parties were before the court at the hearing of the leave application and in the event that leave was granted, at all subsequent hearings, so that the central issues raised in these

proceedings could be examined by the court in a full and proper manner. To that end, if it was necessary to join the firm as a second applicant, that should be done.

37. In relation to the prematurity argument, it was submitted that the present application was not premature. The decision of 15th May, 2020 was grounded on the fact that the respondent had informed the gardaí about the notes. It was submitted that they could only do that and could only lawfully withhold exchange of the notes under Art. 3.3(b) of the Decision of the European Central Bank on the denominations, specifications, reproduction, exchange and withdrawal of Euro bank notes of 19th April, 2013 (hereinafter 'the ECB decision'), if the respondent knew, or had "sufficient reason to believe" that a criminal offence had been committed.
38. It was submitted that the criminal offence referred to in that sub article had to relate to the damage to the notes themselves. That could not be asserted in the present case, due to the fact that in the previous case brought by the applicant, involving damaged notes from the same original batch as the present notes, the respondent had accepted that the notes were not intentionally damaged and had exchanged them for value. It was submitted that there was therefore no basis on which the respondent could lawfully refuse to exchange the batch of notes the subject matter of these proceedings. Furthermore, there had been no lawful basis for the respondent to inform the first named notice party, An Garda Síochána, about the notes, as it could not have reasonably held the belief which was required in Art. 3.3(b).
39. While the respondent had argued that the criminality referred to in Art. 3.3(b) was not limited to criminal acts causing damage to the notes themselves, that was a matter that was in dispute between the parties. It was submitted that in these circumstances, the applicant had raised an arguable case that the respondent was not entitled to withhold exchange of the notes pursuant to Art. 3.3.(b).
40. Finally, there was a claim for damages put forward by the applicant and by J.T. Flynn & Co, if joined as a second applicant. That claim would be resisted by the plea of statutory immunity which was available to the respondent under s.33A(J) of the 1942 Act (as amended). When that statutory defence was raised, the applicant and J.T. Flynn & Co, would argue that the section was repugnant to their rights under the Constitution of Ireland, and also contravened their rights under the European Convention on Human Rights. It was submitted that that was a further arguable ground on which the applicant should be granted leave.
41. It was submitted that in all the circumstances, the applicant had complied with the test applicable at the leave stage as set down in *G. v. The DPP* [1994] 1 I.R. 374.

Submissions on behalf of the Respondent and the Notice Parties

42. The submissions made on behalf of the respondent and the notice parties can be taken together, as they largely made the same submissions. In relation to the proposed joinder of J.T. Flynn & Co to the proceedings, it was submitted that it was not permissible for an applicant, having moved his application within time, to later apply to join a different

applicant, so as to give that person or entity, the advantage of the first applicant having moved his application within time.

43. It was submitted that even if the application was deemed to be an application by the firm itself to be joined as an applicant, it still had to comply with the requirements of the rules in relation to challenging the particular decision. This included the provisions in relation to the time within which such challenge could be brought. It was submitted that in this case, J.T. Flynn & Co were long out of time to challenge the decision of 15th May, 2020. No basis had been given as to why the court should extend time to enable the application to be brought. It was submitted that in these circumstances, the court did not have jurisdiction to extend the time to enable J.T. Flynn & Co to challenge the impugned decision.
44. It was submitted that the amendments in relation to the constitutional issue should not be allowed, as it was premature to allow such a plea, as no statement of opposition had yet been filed by the respondent, or the notice parties, and therefore the particular statutory immunity had not been pleaded, meaning that the alleged constitutional issue had not yet arisen.
45. The respondent and the notice parties submitted that the applicant lacked *locus standi* to challenge the decision, as he did not own the damaged bank notes; he had not applied for their exchange and the decision had not been addressed to him.
46. It was submitted that the applicant's application was premature, because the decision of 15th May, 2020 was only an interim decision. No final decision had been taken by the respondent in relation to the application that had been made to it by J.T. Flynn & Co to exchange the damaged notes. In those circumstances, it was submitted that neither the applicant, nor the firm, should be granted leave to challenge the interim decision. Instead they should await the final decision and if it was adverse to their interests, they could then challenge it.
47. On the merits of the grounds of challenge raised by the applicant, it was submitted that there were no grounds for suggesting that the criminality referred to in Art. 3.3(b) was confined to criminal damage to the notes themselves. Once there was a criminal investigation ongoing which related to the notes, the respondent was not only permitted, but was required to withhold exchange of the notes, until conclusion of the relevant investigation. That was what had happened in this case. It was submitted that the respondent was not entitled to exchange the notes pending conclusion of the garda investigation. The notes were currently in the possession of An Garda Síochána.
48. On behalf of the first named notice party it was submitted that the court should not grant leave to obtain copies of the communications passing between the respondent and An Garda Síochána in relation to the notes, which were part of an ongoing investigation, as it was well settled that the courts would not interfere in operational matters concerning the investigation of criminal offences by An Garda Síochána.

Conclusions

(a) The Applicant's Application to join J.T. Flynn & Co. as a Second Applicant

49. While O.15, r.13 is very wide in its terms, it cannot be used to circumvent the time limits applying to specific proceedings. The court is satisfied that it is not appropriate to join an applicant to judicial review proceedings if that would enable the newly joined applicant, to gain advantage of the fact that the existing applicant had brought his application seeking judicial review within time. In other words, the person or entity that is sought to be joined as a second applicant, cannot "piggy back" on the application which had been brought within time by the original applicant. To enable a subsequent applicant to do that, would be to set the time restrictions in the rules at naught.
50. Even if the court were to treat the application to join J.T. Flynn & Co. as a second applicant to the proceedings, as an application by the firm itself for leave to seek judicial review to challenge the decision of the respondent made on 15th May, 2020, that application is long out of time.
51. It appears that by letter dated 17th November, 2020, the applicant informed the respondent and the notice parties that he intended to make application to join J.T. Flynn & Co. as a second applicant to the proceedings. To that end, he furnished a "proposed amended statement of grounds". In an email of the same date, Mr. Brandon Hannon of J.T. Flynn & Co. sent an email to Ms. Angela Brennan, a Registrar in the Central Office of the High Court, attaching a proposed amended statement of grounds, which was to be filed on behalf of the applicants, to include the firm as the second named applicant. However, it appears that the notice of motion seeking to join the firm as an applicant to the proceedings was not issued until 26th May, 2021. That motion was heard at the hearing of the contested leave application before this Court on 3rd June, 2021.
52. In the authorities there has been some slight confusion as to when time stops running in relation to a judicial review application. In *McDonnell v. An Bord Pleanála* [2017] IEHC 366, it was held that an application for leave to apply for judicial review was not "made" for the purposes of s.50A(2) of the Planning and Development Act 2000, until the matter was moved before the court. Whereas a different view was expressed by Humphreys J in *McCreesh v. An Bord Pleanála* [2016] IEHC 394, where it was held that the submission of papers in advance of the making of the *ex parte* application for leave to seek judicial review, was the critical event which stopped time running and constituted the date on which the application for an extension of time should be judged.
53. That issue was resolved by the High Court in *Heaney v. An Bord Pleanála* [2021] IEHC 201, where the court, relying on the decision of the Supreme Court in *Riley v. DPP* [2016] 3 I.R. 229, held that time stops running for the purposes of s.50 of the 2000 Act, when the application for leave to seek judicial review is first moved before the High Court. The court is satisfied that that applies generally to all judicial review applications. It is only when the *ex parte* application seeking leave to proceed by way of judicial review is first opened to the court, that time stops running. That date is the critical date for determining when the application seeking judicial review is actually made.

54. Order 84, r.21(1) provides that an application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. Sub-rule (3) permits the court to extend the time within which an application may be made. It is in the following terms:-

"(3) Notwithstanding sub-rule (1), the court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the court shall only extend such period if it is satisfied that: (a) there is good and sufficient reason for doing so, and (b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either (i) were outside the control of, or (ii) could not reasonably have been anticipated by the applicant for such extension."

55. The court can only extend the time for the bringing of an application for judicial review where the matters set out in O.84, r.21(3) have been established. In this case no basis has been set out in any of the affidavits filed on behalf of the applicant, or by Mr. Flynn, on which the court could extend time to allow Mr. Flynn, or the firm, to challenge the respondent's decision of 15th May, 2020. Both Mr. Flynn and the firm are out of time to challenge that decision. They have not provided any grounds on which the court could extend the time to permit them to challenge the decision.

56. Accordingly, the court refuses the applicant's application to join J.T. Flynn & Co as a second applicant. The court further refuses Mr. Flynn's application to have the firm joined as second applicant and refuses his application for leave to seek judicial review of the respondent's decision of 15th May, 2020; same being out of time.

(b) Application to Amend the Statement of Grounds

57. As well as the general power which the court has to allow amendment of pleadings in any case, the court is given a specific power to allow an applicant to amend his statement of grounds in O.84, r.20(4).

58. Many of the amendments sought were grammatical in nature and were inserted in anticipation of the court allowing the joinder of J.T. Flynn & Co as a second applicant. As the court has ruled against the applicant on that aspect of his application, those amendments will not be allowed.

59. The remainder of the amendments sought largely concern the claim that will be made by the applicant that insofar as the respondent pleads that it is entitled to resist his claim for damages on the basis of the statutory immunity conferred on it by s.33A(J) of the 1942 Act, the applicant will maintain that that section is repugnant to the Constitution and is unlawful having regard to his rights under the European Convention on Human Rights.

60. In resisting that application, the respondent has adopted a somewhat contradictory stance, to that adopted in the previous proceedings. In the previous case, it was submitted in argument by counsel then representing the respondent, that the applicant's claim to damages was unsustainable, as the respondent had a complete answer to that

claim under the statutory immunity provided for in the section. In these proceedings, when the applicant sought to amend the statement of grounds to include the plea that s.33A(J) is repugnant to the Constitution, Ms. Cahill SC stated that it was premature to plead that aspect, because the statement of opposition had not yet been filed on behalf of the respondent. The statutory immunity had therefore not been pleaded. It was submitted that in these circumstances no issue of statutory immunity was live in the proceedings and therefore it would be premature to allow the amendments sought.

61. It seems to the court that that is a somewhat artificial argument. It was perfectly reasonable for the applicant to anticipate that in response to his claim for damages, the respondent would raise the statutory immunity argument. In these circumstances, it was up to the applicant to argue that that section was repugnant to the Constitution. To mount such an argument, it would be necessary to put the Attorney General on notice.
62. When dealing with an application seeking leave to proceed by way of judicial review, it is incumbent on an applicant to raise all grounds of challenge at the outset. That enables the respondent and, if necessary, a notice party, to deal with all the issues that will arise for determination at the trial of the action.
63. If the applicant had to await the delivery of a statement of opposition, wherein the statutory defence was pleaded, before he could indicate that he wished to challenge the constitutionality of that section, that would entail an application to amend the statement of grounds and add the Attorney General as a notice party at a later stage, and with all the delay that that would entail.
64. The court is satisfied that it is appropriate for the applicant to amend his statement of grounds so as to include all his grounds of challenge at the outset. The court will allow the applicant to amend his statement of grounds in the manner sought in the notice of motion.

(c) Locus Standi

65. Turning to the substantive objections raised to the grant of leave to proceed by way of judicial review, the court has reached the decision that it is not appropriate to grant leave to the applicant to proceed by way of judicial review in this matter because he does not have *locus standi* to challenge the decision of the respondent communicated to Mr. Flynn on 15th May, 2020.
66. Order 84, r.20(5) provides that the court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.
67. The court has reached the decision that the applicant lacks locus standi for a number of reasons. Firstly, it is accepted on the affidavits sworn by the applicant and by Mr. Flynn, that the notes to the value of €4,400 were transferred by the applicant to J.T. Flynn & Co in part payment of legal fees in or about April 2019. Thus, the applicant did not have any title, or beneficial interest, in the notes after that date.

68. Secondly, the applicant never applied to the respondent for exchange of these damaged bank notes. The applications for exchange of this batch of damaged notes, were made by Ms. Daly and subsequently, by Mr. Flynn on behalf of his firm.
69. Thirdly, the decision which is challenged in these proceedings, did not concern the applicant. It was a decision that related to an application for exchange of the notes that had been submitted by Mr. Flynn. The decision was addressed to Mr. Flynn as the person who had made the application on behalf of J.T. Flynn & Co. The applicant cannot challenge a decision that has been addressed to someone else.
70. In these circumstances, the court is satisfied that the applicant has no interest in the decision sought to be challenged in these proceedings. The court is satisfied that he lacks *locus standi* to challenge the impugned decision of the respondent of 15th May, 2020. Insofar as the applicant has made a claim to damages, that does not arise, as the applicant was not the owner of the bank notes at the material time and he did not apply to the respondent to exchange them for value.
71. Accordingly, the court refuses the applicant's application for leave to proceed by way of judicial review on the grounds that he lacks *locus standi* to challenge the impugned decision.

(d) The Application is Premature

72. Even if the court is wrong in its finding that the applicant lacks *locus standi*, the court is satisfied that in the circumstances of this case, it would be premature for either the applicant, or Mr. Flynn, to challenge the decision of the respondent of 15th May, 2020. That decision was clearly a holding decision. It indicated to Mr. Flynn that the respondent was going to exchange the bank notes for value, as soon as the garda investigation was concluded and if it was appropriate to do so at that time.
73. Thus, the decision was in favour of Mr. Flynn's firm, but was subject to the prior conclusion of the garda investigation. There was no final decision not to exchange the notes, which were the subject of the application submitted by Mr. Flynn on behalf of the firm on 26th April, 2019.
74. The issue of prematurity of a challenge to a decision that is made by a decision maker in the course of an ongoing inquiry, or other process, was examined by the Supreme Court in *Roland v. An Post* [2017] IESC 20. Giving the judgment of the court, Clarke J. (as he then was) set out the relevant principles at paras. 2.3 to 2.7 of his judgment. In that judgment he made it clear that the court would only intervene where there was an ongoing process, if it was clear that the process had gone irremediably wrong. However, the circumstances in which the court would intervene on that basis were limited. The learned judge stated as follows at para. 2.7:

"However, in order for that latter consideration to become the dominant factor in the Court's assessment, it follows that the Court must be satisfied that it is clear that the process has gone wrong, that there is nothing that can be done to rectify it

and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law. In any case where the plaintiff cannot establish that the case meets that standard it will ordinarily be inappropriate for the court to intervene at that stage but rather the process should be allowed to continue to its natural conclusion at which stage it can, if any party wishes it, be reviewed."

75. The rationale for the reluctance on the part of courts to interfere in an ongoing administrative process, was explained by Humphreys J in *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* [2016] IEHC 300 at para. 131:

"However, there are several significant reasons, already referred to, which strongly favour the need to submit to an administrative or judicial process prior to seeking relief by way of judicial review:-

- (a) Firstly, such a requirement prevents the severe disruption to the administrative or judicial process concerned that would be occasioned by mid-stream applications.*
- (b) Secondly, it prevents premature and unnecessary consumption of the very limited resources of the court. For this reason, in particular, it does not seem to me to be crucial that the decision maker in question can resolve the specific legal point made by an applicant. For example, supposing an applicant is on trial in the District Court under a statute which he or she contends to be unconstitutional. Obviously, that court does not have jurisdiction to resolve that particular issue. But that is not a reason why prohibition should be allowed so as to enable the statute to be challenged in advance. The applicant may, after all, be acquitted, thereby obviating the need for any inquiry into wider public law issues. As long as the decision maker has jurisdiction to provide satisfaction to an applicant, even if that is by a route which does not address the specific grievance in legal terms, an applicant should, in general, be required to submit to that process before seeking judicial review.*
- (c) Thirdly, the underlying process may resolve a number of factual and possibly legal questions which will simplify, assist or possibly obviate the necessity for judicial review proceedings at the end of the process. For example, an issue which appears potentially relevant in advance may in the event turn out not to be decisive. An applicant's standing to raise particular issues might turn out to be either confirmed or lacking depending on certain findings of fact in the course of the process.*
- (d) Fourthly, by simplifying the process for challenge, such an approach assists applicants overall by providing a clear pathway to an effective remedy and by removing uncertainty as to whether they should intervene in the course of a process or await its outcome, as a matter of generality.*
- (e) Relatedly, it also assists applicants who do not have an alternative remedy by freeing up court resources for their benefit rather than allowing such resources to*

be spent on applicants who have, but do not wish to use, the alternative remedy of a process to submit to.”

76. Having regard to these authorities, the court is satisfied that even if the applicant was held to have *locus standi*, his challenge is premature, because the decision of the respondent of 15th May, 2020 is clearly not a final decision, which could be said to adversely affect his rights. It is an interim or holding decision, pending other developments, in light of which a final decision will be made.
77. There is one very good reason why the present proceedings are premature: The notes may well be exchanged for Mr. Flynn following on the conclusion of the garda investigation. If that investigation is determined in a particular way, the notes will be exchanged for Mr. Flynn. In these circumstances, it is premature for the applicant or Mr. Flynn to challenge the decision of 15th May, 2020.

(e) Other Arguments Raised by the Applicant

78. In view of the findings of the court on the *locus standi* and prematurity issues, it is not necessary for the court to determine the substantive arguments that were canvassed as to whether the decision of the respondent of 15th May, 2020 was lawful.
79. As the applicant does not have *locus standi* to challenge the impugned decision, his claim to be furnished with copies of the communications passing between the respondent and the first named notice party concerning the notes, does not arise.

Decision

80. For the reasons set out herein, the court refuses the applicant's application for leave to proceed by way of judicial review to challenge the decision of the respondent of 15th May, 2020 on the grounds set out in his amended statement of grounds.
81. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions in relation to the terms of the final order and on costs and on any other matters that may arise.