THE HIGH COURT

[2024] IEHC 51

[Record No. 2022/261 JR]

BETWEEN

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

APPLICANTS

AND

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

RESPONDENTS

AND

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

NOTICE PARTIES

JUDGMENT of Mr. Justice Barr delivered on the 2nd day of February, 2024

Introduction.

1. The first applicant is a retired Taxing Master of the High Court. He is a practising solicitor. He is currently a suspect in an ongoing garda investigation into suspected money laundering offences contrary to s.7 of the Criminal Justice (Money Laundering and Terrorist Offences) Act, 2010 (hereinafter "the 2010 Act").

2. The second applicant is the firm through which the first applicant carries on his practice as a solicitor. Hereinafter the applicants will be referred to jointly as "the applicant".

3. In this application, the applicant seeks interlocutory injunctions in the following terms:

> "(a) An interim and/or interlocutory injunction restraining An Garda Síochána, pending the determination of the within proceedings, from bringing any further application to any District Court for search warrant to permit the examination of data from the first named applicant's mobile phone, including but not limited to any application made under s.10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997, as amended by s.6(1)(A) of the Criminal Justice Act, 2006, or under any other provision of law;
>
> (b) An interim and/or interlocutory injunction restraining An Garda Síochána from examining any of the data downloaded from the first named applicant's mobile phone."

General background.

4. The background to these proceedings is both unusual and complex. A client of the applicant's, one L.S., maintained that he had been repaid a loan of €10,000 in cash by a man in

Carrickmacross. The wife of L.S. placed the cash, which was in an envelope, in or near a furnace, at the workshop operated by L.S. The notes were retrieved, but they were damaged.

5. In early 2019, L.S. sent some of the damaged notes, to the value of €4,950, to the Central Bank of Ireland (hereinafter "CBI"), for the purpose of exchanging the damaged notes for new ones. When the CBI initially refused to exchange the notes, on the basis that they were not satisfied that they had been accidentally damaged, L.S. commenced judicial review proceedings, seeking to force them to exchange the notes. After protracted correspondence and additional testing, the CBI indicated that they would exchange the damaged notes for new ones.

6. The CBI invited L.S. to discontinue his proceedings on the grounds that they had become moot. When he refused to do so, CBI brought a motion before the High Court seeking to have the action struck out. They were successful before the High Court. L.S. appealed to the Court of Appeal. CBI were again successful: see decision of Court of Appeal [2022] IECA 241. L.S. then sought to appeal that decision to the Supreme Court. The Supreme Court refused his application for leave to appeal: [2023] IESCDET 69.

7. L.S. had paid his solicitor, the applicant herein, with notes from the original batch of damaged notes. In a contested leave application, L.S. sought leave to institute a second set of judicial review proceedings, seeking to have CBI give a decision in respect of this further batch of damaged notes, which had been lodged by one Sandra Daly, who was then an employee of the applicant's firm.

8. CBI had made an interim decision not to reach any determination in respect of this batch of notes, because they had referred the matter to An Garda Síochána pursuant to s.19 of the Criminal Justice Act, 2011.

9. The second set of proceedings brought by L.S., was unsuccessful before the High Court, on the grounds that he lacked any title to the damaged notes and because he had not sought their replacement from CBI; that having been done by or on behalf of the applicant. The appeal brought by L.S. against that decision, was unsuccessful in the Court of Appeal: [2022] IECA 250. L.S. sought to bring a further appeal to the Supreme Court, but he was unsuccessful in so doing: [2023] IESCDET 69.

10. L.S. also brought an application before the Supreme Court for leave to appeal against the original decision of the High Court of 15th October, 2020 in the first set of judicial review proceedings, even though he had already unsuccessfully appealed that decision to the Court of Appeal. The Supreme Court ruled that it did not have jurisdiction under Art 34.5.4 of the

Constitution, in respect of an application of that kind for a direct appeal from the High Court, where the Court of Appeal had already ruled on the merits of the appeal from that court. Accordingly, they refused the application for leave to appeal: [2023] IESCDET 71.

11. L.S. made a further application for leave to appeal to the Supreme Court on the basis that the Irish courts did not have jurisdiction to deal with these matters at all. He had pleaded that he had been unaware of the jurisdictional issue at the time that he had moved his original applications. He further maintained that the CBI had been fully aware of the jurisdictional issues, but had failed to alert him, or the High Court, to the fact that the High Court lacked jurisdiction in the matter. The Supreme Court refused his application for leave to appeal: [2023] IESCDET 70.

12. Finally, L.S. and the applicant, brought an application to the Court of Justice of the European Union seeking various reliefs, including the annulment of the determination of the Supreme Court made on 25th May, 2023; annulment of s.33AJ(2) of the Central Bank Act, 1942 (as amended), granting the Central Bank of Ireland immunity from suit for damages; a declaration that the applicant's rights under Art. 47 of the European Charter of Fundamental Rights to an effective remedy had been infringed; an order that the CBI was to make a final determination of the second applicant's application for exchange of the second batch of damaged banknotes; an award of damages and costs. By order dated 31st August, 2023, the CJEU ruled that the applicant's application be dismissed on ground of manifest lack of jurisdiction. The court ruled that there was no need for the proceedings to be served on the defendant.

Background to the Present Proceedings.

13. Arising out of the referral of the second batch of banknotes to An Garda Síochána by CBI, the first respondent commenced an investigation into the suspected money laundering offences contrary to s.7 of the 2010 Act.

14. In the course of that investigation, a statement was made to the gardaí by Ms. Sandra Daly, a former employee of the applicant's firm, who had signed the form seeking replacement by CBI of the second batch of damaged banknotes. According to the gardaí, in her statement, Ms. Daly gave the following account of her interaction with the applicant in relation to the exchange of the banknotes:

> "*I went in, I closed the door behind me, and I said to James 'What's really going on with the money, what's the story?'. James said in a reserved manner – It's dyed money Sandra, it's [L.S]".*

15. On 3rd March, 2022, D/Sgt Gary Sheridan swore information before the District Court for the purpose of obtaining a search warrant in respect of the solicitor's offices. In his sworn information, he stated that Ms. Daly had informed the gardaí that she was told by the applicant, that seeking exchange of damaged banknotes was going to be an ongoing process "once a week". He stated that in his experience, that was typical of a money laundering technique known as "smurfing", whereby large amounts of cash are broken into multiple smaller transactions to avoid suspicion and evade regulatory reporting limits. He stated that it was the belief of investigating gardaí, that that activity was indicative of an attempt by the applicant to launder funds on behalf of L.S. and that he was either reckless or complicit in that process. He stated that in the course of a cautioned interview, L.S. had told the gardaí that in early 2018, he had received the relevant funds from a man in Carrickmacross, who was now deceased, and that the funds formed part of a loan repayment.

16. D/Sgt Sheridan went on to state that forensic reports that had been obtained by the gardaí, showed that the damage to the notes was inconsistent with the "damage by fire" explanation put forward in the application that had been made for replacement of the first €4,950 batch of cash. He stated that it was reported that "The imperfect banknotes are faded and abraded such as might be caused by a washing/scrubbing procedure".

17. D/Sgt Sheridan stated that on foot of the above information and given that it was asserted that the second batch of damaged notes of €4,400, were received as payment for services by the applicant's firm, it was his belief that evidence pertaining to those transactions, including L.S. solicitor's client account file, client ledger, records of payments received, documentation relating to the L.S./Sandra Daly/J.T. Flynn Central Bank applications, and any documentation in respect of anti-money laundering obligations under the 2010 Act, were to be found at the offices of the applicant. On that basis he applied for a warrant under s.10(1) of the Criminal Justice (Micellaneous Provisions) Act ,1997 (as substituted by s. 69(1)(a) of the Criminal Justice Act, 2006) (hereinafter "the 1997 Act"), to search the offices of the applicant and any person found at that place.

18. On 3rd March, 2022, a search warrant was issued on the basis of the sworn information of D/Sgt Sheridan. It authorised the search of the applicant's offices in the following terms:

> "*THIS IS TO AUTHORISE Detective Sgt Gary Sheridan, of the Garda National Economic Crime Bureau, a member of An Garda Síochána, accompanied by such other members of the Garda Síochána or persons or both as the said member thinks necessary,*

TO ENTER at any time or times within one week of the date of issue of this warrant, on production if so requested of this warrant, and if necessary by the use of reasonable force, the place namely JT Flynn & Co Solicitors, 10 Anglesea Street, Dublin 2 in the said court (area and) district as aforesaid,

TO SEARCH that place and any persons found at that place, and

TO SEIZE anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that the said member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence."

19. On 4th March, 2022, the applicant's offices were searched. He was also arrested on that occasion. His mobile phone was seized. The circumstances of the arrest and seizure of the phone were described in the following way by Detective Inspector Shane Fennessy in his affidavit sworn on 4th December, 2023 at para. 15:

"*The search warrant was executed at said premises on the 4th March, 2022. On that date, in addition to and independent of, the search team, an arrest team entered the said premises pursuant to s.6 of the Criminal Law Act, 1997, in order to effect an arrest of the first named applicant. While effecting the arrest of the first named applicant, his mobile phone was seized from his person by the arrest team pursuant to s.7 of the Criminal Justice Act, 2006, as amended, on the basis that there were reasonable grounds for believing that it contained evidence of, or relating to, the commission of an arrestable offence, which would be of relevance to the investigation. The first named applicant was detained at Irishtown Garda Station, where he was interviewed and later released without charge.*"

20. By an *ex parte* motion docket dated 28th March, 2022, the applicant sought leave to institute judicial review proceedings for the following reliefs: an order of *certiorari* quashing the search warrant dated 3rd March, 2022; an order of *mandamus* compelling the Commissioner of An Garda Síochána to provide copies of all materials which formed the basis of the sworn information sworn by D/Sgt Gary Sheridan as referred to in the search warrant; an order of mandamus compelling the DPP, who was then a party to the proceedings, to make a final determination in respect of whether or not there had been any criminal offence committed for the purposes of Art. 3(3)(b) of the decision of the European Central Bank of 19th April, 2013, on the domination, specifications, reproduction, exchange and withdrawal of euro banknotes ECB/2013/10; an order of prohibition restraining the Commissioner of An Garda Síochána from taking any further steps in

the investigation of any alleged offence under s.7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2020 and an order restraining the DPP from proceeding to trial of the applicants in respect of the alleged offence.

21. On 1st June, 2022, the applicant's solicitor wrote to the first respondent seeking voluntary discovery of documents underlying the sworn information made by D/Sgt Sheridan. On 23rd June, 2022, the first respondent refused to make the voluntary discovery as sought by the applicant.

22. On 11th January, 2023, an amended statement of grounds was served by the applicant. A number of parties were changed and additional grounds were pleaded and additional reliefs sought, including an injunction restraining the gardaí from examining any of the data downloaded from the applicant's mobile phone; an order of mandamus compelling the gardaí to return the phone to the applicant; an order of prohibition providing for the destruction by the gardaí of all data downloaded from the applicant's phone; a declaration that s.10 of the 1997 Act is incompatible with the Constitution, for failure to incorporate procedural or prescriptive measures to protect privacy rights guaranteed by Art. 40.3.2 of the Constitution; a declaration under s.5 of the European Convention on Human Rights Act, 2003 that s.10(1) of the 1997 Act is incompatible with the State's obligations under the European Convention on Human Rights (hereinafter "ECHR"), for failure to incorporate procedural or prescriptive measures to protect privacy rights guaranteed by Art. 8 ECHR.

23. On 3rd November, 2023, the Chief State Solicitor wrote to the applicant's solicitor informing him of the intention of the gardaí to apply for a further search warrant under s.10 of the 1997 Act, allowing the gardaí to access the data on the applicant's mobile phone. The letter suggested a protocol for limiting the extent of the search of the data, by reference to specific dates and by means of a targeted wordsearch. The letter went on to propose a protocol for the identification of documents over which the applicant wished to claim legal professional privilege (hereinafter 'LPP'), together with a mechanism for the determination of such claim to privilege by an independent third party.

24. It was suggested that such determination would be made by a third party agreed between the parties, or in default of agreement that the Chair of the Bar Council would appoint an assessor to carry out an assessment of the claim to privilege. An undertaking was given that the gardaí would not examine any materials on the applicant's phone in respect of which a claim to privilege was upheld, or which was not part of the data extracted according to the defined search terms and the parameters outlined in the letter. The letter also confirmed that to that date, none of the data

on the applicant's phone had been examined by the investigation team. The applicant was asked to provide any proposals that he may have in relation to the process outlined in the letter.

25. By letter dated 6th November, 2023, the applicant's solicitor replied at some length to the letter that had been sent by the Chief State Solicitor with the suggested search protocol. The applicant made it very clear that he did not agree to the proposed protocol.

26. On 27th November, 2023, the applicant issued a notice of motion seeking the interlocutory reliefs herein, to prevent the first respondent from appling for a further search warrant and from accessing the data on his mobile phone. On 29th November, 2023, the applicant was furnished with a copy of the sworn information provided by D/Sgt Sheridan.

27. On 30th November, 2023, the applicant was granted leave to proceed by way of judicial review. The respondent's had previously written to the applicant's solicitor, indicating that in light of the Supreme Court decision in *People DPP v Quirke* [2023] IESC 5, which had been delivered on 20th March, 2023, they would adopt a "neutral stance" on the applicant's application for leave to proceed by way of judicial review.

28. On 19th and 20th December 2023, the applicant's application for interlocutory relief was heard before the High Court.

Relevant Statutory Provisions.

29. The following statutory provisions are of particular relevance to the issues that arise for determination on this application. Section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as inserted by s.6(1)(a) of the Criminal Justice Act 2006) provides as follows:

> *10.—(1) If a judge of the District Court is satisfied by information on oath of a member not below the rank of Sgt that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an arrestable offence is to be found in any place, the judge may issue a warrant for the search of that place and any persons found at that place.*
>
> *(2) A search warrant under this section shall be expressed, and shall operate, to authorise a named member, accompanied by such other members or persons or both as the member thinks necessary—*
>
> *(a) to enter, at any time or times within one week of the date of issue of the warrant, on production if so requested of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,*
>
> *(b) to search it and any persons found at that place, and*

(c) to seize anything found at that place, or anything found in the possession of a person present at that place at the time of the search, that that member reasonably believes to be evidence of, or relating to, the commission of an arrestable offence.

(3) A member acting under the authority of a search warrant under this section may—

(a) require any person present at the place where the search is being carried out to give to the member his or her name and address, and

(b) arrest without warrant any person who—

(i) obstructs or attempts to obstruct the member in the carrying out of his or her duties,

(ii) fails to comply with a requirement under paragraph (a), or

(iii) gives a name or address which the member has reasonable cause for believing is false or misleading.

(4) A person who obstructs or attempts to obstruct a member acting under the authority of a search warrant under this section, who fails to comply with a requirement under subsection (3)(a) or who gives a false or misleading name or address to a member shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both.

(5) The power to issue a warrant under this section is without prejudice to any other power conferred by statute to issue a warrant for the search of any place or person.

(6) In this section—

'arrestable offence' has the meaning it has in section 2 (as amended by section 8 *of the Criminal Justice Act 2006) of the Criminal Law Act 1997 ;*

' place' means a physical location and includes—

a dwelling, residence, building or abode,

(b) a vehicle, whether mechanically propelled or not,

(c) a vessel, whether sea-going or not,

(d) an aircraft, whether capable of operation or not, and

(e) a hovercraft.

30. The following provisions of s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as amended, are of relevance:

7.— (1) A person commits an offence if—

(a) the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:

(i) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property;

(ii) converting, transferring, handling, acquiring, possessing or using the property;

(iii) removing the property from, or bringing the property into, the State,

(b) the person knows or believes (or is reckless as to whether or not) the property is the proceeds of criminal conduct.

[…]

(4) A reference in this section to knowing or believing that property is the proceeds of criminal conduct includes a reference to knowing or believing that the property probably comprises the proceeds of criminal conduct.

(5) For the purposes of subsections (1) and (2), a person is reckless as to whether or not property is the proceeds of criminal conduct if the person disregards, in relation to property, a risk of such anature and degree that, considering the circumstances in which the person carries out any act referred to in subsection (1) or (2), the disregard of that risk involves culpability of a high degree.

(6) For the purposes of subsections (1) and (2), a person handles property if the person—

(a) receives, or arranges to receive, the property, or

(b) retains, removes, disposes of or realises the property, or arranges to do any of those things, for the benefit of another person.

Submissions on behalf of the Applicant.

31. On behalf of the applicant, Mr Southey KC, submitted that in light of the decisions of the Supreme Court in *People (DPP) v Quirke* and *Corcoran & Anor. v Commissioner of An Garda Síochána & Anor* [2023] IESC 15, it was settled in Irish law that a search of a person's computer or mobile phone, constituted a significant encroachment into the private digital space enjoyed by that person. As such, the person's right to privacy under Art. 8 of ECHR, was engaged, as was their right to privacy, as recognised under Art. 40.3 of the Constitution.

32. It was submitted that when the mobile phone that was sought to be accessed, was the phone of a practising solicitor, that necessarily implied that data on the phone would likely contain much data that would be protected from disclosure under LPP. That had been recognised in the caselaw of the European Court of Human Rights: *Saber v Norway* [2020] ECHR 912. It was submitted that in that decision, the court had acknowledged the importance of specific procedural guarantees when it came to protecting the confidentiality of exchanges between lawyers and their

clients and of LPP. In that case, the court had expressed its concern in relation to the lack of an established framework for the protection of LPP, under the search procedures that were adopted in *Norway*.

33. It was submitted that the provisions of s.10 of the 1997 Act, did not permit the District Court judge to impose any limitations on the nature of the search that could be undertaken if the gardaí were allowed access to the phone. In this regard counsel referred to the dicta of Hogan and Collins JJ in the *Corcoran* case.

34. It was submitted that where a search of a person's mobile phone was to be carried out, that meant that the person's privacy was at stake and where that person was a solicitor, there were also issues of LPP, which rights would be irreparably damaged, were the search warrant to be granted. It was submitted that in such circumstances, it was not necessary for a person to await prosecution and then seek to challenge the admissibility of evidence on grounds of the illegality of the search. It was permissible for the person concerned to bring judicial review proceedings, as they must have an effective remedy, if a breach to their right to privacy and their right to assert legal professional privilege, were threatened. Accordingly, it was submitted that the applicant's substantive judicial review proceedings herein, were not premature or otherwise inappropriate.

35. In addition, it was submitted that where an applicant had challenged the constitutionality of s.10 of the 1997 Act, he was obliged to proceed in the High Court. Therefore, he could not challenge that aspect in any trial that may proceed in either the Circuit Criminal Court, or the Special Criminal Court. Accordingly, it was submitted that it was appropriate for the applicant to seek such relief in the substantive judicial review proceedings and to seek to preserve the *status quo* by means of interlocutory injunctive relief.

36. Counsel submitted that applying the standard *Campus Oil* principles, the applicant was entitled to an interlocutory injunction. It was submitted that on the basis of the decisions in *Quirke & Corcoran*, and as the respondents had not objected to his being granted leave to proceed by way of judicial review, and as he had obtained leave from the court to seek such relief in the proceedings herein, it was clear that the applicant had an arguable case.

37. In relation to the balance of convenience, it was submitted that that favoured preserving the *status quo* and leaving the content of the phone unsearched until the determination of the substantive proceedings. It was submitted that that was appropriate because the respondents had had the phone for almost two years and had not yet sought to have access to the data on it. That data had been downloaded, but had not been viewed by the investigation team. The evidence

contained in the phone, whatever it was, would remain intact until after the trial of the action. Accordingly, it was submitted that there was no real prejudice to the respondents in their investigation of the suspected offences, if interlocutory relief were granted to the applicant.

38. It was submitted that if the respondents were permitted to apply for a search warrant to access the data on the phone and if the search warrant was subsequently executed, the damage to the applicant would be irreparable. It was recognised in the caselaw that by entering the digital space, the applicant's right to privacy would be seriously infringed. Furthermore, as he was a solicitor, there would be substantial loss of the right to legal professional privilege involved in accessing such data. It was submitted that the applicant was entitled to rely on legal professional privilege in respect of any communications with his solicitor. In addition, clients of his, had rights to LPP over communications between them and the applicant, which may be stored on the phone. They would also suffer irreparable damage if a search warrant were granted and executed, in advance of the trial of the action.

39. It was pointed out that there was no assertion that any further delay in accessing the data on the applicant's phone, would hinder the garda investigation in any material way. It was submitted that the court could have regard to the fact that in the substantive judicial review proceedings, the applicant had asserted that the original search warrant and the execution thereof, were unlawful; meaning that the original seizure of the phone by the gardaí was also alleged to have been unlawful. It was submitted that in all the circumstances, it was appropriate for the court to grant the interlocutory injunctions sought by the applicant.

Submissions on behalf of the Respondents.

40. Mr O'Callaghan SC on behalf of the respondents, submitted that the present application was quite extraordinary in its nature. The applicant was not an accused person. He had not been charged with any offence. He was not facing any trial. He was merely a suspect in an ongoing garda investigation.

41. It was submitted that it would cause chaos in the criminal justice system, if people who are suspects in ongoing criminal investigations, could stop the investigation for an indefinite period, by challenging a search warrant, or power of arrest, pursuant to or ancillary to which, an object had lawfully come into the possession of the gardaí. In this regard counsel referred to the dicta of Irvine J in *Burke v Hamill* [2010] IEHC 449 and the dicta of Twomey J in *Foley v WRC* [2016] IEHC 585.

42. It was submitted that it was well settled at law, that if a person was facing a criminal trial, the appropriate time to challenge the legality of a search warrant, or some aspect of his arrest and detention, was in the course of a challenge to the admissibility of evidence in the trial itself: *Byrne v Grey* [1998] IR31; *Berkeley v Edwards* [1988] IR 217; *CRH plc v Competition and Consumer Protection Commissioner* [2018] 1 IR 521 (per Charleton J at para. 219).

43. It was submitted that the court should not grant injunctive relief to prevent the gardaí making an application pursuant to s.10 of the 1997 Act, on the basis that the applicant had challenged the constitutionality of that section in his judicial review proceedings. It was submitted that it was settled law, that once an Act has been passed by the Oireachtas, it is presumed to be constitutionally valid, until it is set aside by Order of the High Court, pursuant to a successful challenge to that legislation: *Murphy v Ireland* [2014] 1 IR 198.

44. Counsel submitted that when one looked at the essence of the applicant's application, he was saying that because he was a solicitor, the gardaí could not even apply to the District Court to obtain a search warrant to enable them to look at the data on his mobile phone, because it contained material that he said was covered by LPP. If that was accepted by the court, it would mean that every solicitor could invoke LPP to prevent his or her phone ever being searched by the gardaí in the course of a criminal investigation. It was submitted that there was no legal basis for that assertion.

45. Counsel accepted that a search, which involved entry onto a person's "digital space" was a matter of considerable importance, given the breadth of material that may be accessed *via* a computer, or a mobile phone. It was submitted that in this case, the first respondent had taken account of the decisions of the Supreme Court in the *CRH*, *Quirke* and *Corcoran* cases and had made a reasonable offer to the applicant to conduct a targeted search, followed by an opportunity for him to claim LPP over any material identified on foot of the targeted search; which claim to privilege would be determined by a suitably qualified person, who was independent of the garda investigation.

46. It was submitted that that proposal by the first respondent constituted a reasonable and proportionate means of ensuring that no unwarranted breach of privacy, or no breach of the right to legal professional privilege, would occur. However, the applicant had point blank refused to engage with that proposal, or to put forward any alternative proposal. It was submitted that the court was entitled to have regard to the conduct of both parties in deciding where the balance of convenience lay, when considering whether to grant an injunction.

47. It was submitted that when considering whether to grant interlocutory relief in the public law area, the court was not confined to the principles set down in the *Campus Oil* case, but the court should have regard also to the public interest in ensuring that a law was not effectively disapplied by the grant of any injunction in the public law area. The court was entitled when considering whether to grant such an injunction, to examine more closely the merits of the applicant's case. In addition, it could have regard to the nature of the damage that would be suffered by both the applicant and the public, if an injunction were granted and the applicant was then ultimately unsuccessful in obtaining a permanent injunction at the trial of the action: *Okunade v Minister for Justice* [2012] IESC 49; *Krikke v Barranafaddock Sustainability Electricity Limited* [2020] IESC 42. It was submitted that if an injunction as sought by the applicant were granted, it would effectively mean that the gardaí could not pursue a lawful avenue in the conduct of their ongoing criminal investigation, by applying for a further search warrant under s. 10 of the 1997 Act to authorise them to access the data on the applicant's mobile phone. It was submitted that that would be seriously adverse to the public interest in the proper investigation of criminal offences.

48. It was submitted that having regard to the extraordinary nature of the application, the fact that the first respondent had proposed a protocol that would ensure that there was no unwarranted breach of the applicant's right to privacy and no encroachment on the right to legal professional privilege, the court should refuse the interlocutory reliefs sought by the applicant.

The Law.

49. There have been a number of significant decisions in the recent past in the area of access to the digital space and its effect on the right to privacy. In particular, two substantial decisions were handed down by the Supreme Court in this area in 2023. While it is not necessary to give an exhaustive account of all of the relevant decisions, it will be helpful to set out the general principles that emerge from the cases that have been decided in this area in recent years.

50. In 2017, the Supreme Court handed down the decision in *CRH & Ors v. The Competition and Consumer Protection Commission* [2018] 1 IR 521. While that case involved an investigation by the defendant (hereinafter "the CCPC"), rather than an investigation by the gardaí, it dealt with the powers of the investigating authority to investigate what was termed the "digital space" pursuant to a search warrant.

51. In that case, the District Court had issued a search warrant pursuant to s. 37 of the Competition and Consumer Protection Act, 2014, authorising an officer of the defendant to enter

onto the second plaintiff's premises for the purpose of carrying out a search thereon. When executing the search warrant, the defendant seized the entirety of the email account of the third plaintiff, who was the former managing director of the second plaintiff, which consisted of over 100,000 individual emails.

52. The plaintiffs informed the defendant that many of the emails seized, were unrelated to the business activity of the second plaintiff, Irish Cement Ltd, and related either to the business of the first plaintiff, or were private to the third plaintiff. The plaintiffs complained that many of the documents seized were outside the scope of the search warrant and that the search warrant and seizure, constituted an unlawful interference with the private life, correspondence and home, of the second and third plaintiffs contrary to Art. 8 of the ECHR and Art. 40.3 of the Constitution.

53. Delivering one of the majority judgments in the case, with which the other judges agreed, Charleton J. described the difficulty that occurred in relation to the extent of the search of the data that was proposed in that case, in the following terms:

> "*Here, the problem is in the seizure of an entire email account of many thousands of communications without justification for such an ample and undifferentiated seizure. Nor does the context necessarily, as in the examples just given, provide that justification. This search was done without any relevant dates as target and without the consideration of using target search terms or some other means of limiting the material proportionately to what needed to be taken. That may be justified where the police or investigating authority needs to search out accomplices or co-conspirators to prevent or investigate an atrocity or where the identification or an organised crime or terrorist ring requires a complete analysis of all information available as to their communications. Such a necessity, however, has not been identified here by the Commission."*

54. One of the arguments raised by the plaintiffs in that case, which is also raised in the present case, was that some of the emails would have constituted communications with the company's lawyers, which would be covered by LPP. It was noted that solicitors had been present on behalf of the first plaintiff and others during the conduct of the search. It had also been confirmed that the defendant would not "review any of the seized documentation pending resolution of the issue of legal privilege" and that therefore any issue in relation to the data of the third plaintiff, Mr. Lynch, would be raised "in further detail in correspondence with the [Commission] rather than during the search".

55. Charleton J. set out the rationale behind the existence of the privilege known as legal professional privilege in the following terms at paras. 249 and 250:

> "*[249] Legal professional privilege protects from any disclosure advice given by a lawyer to a client. Legal advice is opposed to legal assistance, such as the drafting of contracts or other documents designed to have legal effect. A client, in order to get advice, may have to make a definite indication of what he or she has done. The advice as to liability or as to a potential defence, which can only be on the basis of facts as revealed by a client, may then follow. Thus a document giving legal advice may contain or reference a complete confession to murder, to rape or to the abuse of a dominant position in the marketplace. A note might be drawn up pursuant to the right of a prisoner to receive legal advice while in custody and prior to questioning by gardaí. This may later be contained on a computer or on a computer server. Nothing could be more relevant to an investigation, or more definitive, yet nothing could be more untouchable. This is not the place to consider the possible obligation of a lawyer that might arise for limited disclosure if the innocence at stake exception of another person were to arise. A legally professionally privileged document may not be waived by the lawyer; the privilege is that of the client alone. [250] Legal professional privilege is an exception at common law to the disclosure of documents in civil and, where it arises, in criminal cases. It is one of the exceptions which is absolute, or almost so, as with the extraordinary instance of innocence of another perhaps enabling limited disclosure. Within its terms it is not subject to interference. That privilege is of immense benefit to society in enabling those accused to have professional assistance under questioning and to assert their right to liberty and to have recourse to the rule of law. It enables non-production of relevant documents. Hence, it is not trammelled or curtailed. Privacy is. […]*"

56. The result of the case was that the judgment of the High Court, which had granted a declaration that certain materials seized were not covered by the terms of the search warrant and were seized without authorisation under s.37 of the 2014 Act, was upheld. The High Court had granted injunctive relief preventing the defendant from accessing, or reviewing the disputed data on the basis that it would breach the rights of the plaintiffs under Art. 8 of the ECHR. Charleton J. held that the order of the High Court was correct in the context in which the case was presented, and should be upheld.

57. However, he noted that as Laffoy J. had suggested in her judgment, the forward movement of the investigation could easily be effected through the agreement of the parties. He held that the Commission was entitled to lawfully proceed with its investigation. In assisting the process, and within the specific context of the applicable legislation, he offered the following suggestion: the plaintiffs were entitled to write a letter to the defendant setting out what private material had been copied in the email server of the third plaintiff, and why there was special sensitivity that attached to it, which required the protection of his privacy rights under Art. 8 of the Convention, specifying either dates or the subject matter requiring protection; the Commission should invite submissions as to targeted word searches and put the appropriate analysis to bring to light relevant material; the plaintiffs were entitled to respond to that bearing in mind that the statutory responsibility for the final decision was that of the defendant; the initial search of the voluminous material that had been seized with a view to scoping what was relevant by word specific search, it might be appropriate that a representative of the third plaintiff should also be enabled to attend that initial analysis; the Commission should endeavour to protect the privacy of the third plaintiff, but could proceed to investigate crime in a proportionate way and the steps that had been suggested ought to fulfil that; it was noted that the context in relation to emails may be important, so the metadata, or any relevant material uncovered in the search may be of importance in order to place of communications in their proper context; what was private and not relevant to the breach of competition law investigation, should be destroyed at the end of the process of identifying what was relevant and the representatives of the plaintiff might usefully assist in consideration of an appropriate methodology; it would not be incorrect for the Commission to consider a code of practice, perhaps involving individual protocols, for future cases under the legislative code.

58. The issue of access to electronic data in the digital space was again considered by the Supreme Court in *People (DPP) v. Quirke*, in which a single judgment was delivered on behalf of the court by Charleton J. on 20th March, 2023. In that case, the appellant had been convicted in the Central Criminal Court of the murder of one Bobby Ryan. On 3rd June, 2011, the family of Mr. Ryan had reported to the gardaí that he had inexplicably vanished. Extensive searches were carried out by the gardaí, but these were unsuccessful. A particular farm had been searched on 11th June, 2011, but there was no sign of the deceased's whereabouts on it. On 30th April, 2013, the appellant had claimed that he had been working on spreading, or preparing to spread, slurry

from a tank at the farm and had needed water from a particular underground tank. He told gardaí that he had found the body of Mr. Ryan in the tank.

59. In the course of the murder investigation conducted by the gardaí, a search warrant had been granted in respect of the appellant's home on 13th May, 2013. The search had taken place on 17th May, 2013. In the interval, the appellant had attended and had been interviewed at a garda station. He had denied any involvement in the death of Mr. Ryan. In the search, his computer was seized. Through forensic analysis of the computer's hard drive, it emerged that the accused, subsequent to the disappearance of the deceased, had researched the decomposition of human remains. That internet search was a strand in the prosecution case, whereby circumstances were said to point to his guilt. The internet searches were proximate to other events, that were argued at trial, to make the accused's interest in these matters, more than academic.

60. The appellant appealed his conviction *inter alia*, on the basis that it was unsound, because a computer and other digital devices taken from his home, had not been mentioned in the sworn information upon which the District Court judge had granted a search warrant to enter his home and to seize potential evidence. The issue at the centre of the appeal was the contention that the gardaí had failed to inform the District Court judge of their intention to seize computers and electronic devices from his home and to access the data thereon.

61. In the judgment, Charleton J. carried out an extensive review of the law relating to search and seizure pursuant to search warrants, both at common law and under statute. He noted that on occasion, a computer or other electronic device, could be relevant evidence in itself, if it contained blood stains, or fingerprints, that were relevant to the investigation. However, that was a different matter to the issues that arose when gardaí sought to access the electronic information stored on the computer, or other device. The judge described this dichotomy in the following way at paras. 96 and 97:

> "*96. The law cannot be distorted whereby the clear terms of a statutory search warrant power are altered so that a computer becomes a separate physical space from the dwelling in which it may be found. What is a place is, however, defined in the 2006 Act. A computer is not a place. It is, instead, a repository and recording of vast stores of information, beyond the capacity of even some public libraries, of the deeds, thoughts, obsessions and activities of a person, of the persons communicating with that person and of what is stored outside the computer on servers, on cached sites by service providers and more widely on the utilization of multiple computers through the cloud. Consequently, not only is a*

computer not a place; it is in a different category to a place under the careful delineation of the legislation from 2006 enabling the search of "a physical location". Since seizing something on reasonable belief means seizing it for analysis, it is within the powers of a judge issuing a search warrant, the physical nature of objects for forensic testing imply that all that is necessary to uncover their nature and relationship to the allegations against the accused may proceed in the ordinary way; [The People (DPP) v] Hannaway [& Ors [2021] IESC 31].

97. A computer or other digital device must of necessity be found in a place but the seizure of it for testing involves the entry into the digital space and departure from the physical location seizure powers authorised by the 2006 Act. This difference necessarily requires authorisation for the search of the digital space outside the physical location enabled by the statutory power. When, in contrast to this case, a judge is told that computer devices, which includes mobile phones and akin digital instruments, are to be searched for and potentially seized, the judicial mind is entitled to infer that the purpose of search is to enable entry into the non-physical space controlled by the accused or to be found within the physical location to be searched. That search may be justified by appropriate information in the sworn information accompanying an application for a warrant. But the lawful search for and seizure of a computer requires judicial intervention on the settled authority of Damache. The seizure for entry into the digital space involves the automatic loss of privacy rights on a vast scale. Without judicial scrutiny, seizure for the purpose of a non-physical search into mobile phones and other computer devices of vast memory and carrying the private dimensions of a human life over years or months no balancing of rights can be undertaken whereby a court may authorise such a search and seizure."

62. Charleton J. held that the sworn information that was before the District Court judge, who had issued the search warrant, had only sought a search and seizure of physical items. As drafted, the search warrant for such items, was therefore valid. However, he held that entry into the digital space, apart from the physical space to be searched, had been on the minds of the gardaí seeking that warrant. He held that in the manner in which the warrant had been sought, the need to search in the digital space had not been brought to the attention of the judge. Since the foundation of the common law, and under democratic constitutional systems, judicial analysis was

required before searches of homes and premises became lawful; similarly, in seeking entry to the digital space, a similar judicial intervention was required.

63. As there had been no mention in the sworn information of any intention on the part of the gardaí to search the digital space, the essential ingredient of judicial intervention prior to the searching of such space, was entirely absent. Therefore, it was held that while the search had been lawful, the search of the computer, as a search within the digital space, had not been authorised. Accordingly, the court made an order declaring the seizure of the computer devices from the accused's home to have been unlawful in the context of a valid warrant and otherwise lawful search. The court adjourned for further argument, the consequences which would flow from that decision.

64. In a judgment delivered on 28th July 2023, with neutral citation [2023] IESC 20, Charleton J. affirmed the conviction of Mr. Quirke, holding that the admission of the evidence obtained on foot of the unlawful search was permissible as an exception to the exclusionary rule. He stated at para. 63:

> "*In the result, the admission by the trial judge of the evidence of what was on the computer devices seized from the home of the accused can and should be affirmed since the illegality attaching was due expressly to a new legal development in the law related to digital-space privacy. There was, on the trial judge's ruling, no dishonesty. The mistake in the application on oath for the warrant and the resulting search warrant was due to honest inadvertence*."

65. On 22nd June, 2023, the Supreme Court delivered judgment in *Corcoran v. The Commissioner of An Garda Síochána* [2023] IESC 15. In that case the appellant was not accused of any crime, nor was he a suspect. He was a journalist, who had attended at a property, in Strokestown, Co. Roscommon, which had been repossessed pursuant to a court order. On the day that he attended at the property, 16th December, 2018, a number of masked and armed people had attended at the premises, where they had attacked and injured the security personnel who were guarding the property. They had set a number of vehicles alight. It appeared that a firearm may have been used during this encounter. Some of the security personnel had been falsely imprisoned during the course of the events. The appellant had been tipped off about the incident. He travelled to the location, where he took photographs and video footage of what took place at the property. These were subsequently uploaded to the website of a newspaper called "The Democrat".

66. On 2nd April, 2019, one of the investigating gardaí, applied *ex parte* to the District Court judge in Roscommon for two search warrants: one in respect of the appellant's house, and one in respect of the premises of the newspaper. The application was made pursuant to s.10 of the 1997 Act. In the information grounding the application for the search warrants, the garda attested that he believed that further video footage, which might identify other suspects sought in respect of the investigation of the incident on 16th December, 2018, might be found on the appellant's mobile telephone, from which public materials available on the newspaper's website had been downloaded; or may be on other computers or media devices located at the premises of the newspaper, or in the appellant's house.

67. One of the security officers who had been injured in the incident, had made a statement to the gardaí in which he stated that he had seen a male, matching the appellant's description, recording the events with a mobile telephone. He stated that the man was accompanied by another man, who was wearing a balaclava and a camouflage jacket, which bore certain distinctive markings. That man was holding a wooden cudgel with a knotted head. The security man stated that both men left the scene as emergency services arrived.

68. The information that had been sworn by the garda who applied for the search warrant, did not record the fact that the appellant was a journalist, or that The Democrat was a local newspaper.

69. When the search warrant was executed, the appellant immediately applied for leave to seek judicial review in the High Court on the afternoon of 4th April, 2019, before any members of the gardaí could access the data on the phone. He sought leave to obtain an order for *certiorari* in respect of the search warrant and an order of *mandamus* requiring the gardaí to deliver to him all and any information accessed on the mobile phone, alongside the deletion of any copies they may have retained.

70. In the High Court, Noonan J. granted leave to apply for judicial review. He also granted a stay preventing members of An Garda Síochána examining or otherwise attempting to access information on the telephone until 10.45 hours on 5th April, 2019, which was the following day. On that date, the gardaí gave an undertaking not to execute or otherwise attempt to access information on the mobile phone pending further order of the court. That remained the position up to the time that the matter came before the Supreme Court.

71. Concurring judgments were delivered by Hogan and Collins JJ. One of the arguments that was put before the court, was that once the search had been authorised by the issuance of a valid

search warrant, if the owner of the property had any complaint to make, his effective remedy was to bring judicial review proceedings after the search of the material had taken place. Collins J. did not accept that proposition. He stated that judicial review was not an adequate or practical remedy after the search of the data had occurred. He stated as follows at para. 55:

> *"…A subsequent quashing of the warrant on judicial review will not, of itself, remedy such a violation. More fundamentally, judicial review simply cannot provide a "guarantee of review by a judge or other independent and impartial decision-making body .. prior to the handing over" of material protected by Article 10. Here, it is true, Mr Corcoran managed to institute judicial review proceedings, and obtain a stay, before the Gardaí managed to access his iPhone. But that was exceptional. It was possible only because of the happenstance that the iPhone was password protected and that the Gardaí were unable to access it. No doubt, the fact that Mr Corcoran's business partner was also a solicitor, who was already aware of the Garda investigation, was also a significant – and exceptional – factor in enabling Mr Corcoran to get to court as quickly as he did."*

72. Collins J. went on to note that if the appellant's iPhone had not been password protected, the gardaí would have obtained access to the material on it, before judicial review proceedings could have been initiated. He stated that the State's compliance with Art. 10 ECHR could not depend on the contingency of whether the subject of a search could manage to make to the Four Courts before access took place.

73. Both Collins and Hogan JJ, held that the search warrant was invalid, due to the fact that the gardaí had not brought to the attention of the District Court judge, the fact that the appellant was a journalist and was the editor of The Democrat newspaper. Collins J. stated as follows at para. 58:

> "*Where a Section 10 warrant would potentially interfere with the protection of a journalist's sources – a fortiori where the warrant is sought for the very purpose of identifying such a source – that must be brought to the notice of the judge and the judge can properly issue the warrant only if he or she is satisfied that the public interest – in this context, the public interest in the prevention and punishment of crime and the protection of public safety – justifies the potential interference with the protection of journalistic sources*."

74. Both judges emphasised in clear terms, that there were shortcomings and deficiencies with s.10 of the 1997 Act. The judges pointed out that there was nothing in the section to suggest that a judge had power to restrict the scope of a warrant issued under the section, such as by

authorising only the seizure of specified items or categories of items. Nor was there anything in the section that appeared to permit the judge to attach conditions to a warrant, such as a condition prohibiting access to journalistic material, or deferring access to it, so as to allow the issue of access to be litigated. The section did not appear to permit a judge to review a warrant that had been issued, or to hear objections to it, whether at the time of the application for it, or *post hoc*. It was also clear that the section did not provide for, or permit, an *inter partes* hearing prior to the issuing of a warrant. It was held that to interpret the section as permitting such a hearing, would be to radically rewrite it. The court noted that a further and significant omission from s.10, was the absence of any reference to the position of privileged or protected material. The court noted that there were provisions protecting the disclosure of documents that were subject to LPP in a significant number of other statutory provisions, but not in s. 10; (see generally the dicta of Collins J at paras. 12, 14 and 59).

75. Both judges were of the view that the shortcomings in s.10 of the 1997 Act, were beyond the capacity of the courts to cure and could only be addressed by the Oireachtas. They called on the Oireachtas to address this issue as a matter of urgency. Indeed, they noted that Costello J, in the Court of Appeal, had made a similar plea to the Oireachtas. Hogan J stated that the lack of any safeguards in s.10 designed to protect journalistic privilege and to provide for an independent, merits-based assessment of such a claim, were particularly problematic. While his comments relate to journalistic privilege they are equally apposite in the case of LPP; he stated as follows at para. 113:

> "*The lack of safeguards in the section designed to protect journalistic privilege and to provide for an independent, merits-based assessment of such a claim are particularly problematic. In any assessment of whether that claim was entitled to be upheld, regard would have to be had to the source of the information at issue in the present case and decisions such as that of the ECtHR in Stichting Ostade Blade.*"

76. Hogan J stated that all of the matters that they had indicated as being of concern in relation to s.10 of the 1997 Act, were matters to which the Oireachtas may wish to give urgent consideration. For the purposes of the appeal, they held that the search warrants at issue in the case, should be quashed and the appeal brought by the Garda Commissioner from the decision of the Court of Appeal should be dismissed.

77. O'Donnell CJ also issued a short concurring judgment, in which he noted that s.10 had been framed in very blunt terms. However, he stated that a judge before whom an application was

made for a search warrant, retained the possibility of granting or refusing it. Therefore, the fact that the warrant would necessarily trench upon a journalist's ability to maintain confidentiality, could have been a ground upon which a judge might have exercised the option of refusing to grant the warrant. It followed that those facts were material facts, which ought to have been brought to the attention of the judge before any warrant was granted; and a failure to do so meant that the warrants had to be quashed.

78. In the course of argument at the bar in the present case, reliance was placed on the decision of the European Court of Human Rights in *Saber v Norway* [2020] ECHR 912. Somewhat curiously, the mobile phone that was seized in that case, belonged to a man, who was the intended target of two other men who had conspired to murder him. The mobile phone had been taken by the police in the course of that investigation. However, when the phone had been taken, the applicant stated that it contained his correspondence with two lawyers, who were defending him in another criminal case in which he was a suspect.

79. The Norwegian police initially gave the phone to the Oslo City Court as an independent authority, to determine which parts of the data on the phone were subject to LPP. After some time, and following a decision of the Norwegian Supreme Court in a different case, the Oslo City Court returned the mobile phone to the Norwegian police, without making any determination in the matter, as it was felt that as a result of the decision handed down by the Supreme Court in the other case, that the police authorities had the power to determine any issues in relation to LPP. Following return of the phone, the search of the data was carried out by the police themselves, without any control by the regional court.

80. The ECtHR noted that the search that had been carried out had a formal basis under the law of Norway. Insofar as it had been established that access to correspondence between the applicant and his lawyers could be obtained *via* the mirror image copy of his smartphone, the crux of the case was, whether the law in question had sufficient quality and offered sufficient safeguards to ensure that LPP was not compromised during the search and seizure procedure.

81. The court held that in the context of searches and seizures, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. The court held that the law must be sufficiently clear in its terms to give citizens an adequate indication of the circumstances and conditions under which public authorities are empowered to resort to any such measures. The court held that as search and seizure of such data, represented a serious interference with a person's private life, home and correspondence; it must be based on a law that

was particularly precise. It was essential to have clear detailed rules on the subject: (see paras. 49 and 50).

82. The court went on to acknowledge the importance of specific procedural guarantees when it came to protecting the confidentiality of exchanges between lawyers and their clients and of LPP: (see para. 51). The court was concerned by the lack of any established framework for the protection of LPP in the case that was before it. The court noted that the issue that arose in the case, was not as such owing to the Supreme Court's ruling in that case, rather it originated in the lack of appropriate regulation as pointed out by the court. The court held that the lack of foreseeability in the case before them, due to the lack of clarity in the legal framework and the lack of procedural guarantees relating concretely to the protection of LPP, fell short of the requirements flowing from the criterion that the interference must be in accordance with law, within the meaning of Art. 8.2 of the Convention. In light of that finding, the court found that there had been a violation of Art. 8 of the Convention.

83. Finally, on 14 November 2023, the Court of Appeal delivered judgment in *Hyland v Commissioner of An Garda Síochána* [2023] IECA 278. That case did not involve any challenge to a search warrant. It related to the use to which the gardaí could put material which they had lawfully obtained, following a lawful search of a person's mobile phone. The Court of Appeal held that the Garda Commissioner could not use material which he had obtained in the course of a lawful search of the mobile phone, which had been searched in the course of an unrelated criminal investigation; as grounds upon which base a charge for breach of the garda disciplinary regulations against the appellant.

84. The court noted as follows at para. 153 of its judgment:

> "*An exception to the general prohibition on the use of material obtained on foot of search warrant, without restriction or limitation of any kind, which would allow the Commissioner to use information incidentally found on a smartphone during a criminal investigation in a disciplinary proceeding would be very far-reaching in practical terms and sits rather uneasily with the privacy interests protected by the Constitution and the Convention. Among the many questions it raises is the question of whether permission for such a wide-ranging intrusion on the privacy right has been clearly articulated by law, a matter in which the European Convention on Human Rights would have a particular interest. Moreover, it is difficult to see how the exception, if recognised, could be confined as a matter of principle to Garda disciplinary proceedings. It is true that in this case the Garda*

Commissioner is both in charge of criminal investigations and the disciplinary regime and there is therefore no question of having to "share" the information with an external body. However, if the exception is recognised in the present case, it is difficult to see why the same principle should not apply to the sharing of information with other regulatory bodies which are responsible for enforcing professional standards. This may well be a good thing, but the question here is not whether it would be desirable in the public interest that it should be so, but whether the current state of Irish law allows for such a permissive approach notwithstanding the specific and restrictive wording of s. 9 of the 1976 Act, the high value afforded to the right to privacy, especially digital privacy, under the Constitution, the European Convention on Human Rights, and the Charter of the European Union, and the vast amount of information which may be uncovered in digital searches."

85. While not directly on point, the decision in *Hyland* recognises that in Irish law, the right to privacy is firmly engaged where there is a search of a person's digital space.

Conclusions.

86. At its core, this application boils down to the following issue: Can a person who is a suspect in an ongoing criminal investigation, stop the gardaí applying to a District Court judge for a search warrant under s.10 of the 1997 Act, on the grounds that, in judicial review proceedings, he has challenged the legality of the seizure of his mobile phone and the constitutional validity of s. 10 of the 1997 Act, and its compatibility with the ECHR?

87. There are significant dicta in the decision of the Supreme Court in the *Corcoran* case, which point out the shortcomings of s.10, having regard to the provisions of the European Convention on Human Rights and the Constitution.

88. While counsel for the respondents argued that these were only *obiter dicta,* they are the considered dicta of two judges in the highest court in this jurisdiction. Their judgments, including these dicta, were accepted by the other judges, who concurred with the judgments delivered by Hogan and Collins JJ. This Court is satisfied that these pronouncements are due considerable weight, notwithstanding that they may be strictly *obiter* to the *ratio* of the *Corcoran* case.

89. Having regard to the decisions in the *CRH*, *Quirke* and *Corcoran* cases, the court is satisfied that the applicant has an arguable case that s.10 may be repugnant to the Constitution and may infringe various provisions of the ECHR. The *Saber* decision made it clear that in order to be compatible with the Convention, the law governing the seizure and search of material on electronic devices, and the protection which is afforded once issues of LPP arise, must provide

protection to the individual against arbitrary interference with his Art 8 rights; to which end, the law must be sufficiently clear and precise in its terms.

90. The ECtHR also acknowledged the importance of specific procedural guarantees when it came to protecting the confidentiality of exchanges between lawyers and their clients, and of LPP. It is certainly arguable that given the shortcomings that have been identified by Hogan and Collins JJ in s.10 of the 1997 Act, that that section does not comply with the requirements of the Convention.

91. The court does not accept the argument put forward by the respondents, that the only appropriate time for a challenge to the seizure of the phone, or to any subsequent accessing of data on it, must be in the course of a challenge to the admissibility of evidence at any criminal trial that may ensue after such search and access of data has taken place.

92. The caselaw makes it clear that the right to privacy is engaged when a state authority seeks to enter into a person's digital space by accessing data on the person's computer, mobile phone, laptop, or other similar device. The court does not accept the argument that a person who is aggrieved by any such interference, or who fears that it may take place, must allow the intrusion into the digital space to occur and must await the ensuing criminal trial, before they can challenge what has happened, or what may happen, if access is permitted.

93. The court is satisfied that in certain cases, of which this case is an example, it is appropriate for an aggrieved person to seek to proceed by way of judicial review, rather than have to wait and mount a challenge to the admissibility of evidence as a result of the intrusion onto the digital space, in any ensuing criminal trial.

94. Furthermore, when a person wishes to challenge the constitutionality of a section in an Act, they have to mount such challenge before the High Court, on notice to the Attorney General. That, of itself, involves proceedings in a court, that will not be the court of trial. It is appropriate in certain circumstances to bring judicial review proceedings in respect of matters that may arise in the course of a future criminal trial. Accordingly, the court finds that the applicant's substantive proceedings herein are not premature, or inappropriate.

95. Notwithstanding that the court is satisfied that the applicant has an arguable case in his substantive proceedings, and that it is appropriate to proceed by way of judicial review proceedings, I am not satisfied that it is appropriate to grant the interlocutory reliefs sought by the applicant.

96. While I accept that there appears to be no urgency for the gardaí in accessing the data on the applicant's phone, because they have had the phone since 4th March 2022, and have not yet sought an order from the District Court permitting them access the data; nevertheless, the court cannot lose sight of the fact that the gardaí are conducting an ongoing investigation into suspected money laundering offences.

97. The law provides that they may apply for a search warrant under s.10 of the 1997 Act. That section must be presumed by this Court as being valid under the Constitution, until it is set aside by the High Court, following a successful challenge by a person with *locus standi* to do so.

98. In *Murphy v Ireland & Ors.* [2014] 1 IR 198, the plaintiff had instituted proceedings challenging the constitutionality of s.46(2) of the Offences Against the State Act 1939 (as amended). The court had to determine whether the bringing of such a challenge to the legislation, meant that the criminal prosecution could not proceed. O'Donnell J (as he then was) stated as follows at para. 9:

> "*Furthermore, I do not consider that it should be taken for granted that a trial, and indeed any subsequent trial in which the same point can be said to arise, should be allowed to be adjourned as a matter of course pending the outcome of the challenge. That would be to give an applicant the benefit of an injunction without any application to, or consideration by, a court. Such an acceptance could involve, in effect, the suspension or disapplication of law enacted by the Oireachtas and entitled to the presumption of constitutionality. Prima facie, the bringing of this prosecution was in compliance with the law, which continues to be binding, unless declared repugnant to the Constitution by the only courts with constitutional power to do so. If the law is not enforced over a protracted period, but subsequently the challenge is rejected, there will have been great damage to the system of law enforcement that is not capable of calculation or repair. It is necessary for both parties to such a case to understand the constitutional values in issue and to cooperate in agreeing a speedy timetable, to ensure the case is disposed of as soon as possible*."

99. The court is satisfied that when considering whether to grant interlocutory relief in proceedings in the public law area, there are additional factors other than those set out in *Campus Oil v. Minister for Energy (No. 2)* [1983] IR 88, which must be considered. These include the public interest in the effective investigation of suspected criminal offences by the Gardaí. It also includes the adverse effect on the public interest that can occur where an order of the court would effectively disapply an extant legislative provision for the duration of the injunction: see generally

dicta of Clarke J. in *Okunade v Minister for Justice and Equality* [2012] IESC 49 at para. 9.5 *et seq*; in particular at para. 9.30.

100. In the present case, the respondents were directed to lodge their statements of opposition by 28th January 2024. The applicant's motion for discovery of documentation underlying the sworn information of D/Sgt Sheridan, is listed for hearing before the High Court in March 2024. The judgment on that application may take some time to be delivered. It may be appealed to the Court of Appeal.

101. When the discovery issue has been finally determined and, if so directed, discovery of documents has been made, the substantive matter may then be set down for hearing before the High Court.

102. In these circumstances, it is clear that were this court to grant the interlocutory reliefs sought by the applicant herein, the Gardaí would be prevented from applying for a search warrant pursuant to s. 10 of the 1997 Act, for a considerable period of time; of somewhere in the order of possibly 6/12 months from today's date. To effectively halt a criminal investigation for such a period, would be seriously prejudicial to the public interest in the efficient investigation of suspected criminal offences by the Gardaí.

103. The court is satisfied that it would be inappropriate for this court to make an order preventing the gardaí from even applying to the District Court for a search warrant pursuant to s.10 of the 1997 Act, to permit them to access the data on the applicant's mobile phone. That statutory provision has been extant for many years. It has not been declared repugnant to the Constitution. The gardaí are entitled to rely on it to further their investigation.

104. The court accepts the argument made by counsel on behalf of the respondent, that if a suspect in an ongoing criminal investigation, was to be permitted to bring that investigation to a halt, by instituting proceedings challenging the constitutional validity of some statutory provision that may be utilised by the gardaí in the course of their investigation, that could lead to chaos in the criminal justice system. It would also be adverse to the legitimate public interest in the investigation of criminal offences.

105. Having said all that, the refusal of an interlocutory injunction may well turn out to be a Pyrrhic victory for the respondents. That is because, if and when, they apply for a search warrant under s.10 of the 1997 Act, to access the data on the applicant's mobile phone, they will have to bring all relevant matters to the attention of the District Court judge.

106. That will include the fact that the applicant is a solicitor; that he has asserted LPP over an amount of material on his mobile phone; together with the fact that entry onto the digital space, necessarily includes significant encroachment into a person's private life and in the circumstances of this case, raises significant issues in relation to LPP.

107. It would appear from the dicta of Hogan and Collins JJ in the *Corcoran* case, that the District Court judge cannot refashion s.10 of the 1997 Act, to provide for limitations on the parameters of search that may be allowed, given that such provisions are not provided for in the wording of the section. The court has already referred at length to the dicta of Hogan and Collins JJ in this regard.

108. In these circumstances, the District Court judge may well agree with the dicta of the Supreme Court, that he or she cannot impose restrictions on a search of the data on the mobile phone. That being the case, the judge may well come to the conclusion that the grant of a search warrant in these circumstances may be disproportionate to the invasion of the applicant's right to privacy and breach his right to assert LPP; such that a search warrant should not issue. However, that is a matter for the District Court judge to decide, if and when, an application is made for a search warrant, permitting access to the data on the applicant's mobile phone.

109. As that application will necessarily take place on an *ex parte* basis and to ensure that all relevant considerations are put before the District Court judge on the making of such applicant, I direct that the judge hearing the application be provided with copies of the decisions in the *Quirke*, *Corcoran* and *Saber* cases and also with a copy of this judgment.

110. This is not a new problem. While in the *Corcoran* case, the Supreme Court had urged the Oireachtas to look at s.10 of the 1997 Act, as a matter of urgency; the same exhortation had been given by Costello J when delivering the judgment of the Court of Appeal in that case, on 22nd April, 2022. So, the Oireachtas has had plenty of warning of the difficulties with s. 10 and searches of the digital space.

111. For the reasons set out above, the court refuses the reliefs sought by the applicant in his notice of motion dated 27th November, 2023.

112. As this judgment is being delivered electronically, the parties shall have three weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

113. The matter will be listed for mention at 10.30 hours on 7th March 2024 for the purpose of making final orders.