[2024] IEHC 687

THE HIGH COURT

JUDICIAL REVIEW

[2022/261 JR]

BETWEEN:

JAMES FLYNN AND J.T. FLYNN & 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 Barry O'Donnell delivered on the 3rd day of December, 2024

INTRODUCTION

1. This judgment concerns a motion for discovery. The application is made in the context of judicial review proceedings in which the applicants seek a variety of reliefs arising from the execution of a search warrant and an arrest. The execution of the warrant occurred in the context of an ongoing investigation into money laundering offences where to date no decision

has been made by the Director of Public Prosecutions to charge the first named applicant. Among other reliefs, the applicants seek to quash the search warrant and also to have the court declare on the constitutionality of the legislative provision that permitted the granting of the warrant by the District Court. In addition, the applicants seek orders, in effect, compelling the respondents to make a final determination on whether there is sufficient evidence to support charges, while at the same time (a) restraining An Garda Síochána from taking any further steps in their investigation and (b) restraining An Garda Síochána from examining any data extracted from a mobile phone seized from the first applicant in the course of his arrest.

2. The applicants have sought discovery from the respondents. Discovery initially was sought by way of a notice of motion dated the 24 November 2022, and the extent of the relief sought in the notice of motion was expanded by order of the High Court dated the 12 March 2024. The respondents strongly contest the proposition that the applicants should be entitled to any discovery. In addition, the court had the benefit of an affidavit and written submissions from the Central Bank of Ireland (*CBI*). The CBI opposed the grant of certain categories of discovery on the basis that the documents sought included materials that had been provided by the CBI to An Garda Síochána that the CBI considered to be highly confidential and that ought to attract a claim to privilege.

3. The issues raised in the application went beyond the normal issues raised in a discovery application and extended to issues of public interest privilege and the implications of the duty of candour in a discovery application.

4. For the reasons set out in this judgment I have concluded that save in respect of one of the categories sought discovery should not be ordered. As will be explained, it has not been necessary to make a decision regarding any claim to public interest privilege at this point in the process. In addition, the court has not been persuaded that the respondents have in any sense

failed to comply with the duty of candour on public bodies defending applications for judicial review.

5. In this judgment I intend to set out the background facts, the pleaded case and the principles that I consider applicable to the resolution of the issues. I will then address the categories of discovery that are sought.

THE PROCEEDINGS

6. The factual backdrop to these proceedings has been set out in detail in judgments that have been delivered in the context of applications in which various interim and interlocutory injunctions were sought by the applicants. The judgment in the High Court was delivered by Barr J. and bears neutral citation [2024] IEHC 51, and two subsequent judgments were delivered by the Court of Appeal on the 4 June 2024 and the 4 November 2024, bearing neutral citations [2024] IECA 191, and [2024] IECA 278, respectively.

7. The first named applicant is a solicitor, and he is a partner in the second named applicant firm of solicitors. As explained by the Court of Appeal, the District Court issued a search warrant on the 3 March 2022 pursuant to section 10(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997, as substituted by section 6(1)(a) of the Criminal Justice Act, 2006. On the 4 March 2022, relying on that search warrant, gardaí from the Garda National Economic Crime Bureau (the *GNECB*) conducted a search of the offices of the second named applicant firm. This was in the context of an investigation of suspected money laundering offences. The first named applicant was present at the time. He was arrested pursuant to section 6 of the Criminal Law Act, 1997, and his mobile phone was seized by gardaí in exercise of their powers under section 7(1) of the Criminal Justice Act, 2006.

8. The data on the mobile phone was not interrogated immediately. The phone was sent by the GNECB to the Garda National Cyber Crime Bureau (the *GNCCB*) so that the data could be downloaded forensically. This occurred on the 31 March 2022. Two copies of the data were created. One copy was furnished to the first named applicant so that he could specify areas of the data over which he wished to claim legal professional privilege. The other copy was furnished to the GNECB. The copy furnished to the GNECB was password protected, and the password was retained by a detective sergeant with the GNCCB pending resolution of the issue around legal professional privilege. The phone itself was returned to the GNECB and placed in a secure storage locker.

9. Arising from that basic factual scenario, the applicants sought a variety of reliefs which have been set out in an amended statement of grounds dated the 11 January 2023.

10. The applicants seek the following orders: -

> *"1. An order of Certiorari sending forward to this Honourable Court for the purpose of being quashed the Search Warrant dated 3rd March 2022 issued by the Dublin Metropolitan District Court under s.10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 (the '1997 Act') as substituted by s.6(1)(a) of the Criminal Justice Act 2006, authorizing the search and seizure of anything found at JT Flynn & Co. Solicitors, 10 Anglesea Street, Dublin 2 believed by the designated Garda Member to be evidence or, or relating to, the commission of an arrestable offence;*
>
> *2. An order of Mandamus to compel An Garda Síochána to provide copies of all the material which comprised and formed the basis of the 'information on oath and in writing' sworn by Detective Sergeant Gary Sheridan of the Garda National Economic Crime Bureau on the 3rd March 2022 as referred to in the search warrant;*

3. An order of Mandamus compelling An Garda Síochána to make a final determination in respect of whether or not there is sufficient evidence to support a charge that any criminal offence has been committed for the purposes of Article 3(3)(b) of the Decision of the European Central Bank of 19 April 2013 on the denominations, specifications, reproduction, exchange and withdrawal of euro banknotes ECB/2013/10 (the 'ECB Decision');

4. An order of Prohibition restraining on 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 (as amended) (the '2020 Act') and further restraining An Garda Síochána from submitting the applicants' file to the Director of Public Prosecutions for purposes of prosecution of the alleged offence;

5. An Injunction, if required, restraining any member of An Garda Síochána or any person with knowledge of the injunction from examining any of the data downloaded from the First Named Applicant's mobile phone by the Garda National Cyber Crime Bureau as referred to in its Extraction Report of 31st March 2022;

6. An order of Mandamus compelling the An Garda Síochána to return to the First Named Applicant the mobile phone seized from him on 4th March 2022;

7. An order of Prohibition providing for the destruction by the An Garda Síochána of all of the data downloaded from the First Named Applicant's mobile phone by the Garda National Cyber Crime Bureau as referred to in its Extraction Report of 31st March 2022;

8. A Declaration that s.10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted by section 6(1)(a) of the Criminal Justice

Act 2006) is incompatible with Bunreacht na hÉireann for failure to incorporate procedural or prescriptive measures to protect privacy rights guaranteed by Article 40.3.2° of Bunreacht na hÉireann;

9. A Declaration, under s.5 of the European Convention on Human Rights Act 2003, that s.10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted by section 6(1)(a) of the Criminal Justice Act 2006) is incompatible with the State's obligations under the European Convention on Human Rights ("ECHR") for failure to incorporate procedural or prescriptive measures to protect privacy rights guaranteed by Art. 8 ECHR."

11. The amended statement of grounds goes on to identify a series of extensive legal grounds on which the relief is sought. For the purposes of this application the grounds can be summarised as follows.

Illegality

12. In this regard, the allegation is that the search warrant was unlawfully issued by the Dublin Metropolitan District Court and unlawfully executed by An Garda Síochána. The allegation is that, for the purposes of s. 10(1) of the 1997 Act, the District Court could not have been satisfied on the "*information on oath and in writing*" that there were any reasonable grounds for suspecting that evidence of or relating to the commission of an arrestable offence was to be found at the applicant's law offices. In addition, it is alleged that the search warrant was unlawful on its face as contrary to the applicants' privacy rights for failure to limit the scope of the evidence sought to those files, documents or materials which pertained exclusively to the alleged offence being investigated. Furthermore, it is alleged that the District Court and An Garda Síochána gave no regard to the applicants' rights (and those of their clients) to a

heightened expectation of privacy and confidential and sensitive documents held at the applicants' law offices.

Breach of Privacy Rights

13. In this regard it is alleged that the search warrant was in breach of the applicants' privacy rights and those of their clients pursuant to Article 40 of Bunreacht na hÉireann, Article 7 of the Charter of Fundamental Rights of the European Union and/or Article 8 of the European Convention on Human Rights. Particular emphasis was placed on the fact that the premises searched were those of a law firm.

Breach of right to information

14. Under this heading the applicants contend that An Garda Síochána is in continuing breach of their right to information in criminal proceedings and access to materials pursuant to Article 6 and 7 of Directive 2012/13/EU and/or Article 40 of Bunreacht na hÉireann and/or Article 6 and 47 of the EU Charter and/or Article 5 ECHR. It is alleged that An Garda Síochána have refused or failed to provide the applicants with all the materials and evidence on which the Gardaí based its reasons to believe that a criminal offence had been committed. It is also asserted and that there had been a refusal or failure to provide the applicants with copies of correspondence from the Central Bank of Ireland including a referral under s. 19 of the Criminal Justice Act, 2011 dated the 24 April 2020 which initiated the investigation.

Breach of property rights

15. Here it is alleged that An Garda Síochána was in breach of the applicants' due process rights and property rights under Article 40 of Bunreacht na hÉireann and/or EU Charter and/or Article 5 ECHR by failing to process the investigation in an impartial or fair manner within a

reasonable period of time and by failing to protect or vindicate the applicants' property rights by depriving them of the value of bank notes under investigation without sufficient reason and for an unreasonable period of time.

Unconstitutionality

16. Under this heading it is alleged that s. 10(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997 is incompatible with the Constitution for failing to incorporate any procedural or prescriptive measures to protect privacy rights and/or is incompatible with the ECHR for much of the same reason.

THE RESPONDENTS' CASE

17. The application for discovery involves arguments that the respondents have failed to comply with its duty of candour. While that argument will be addressed in more detail below, it is important to set out in some detail what the respondents have sought to explain in responding to the proceedings.

18. In the statement of opposition dated the 30 January 2024, the respondents oppose the application for judicial review on a large number of grounds. Essentially the first 57 paragraphs of the statement of opposition are given over to a description of the factual grounds as contended for by the respondents. Those factual grounds confirm that the first named applicant is a suspect in an investigation by An Garda Síochána into suspected money laundering offences contrary to s. 7 of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010. That investigation was commenced after the receipt by An Garda Síochána on 27 April 2020 of a statutory referral from the Central Bank of Ireland pursuant to s. 19 of the Criminal Justice Act, 2011. The referral from the Central Bank arose following two

applications made to it for the exchange of damaged bank notes. In that regard reference is made to judgments that were given in *Lawrence Shields v The Central Bank of Ireland* (1) [2020] IEHC 518, [2022] IECA 241 and *Lawrence Shields v The Central Bank of Ireland* (2) [2021] IEHC 444, [2022] IECA 250.

19. The factual narrative provides more detail on the course of the investigation and notes that on the 3 March 2022 a Detective Sergeant with the GNECB made an application to the District Court for a search warrant to search the second applicant's premises. The statement of opposition notes that that the application was grounded on sworn information (the *Information*) for a search warrant sworn by the Detective Sergeant on the 3 March 2022, and an extract from the Information is set out.

20. The statement of opposition identifies that on the 4 March 2022, in addition to but independent of the search team that was carrying out a search of the premises pursuant to the search warrant, an arrest team entered the second applicant's premises pursuant to s. 6 of the Criminal Law Act, 1997 in order to effect an arrest of the first named applicant. In the course of effecting the arrest of the first named applicant, his mobile phone was seized 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.

21. As noted above, the statement of opposition confirms that the investigating Gardaí have not viewed or examined the data extracted when a digital copy was created of the contents of the phone. The statement of opposition notes that when the first named applicant was offered but refused the opportunity to have the memory stick containing the data extracted from his phone left with his staff at his office. Ultimately, on the 24 May 2022, the first named applicant was provided with the digital copy of the data from his mobile phone. The statement goes on to note that the Chief State Solicitors Office wrote to the applicant's solicitors by letter dated the 3 November 2023 indicating that An Garda Síochána intended to apply for a search warrant

pursuant to s. 10 of the 1997 Act to search the mobile phone for evidence of money laundering offences. The letter included a proposed protocol for the examination of the relevant data contained on the mobile phone while respecting his assertion of legal professional privilege. That protocol appears to be relatively extensive, however the applicants did not seek to engage with the protocol but instead made an application to the High Court for injunctive relief.

22. While this is not a matter addressed in the statement of opposition because it occurred later in time, it can be noted that the applications for injunctions were refused by the High Court and that refusal was upheld on appeal by the Court of Appeal.

23. Finally, from the point of view of the factual narrative, the statement of opposition notes that on the 29 November 2023 the Chief State Solicitors Office disclosed an unsworn version of the Information grounding the application for a search warrant to the applicants. The statement of opposition also notes that the investigation file in relation to the money laundering investigation conducted by GNECB has been submitted to the office of the Director of Public Prosecutions and directions are awaited.

24. The statement of opposition goes on to outline the legal basis for the States' opposition to the applicants' application for judicial review. These are grouped under a variety of headings.

25. In the first instance it is asserted that the applicants' application for judicial review is premature. The respondents note that, at the date when the statement of opposition was being prepared, An Garda Síochána had not examined the content of the phone and was proposing applying for a search warrant in order to conduct a targeted, proportionate search of the phone.

26. Secondly, it was asserted that the application for judicial review constituted an impermissible attempt to interfere with an ongoing Garda investigation and that the applicants have no entitlement in law to seek to prohibit the investigation in its entirety or to restrain An Garda Síochána from submitting a file to the DPP or to force An Garda Síochána and the DPP

to decide whether to prosecute before the investigation has concluded. Under this heading it was noted that if the investigation resulted in charges being brought against the applicants or either of them it would be open to them to challenge the legality of the search warrant or the admissibility of any evidence obtained on foot thereof during the ensuing criminal trial.

27. The statement of opposition goes on to respond to the legal grounds relied on by the applicants and denies each and every accusation of wrongdoing. However, the statement of opposition does not purport to rest on bare denials, the respondents set out a detailed response to the claims that have been made.

28. It was asserted that An Garda Síochána were lawfully entitled to commence an investigation into suspected money laundering offences and that the steps taken were fully justified having regard to the nature of the suspected offences and the Information available to An Garda Síochána. It was asserted that the search warrant which is the subject matter of the proceedings was issued and executed in accordance with law. The respondents deny that the District Court judge acted otherwise than in accordance with law in issuing the search warrant and that, on the basis of the Information grounding the application, there were reasonable grounds for issuing the warrant such that the District Court judge lawfully was entitled to do so. The respondents contend that the sworn Information was clear that the premises sought to be searched was the law offices of a solicitor's firm, and it was denied that no regard was had to the rights of the applicants or their clients.

29. The respondents deny that either the issuing of the search warrant by the District Court judge or its execution by members of An Garda Síochána impermissibly breached the applicants' privacy rights. In that regard, it is asserted that the Information grounding the application for a search warrant expressly noted on numerous occasions that the premises sought to be searched was a solicitor's office. The respondents contend that there was no requirement in law that An Garda Síochána must use methods other than a search warrant,

particularly where the evidence sought to be obtained was in the possession of a suspect in a criminal investigation. The respondents state that all evidence seized by An Garda Síochána was seized as part of the investigation into suspected money laundering offences as expressly authorised by the warrant.

30. The respondents contend that the first named applicant's mobile phone was not seized pursuant to the power in the search warrant but rather was lawfully seized by the arrest team following a lawful search of the first named applicant consequent on his arrest. Again, it is reiterated that, at that point, An Garda Síochána had not examined any of the content of the mobile phone and intended to seek a further search warrant in order to do so.

31. The respondents contend that, insofar as the applicants claim that they are entitled to information or materials pursuant to Directive 2012/13/EU, this claim is premature where the investigation is ongoing and no charges have been brought. Essentially the claim is made that there is no requirement on An Garda Síochána to disclose any information or correspondence or material before the investigation has closed and before any decision to bring charges has been made. The statement of opposition notes that if charges are brought against the applicants, they will be entitled to receive copies of any potentially inculpatory or exculpatory evidence in accordance with the usual disclosure obligations which apply as part of the criminal trial process.

32. The respondents contend that there is no basis in law for the proposition that there is any requirement to provide materials or evidence before the investigation has concluded and before any charges have been. They assert that any such proposition would be unworkable and would seriously prejudice An Garda Síochána in the discharge of its statutory functions in detecting an investigating crime. Essentially, it is contended that this aspect of the claim constitutes an impermissible attempt to interfere in an ongoing investigation.

33. At para. 71 of the statement of opposition the respondents assert a claim of public interest privilege over documents generated for the purpose of the criminal investigation. The statement of opposition goes on to deny that there is any breach of the applicants' property rights or that s. 10 of the 1997 Act is unconstitutional or incompatible with the States obligations pursuant to the ECHR. At para. 74 the respondents assert as follows: -

> *"74. No breach of the Applicants' rights has occurred. The First Named Applicant's mobile phone was lawfully seized during a search of the First Named Applicant consequent on his arrest. An Garda Síochána has not examined the content of that phone. An Garda Síochána intend to apply to the District Court for a search warrant permitting a digital search of the phone and have suggested a protocol for the protection of legal professional privilege in order to preserve any privileged material contained on the phone. Adherence to the proposed protocol will enable the applicants to prevent any legitimately privileged material from being examined by An Garda Síochána."*

34. In terms of the relief being claimed, the respondents assert that an order quashing the search warrant would be futile in circumstances where the warrant is spent having been executed. This is without prejudice to the assertion that the search warrant was issued lawfully.

35. Further, it is contended that the unsworn version of the Information was provided to the applicants by letter dated the 29 November 2023 and an order of *Mandamus* in respect of the Information would serve no purpose. Insofar as the applicants seek "*copies of all the material which comprised and formed the basis of*" the Information, this is something to which the applicants have no entitlement, and the respondents claim privilege over those materials as forming part of an ongoing Garda investigation.

36. The respondents go on to contest the assertion that the applicants have an entitlement to an order compelling An Garda Síochána to make a final determination as to whether there is evidence to support a charge that any criminal offence has been committed or any entitlement to an order prohibiting An Garda Síochána from taking further steps in the investigation and/or from submitting a file to the DPP. Similarly, it is asserted that the applicants have no entitlement in law to an order restraining any member of An Garda Síochána from examining the data downloaded from the first applicant's mobile phone or to an order of *Mandamus* directing the return of that phone.

LEGAL PRINCIPLES

37. Given the extent of the disputes between the parties and the breadth of the arguments that were deployed, it may be helpful if I begin by summarising the legal principles that I intend to apply to this application. The parties directed the attention of the court to a number of authorities that were said to support their respective arguments concerning the discovery issues. I have considered those authorities, which are well established. It is not necessary to rehearse the full detail of those authorities and my focus will be on the key principles that I consider applicable to the decision in this application.

38. I will address below how the nature of judicial review proceedings means that while the same rules that operate in other litigation remain applicable, ordinarily there are fewer reasons for discovery in a judicial review case. I will also address the questions of how claims of public interest privilege and confidentiality impact on the necessary analysis, and how the duty of candour in judicial review interacts with claims for discovery. However, the starting point must be the well-established rules concerning when a party can successfully apply for an order for discovery. In that regard, the meaning of the process provided for in Order 31 rule 12

of the RSC has been described in detail by the Supreme Court and Court of Appeal in a number of relatively recent cases, including *Tobin v. Minister for Defence* [2020] 1 I.R. 211 (*Tobin*), and *Ryan v. Dengrove DAC* [2022] IECA 155 (*Dengrove*).

39. As noted by the Court of Appeal in *Dengrove*, the primary test continues to be whether the documents sought are relevant to the issues in the proceedings. In that judgment the Court made the following points about the approach to be adopted to discovery in general:

a) Relevance is to be assessed by reference to the pleadings and particulars.

b) Relevance must be demonstrated as a matter of probability. " *It is not for the Court to order discovery simply because there is a possibility that documents may be relevant"* (*Hannon v Commissioner of Public Works* [2001] IEHC 59 (per McCracken J at page 3)).

c) It follows that a party "*may not seek discovery of a document to find out whether the document may be relevant*" and "*must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information*." (*O'Brien v. Red Flag Consulting Limited* [2021] IECA 258, para. 5 and 21.4 respectively).

d) *"A vague, unsubstantiated assertion may not be used to justify a trawl through an opponent's documents in the hope that the allegation will crystallise into a substantial one. Moreover, a party may not make a vague or unparticularised plea of wrongdoing and then seek discovery in the hope of obtaining documents which will reveal evidence in support of that allegation."* (Abrahamson et al, *Discovery and Disclosure*, 3rd ed, 2019, at para 6-35)

e) In addressing whether discovery is "*necessary*", the degree of relevance of the documents may be a relevant consideration: *"in considering the*

necessity of the discovery of relevant documents the nature and potential strength of the relevance is a consideration to be taken into account" (*Boehringer Ingelheim Pharma GmbH v. Norton (Waterford) Ltd* [2016] IECA 67)

f) Proportionality requires that "*there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent*." (*O'Brien v. Red Flag Consulting*, para. 21.9)

40. In the specific context of judicial review proceedings, it is clear that the same general rules apply. The point of distinction between judicial review proceedings and plenary cases is that more often than not there are fewer facts in issue and instead the focus is on the legality of a particular decision or series of decisions. As a result, the scope for discovery in judicial review tends to be reduced.

41. In *McEvoy v An Garda Síochána Ombudsman Commission* [2015] IEHC 203, McDermott J. considered an application for discovery in judicial review proceedings in which the applicant, *inter alia*, sought to quash a decision by the respondent deeming a complaint admissible pursuant to s. 87 of the Garda Síochána Act, 2005. McDermott J. considered authorities, including *Ryanair Plc v. Aer Rianta* [2003] 4 I.R. 464, *Framus Limited v. CRH Plc* [2004] 2 I.R. 20, *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 36, *Carlow Kilkenny Radio Limited v. Broadcasting Commission* [2003] 5 I.R. 528, *Kilkenny Communications v. Broadcasting Commission* [2004] 1 ILRM 17, and *Fitzwilton v. Judge Mahon* [2006] IEHC 48. Having done so, at para. 25, McDermott J. stated that the issue of discovery in judicial review proceedings should be approached on the following basis:

"1. An order for discovery should only be granted where the applicant seeking discovery establishes that it is relevant and necessary for the fair disposal of the issues in the case, in the sense indicated by Brett L.J. in the Peruvian Guano case:

2. The court must determine whether the documents sought are relevant to the issues to be tried as determined from the pleadings:

3. A party may not seek discovery in order to find out whether a document may be relevant and a general trawl through a party's documentation is not permitted. However, a reasonable possibility that the documents are relevant is sufficient.

4. Judicial review is not concerned with the correctness of a decision but the way in which the decision was reached. Therefore, the categories of documents which a court would consider necessary to be discovered would be much more confined than if the litigation was related to the merits of the case and this necessarily restricts what may be regarded as appropriate discovery.

5. Discovery will not normally be regarded as necessary if the judicial review application is based on impropriety which may be established without the benefit of discovery:

6. If a decision is challenged as unreasonable or irrational, discovery will not be necessary because, if the decision is clearly wrong, it is not necessary to ascertain how it was reached:

7. Discovery may be necessary where there is a clear factual dispute on the affidavits which must be resolved in order to adjudicate properly or fairly on the application or where there is prima facie evidence to the effect that

a document that ought to have been considered before a decision was made was not or a document which ought not to have been seen before a decision was made, was considered:

8. *The court must consider whether discovery is necessary having regard to the grounds upon which the application was founded or the state of the evidence (per Laffoy J. in Fitzwilton cited above. But the question must be decided in respect of the issues that arise on the judicial review application rather than the substantive issue which was before the decision maker."*

42. The general principles later were discussed by Barniville J. (as he then was) in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2019] IEHC 85, where the following brief summary was set out:

> "*17. The leading decision in this jurisdiction is the decision of the Supreme Court in Carlow Kilkenny Radio Limited v. Broadcasting Commission [2003] 3 I.R. 528 ('Carlow Kilkenny'). In Carlow Kilkenny, Geoghegan J. who delivered the judgment of the Supreme Court in that case, endorsed the statement of principle made by Sir Thomas Bingham M.R. in R. v. Secretary of State for Health ex parte Hackney London Borough (Unreported, English Court of Appeal, 24th July, 1994) ('Hackney'). Essentially, discovery will be ordered in judicial review proceedings where the documents in question are 'necessary for disposing fairly of the application but not otherwise' (per Bingham M.R. at p. 82, quoted by Geoghegan J. in Carlow Kilkenny at p. 534 and by Noonan J. in Barry at para. 10, p. 5).*

18. In Fitzwilton Limited & Ors v. Judge Alan Mahon & Ors [2006] IEHC 48 ('Fitzwilton'), Laffoy J. in the High Court observed that:-

> *'In my view, the recent Irish authorities clearly establish that the same principles apply to discovery in judicial review proceedings as apply generally in civil proceedings, although, primarily by reason of the nature of the process, the relief afforded and the issues which arise in judicial review proceedings, the practical application of the principles may result in discovery being less frequently ordered in judicial review proceedings than in other civil proceedings.' (per Laffoy J. at p.12)*

19. It follows, therefore, that the twin requirements of relevance and necessity in O. 31 RSC must, therefore, be satisfied. However, it is generally more difficult to establish the test of necessity in judicial review proceedings than in ordinary proceedings for the reasons summarised by Laffoy J. in the passage from Fitzwilton quoted above. On the issue of necessity, Geoghegan J. described the test Carlow Kilkenny as follows:-

> *'Where discovery will be necessary is where there is a clear factual dispute on the affidavits that would have to be resolved in order properly to adjudicate on the application or where there is prima facie evidence to the effect either that a document which ought to have been before the deciding body was not before it or that a document which ought not to have been before the deciding body was before it.' (per Geoghegan J. at 537)*

20. In Fitzwilton, Laffoy J. observed:-

> *'What clearly emerges from a review of the recent Irish cases is that, where discovery is sought in judicial review proceedings, the determinant*

> *as to whether discovery will be ordered in many cases is whether it is necessary having regard to the ground on which the application is founded or the state of the evidence.' (per Laffoy J. at p.16)*
>
> *21. In the same vein, in Kerins v. McGuinness [2015] IECA 267, Finlay Geoghegan J. in the Court of Appeal stated (having cited with approval, the dicta of Bingham M.R. in Hackney) that while the same rules on discovery apply in judicial review proceedings as in other civil proceedings, having regard to the nature of judicial review, it is more difficult to establish the tests of relevance and, in particular, necessity.*
>
> *22. I conclude this very brief review of the legal principles by referring to Hogan & Morgan Administrative Law in Ireland (4th ed., 2010) where, having reviewed the authorities, the distinguished authors stated (at para. 16-69) that 'discovery in judicial review applications is thus generally confined to cases where information is improperly withheld or where there is a relevant and material conflict of fact in the affidavits' (para. 16-69, p. 846)."*

43. These are the general principles that I intend to apply in approaching the application for discovery herein. What emerges is that where an applicant in a judicial review is seeking discovery, that party must establish that it is relevant and necessary for the fair disposal of the issues in the case, as framed by the pleadings. It should be noted that what is required is a factual dispute in the pleadings. This should not be confused with expressions of disagreement in the affidavit. Very often, and this occurred in this case, the various affidavits contain strong expressions of disagreement with what has been said by either party. That is not the same as a material conflict of fact. A material conflict of fact is a dispute concerning a factual matter that will have to be adjudicated on by the trial court in order to decide whether the relief sought

should be granted. Hence, for instance, the fact that in this case the parties are in dispute as to whether the proceedings are an improper attempt to interfere in an ongoing criminal investigation is not a material conflict of fact.

SUMMARY OF THE ISSUES

44. A striking feature of the application in this case was that the applicants made detailed and sophisticated legal submissions on the general principles that they said should apply to applications for discovery in judicial review. The difficulty with the approach adopted by the applicants was not necessarily with the arguments from principle but arose from a failure to link those arguments forensically with the factual premises of the case. As noted above, applications for discovery in judicial review must start from a consideration of the pleadings and proceed to identify how the resolution of the legal issues will rely, in turn, on the resolution of disputed material facts. The relationship of the disputed material facts to the pleaded legal issues generates the framework for determining the potential relevance of the categories of documents that a party seeks to have disclosed by its opponent.

45. Ensuring the fair and proper resolution of factual disputes that are material to the legal issues is central to any application for discovery. Hence, and particularly where judicial review proceedings focus on the legality of the actions of a respondent public authority, it is important to note what actually is in issue in the proceedings by reference to the pleaded claims.

46. In this case it is notable that the reliefs sought largely are not dependant on the resolution of any contested facts. The first and primary relief seeks the quashing of a search warrant on the basis that the District Court could not have been satisfied on the basis of the Information that there were any reasonable grounds for suspecting that evidence relating to the commission of an arrestable offence was to be found at the firm's office.

47. Insofar as the applicants seek to have the legislative provision which permitted the issuing of the search warrant declared unconstitutional, this seems to be a legal issue, and it is hard to understand what evidence could be obtained by way of discovery that could assist in that determination.

48. Further reliefs relate to the treatment of the data downloaded from the first applicant's mobile device: the phone is to be returned, and the data copied is not to be accessed and must be destroyed. Thereafter orders are sought prohibiting the continuation of the investigation and requiring a decision to be made as whether there is sufficient evidence to support charges.

49. Finally, it can be noted that one of the substantive reliefs sought in the proceedings involve orders compelling the respondents to provide the applicants with the materials that gave rise to the Information.

50. The legal basis upon which the reliefs are sought are grounded in assertions of fact that appear largely uncontested. As noted above, the search warrant arguments depend on the quality of the contents of the Information and the assertion that no proper regard was had to the fact that a search was being carried out in a solicitor's office. The respondents accept that a search warrant was sought, they have provided the applicants with the Information, and they say that the Information makes clear that regard was had to the fact the warrant was sought to search a solicitor's office.

51. Insofar as there is a claim that the respondents have failed to comply with obligations set out in Directive 2012/13/EU or otherwise failed to make proper disclosure to the applicants, this will depend on the proper interpretation of the various instruments relied on by the applicants. The factual premise of this aspect of the claim is not in issue: the applicants say that they are entitled to the information and the respondents say that any entitlement to the information or materials does not operate until the investigation is concluded and a decision is made as to whether or not charges will be brought. It can also be noted that one of the premises

of the argument relating to the Directive 2012/13/EU is that the respondents ought to have but have not yet furnished the applicants with the correspondence and materials that the Central Bank provided to the Gardai. Again, the respondents and the Central Bank accept that information was provided, their argument is that they are not obliged to share that information during an ongoing criminal investigation.

THE DUTY OF CANDOUR

52. The issue of candour also was addressed in *Cork Harbour Alliance*, where Barniville J noted, at para. 41:

> "*41. Insofar as the applicant seeks to rely on the duty of candour on the part of the Board as a statutory body whose decisions are subject to judicial review, I fully agree that the Board has a duty of candour (and this issue is addressed in more detail below when dealing with the further relief sought by the applicant at para. 3 of the notice of motion). The Board has a duty to be up front in the manner in which it defends judicial review proceedings. It is not suggested by the Board that it is not subject to that duty. It disputes that it has been in breach of the duty.*
>
> *42. The Supreme Court very recently commented on this issue in RAS Medical Limited trading as Parkwest Clinic v. Royal College of Surgeons in Ireland [2019] IESC 4 ("RAS"). At para. 6.9 of his judgment, Clarke C.J. stated:*
>
> > *'As was noted by Lord Donaldson M.R. in R. v. Lancashire County Council Ex p. Huddleston [1986] 2 All E.R. 941, such parties [i.e. public*

authorities] should conduct public law litigation "with all cards face upwards on the table".'"

53. Barniville J. noted that he had not been directed to an example of a case dealing with the duty of candour in which an order for discovery of the type sought in that category has been made. The Court went on to address the approach to be adopted, from paragraph 56 of the judgment, and I have underlined aspects of the extract that seem particularly apposite:

"*56. I have again carefully considered the submissions of the parties on this issue and have concluded that it would not be appropriate for me to make the order sought by the applicant. I fully accept that public bodies such as the Board, in defending judicial review proceedings, are subject to a duty of candour. This is clear from several Irish cases. It is only necessary briefly to touch on a small number. In O'Neill, Keane C.J., in the Supreme Court, described as ' well-founded' an argument made on behalf of the applicants that ' in judicial review proceedings a respondent should disclose to the court all the materials in its possession which were relevant to the decision sought to be impugned', although he stated that respondents would not be required to disclose privileged material (see para. 49 of the judgment of Keane J. in O'Neill, at p. 316). In Carlow Kilkenny, Geoghegan J. described the respondent in the proceedings as being 'entirely up front in disclosing both its procedures and the documentation which was before it' (at p. 538).*

57. The Irish and English authorities were very helpfully recently reviewed, and the applicable principles in relation to the duty of candour summarised, by the High Court (Barrett J.) in Murtagh. I agree with and adopt the principles summarised by Barrett J. at para. 25 of his judgment. It is unnecessary for me

to repeat them here. Finally, as pointed out by the applicant, Clarke C.J. in delivering the very recent judgment of the Supreme Court in RAS expressly endorsed the card playing metaphor suggested by Lord Donaldson M.R. in Huddleston (see para. 6.9 of the judgment of Clarke C.J.).

58. On the question as to whether the court has a jurisdiction to make an order of the type sought by the applicant<u>, I accept that, in principle, if the court were satisfied that there was a clear breach of the duty of candour on the part of a respondent, the court could fashion the necessary remedy to address that breach.</u> However, the sort of remedies which one might expect might be granted in such a situation would include an order for costs, a formal order for discovery in respect of any documents not disclosed, an order precluding the respondent from relying on documents not disclosed and even, in a very serious case, a fine or other penalty for contempt of court. Indeed, I note that these are the sort of orders which are referred to in the Treasury Solicitor's Guidance relied upon by the applicant (see para. 1.6 on p. 8 of that document). I am not aware of any case in which an order of the type sought by the applicant has been made and the applicant has not been in the position to point to any such case. It is not given as one of the examples of the possible orders which could be made in the Treasury Solicitor's Guidance. However, notwithstanding that, I am prepared to proceed on the basis that the court may have a jurisdiction to make an order such as is sought by the applicant in an appropriate case. However, it seems to me that the court could only exercise that jurisdiction in a most exceptional situation, where there was a clear and obvious breach of the duty of candour. I am not satisfied that the circumstances of this case come anywhere near meeting

> *that test, at least on the basis of the material before me on this interlocutory application."*

54. Hence, it is possible for discovery to be sought in respect of documents which ought to have been disclosed as part of the duty of candour. However, there is no indication that such orders should be made without a consideration in the first instance of whether the documents sought are relevant and necessary to the matters at issue. It seems to me that candour does not extend to a duty to disclose irrelevant documents. Insofar as the court – independently of an application for discovery - may order disclosure of materials because of a want of candour, this is an exceptional remedy to be granted only where there is a clear and obvious breach of the duty of candour.

55. The Court of Appeal has commented recently on the duty of candour and the question of the applicability of the *State Litigation Principles* to that concept. *Elsharkawy v Minister for Transport* [2024] IECA 258 concerned a situation in which the applicant asserted that the respondent to judicial review proceedings had deployed legal advice in its opposition papers, and, on that basis, sought disclosure of the advice concerned. In her judgment, Butler J. considered the case law on the duty of candour and identified how the operation of that duty was affected by the amendments that were made to Order 84 with respect to the question of the contents of a statement of opposition.

56. The Court started from the premise that the position of public authorities in public law litigation is different from that of defendants in other litigation. Public authorities have duties and responsibilities regarding the implementation and administration of the law which do not generally apply to other defendants. The positive obligation on a public authority to uphold the law is materially different to and higher than the obligations of other citizens. The well-rehearsed observations of Donaldson MR in *R. v. Lancashire County Council, ex parte*

Huddleston [1986] 2 All ER 941 (*Huddleston*), that the process by which a respondent public authority resists an application for judicial review requires to be "*conducted with all the cards face upwards on the table*", stemmed from the earlier observations that (a) the evolution of judicial review has brought about a new relationship between the courts and those who derive their authority from public law, (b) a public authority should not be partisan in their defence, and (c) that it is not discreditable for a public authority to get things wrong, what is discreditable is a reluctance to explain fully what has occurred and why.

57. Butler J. then noted that while the duty of candour remains an important principle, since *Huddleston* some of the concerns that led to the observations of Donaldson MR have been overtaken by developments such as principles of openness and transparency which are expressed in a variety of ways, including through the Freedom of Information and Data Protection legislation. In addition, the changes to Order 84 now require respondents to do more than simply denying the applicant's claims. As explained by the Court:

> "*44. Where something is denied because it is disputed, the respondent should make clear the basis on which it asserts that a particular legal or factual proposition is incorrect. Although the applicant bears the onus of establishing the facts or matters relied on in a claim for judicial review, a denial which is intended to put the applicant on proof of something within the knowledge of the respondent cannot have that effect in practice unless the respondent has made full and fair disclosure of all relevant material whether through procedures such as those described in para.42 of this judgment* [which referred to Freedom of Information, data access requests, and specific provisions that require authorities to disclose materials] *or otherwise…"*

58. The Court of Appeal in *Elsharkawy* also made clear that while the State Litigation Principles adopted by the Government and Attorney General in June 2023 constitute a positive step, it would be contrary to the express terms of the Principles and the spirit in which they were adopted to allow them to be relied upon in litigation.

59. It should be noted that while the judgment in *Elsharkawy* was delivered after the hearing of this application, I did not consider it necessary or appropriate to recall the parties to make arguments about the effect of the judgment on this case. This was because I consider that the judgment did not alter the principles regarding the duty of candour, but instead provided an extremely useful contextual analysis of those principles. In relation to the approach to arguments grounded on the effect of the State Litigation Principles – which were a feature of the applicants' submissions – this court is bound by the findings of the Court of Appeal. Hence, even if the applicants disagreed with the findings in *Elsharkawy,* it could not alter my obligation to follow those findings.

60. In this case, the applicants assert that there has been a breach of the duty of candour. They argue that where the contents of a document are significant to a decision and where that document is summarised by the respondent, it is better that it be exhibited. That assertion is grounded on the following observations by Lord Bingham in *Tweed v. Parades Commission* [2007] 1 AC 650:

> "*Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task*

without sight of the document. It is enough that the document itself is the best evidence of what it says."

61. The applicants then assert in their written submissions:

> *"Obviously a statement of a fact relied on in opposition then requires disclosure of evidence of the evidence supporting it applying the principles governing candour (see Tweed in particular). The statement demonstrates materiality and then the best evidence rule applies."*

62. In the first instance, I consider that the legal argument made by the applicants goes much further than anything required by the duty of candour. I do not in any sense disagree with the statements made by Lord Bingham in *Tweed*, however, it is clear that they are framed at a high level of principle and qualified. Lord Bingham did not say that all documents referred to in opposition papers must be disclosed. What was referred to were documents that were significant to a decision that was challenged, and, even then, the obligation to disclose only arose "*ordinarily*". This is an important qualification as there may be situations where the document does not need to be disclosed.

63. Secondly, I do not agree that the authorities support the general proposition that the duty of candour requires the disclosure of *any* evidence supporting *any* statement of fact made in opposition papers. In my view that assertion very much overstates the scope of the duty. The question of whether there has been compliance with the duty of candour requires a consideration of the overall opposition papers, the materiality of any statement therein, and a consideration of any reasons why a document or materials should not be disclosed.

64. In this case the court is not satisfied that the applicants have established that there has been any failure on the part of the respondents to comply with the duty of candour. The

respondents' opposition papers are very clear in terms of framing the issues that they say arise, explaining why they disagree with the construction of events contended for by the applicants, and in setting out an extensive rehearsal of the factual backdrop to the proceedings.

65. The respondents have furnished the applicants with an unsworn version of the Information that was before the District Court and that was relied on in seeking the search warrant. The respondents are clear that they possess further materials, documents and evidence that are relevant to the underlying criminal investigation. The respondents have also made clear that, as matters stand, they do not intend to volunteer that material because they consider that to do so would compromise an ongoing criminal investigation in which there has not been a decision to prosecute, and where they have stated that they intend to assert public interest privilege in response to any application for the disclosure of those materials.

66. The court's view is that the duty of candour does not automatically require a public body that is investigating a potential criminal offence to disclose materials generated in the course of that investigation where a potential suspect brings judicial review proceedings that relate to that investigation. I agree with the submissions made by the respondents that there are strong established public policy reasons why in the context of the duty of candour such documents ordinarily should not be disclosed.

67. This is not to say that such documents will always or automatically be protected from disclosure. As the Court of Appeal made clear in *A. v. B. and the Commissioner of An Garda Síochána* [2024] IECA 95, and *Child and Family Agency v. A.P. and B.P.* [2024] IECA 94, there is no "*carve out*" for materials gathered in the course of a Garda investigation from the principles established by *Murphy v. Dublin Corporation* [1972] IR 215 as to the jurisdiction of the courts to resolve conflicting claims of public interest. However, that requires a consideration of the sequencing involved in those situations.

68. As noted above, in all cases where there is a disagreement about whether there should be disclosure of documents that are relevant and necessary to the fair resolution of issues, a party may seek discovery. Ordinarily, where one of the parties is a public authority that seeks to assert public interest privilege over documents that fall within a category of document that has been found to be relevant and necessary, the proper course of action is for an affidavit of discovery to be sworn and for the documents to be scheduled as privileged. At that point, if the requesting party seeks to challenge the public interest privilege claim a further application can be made to the court seeking production and inspection of the contested documents. The ultimate decision as to whether the documents will be disclosed is one for the courts and arises as part of the court's judicial function. The need for those procedures reflects the fact that what is in issue involves a balancing of rights. The procedures operate to protect the rights of both parties.

69. The duty of candour, in the form asserted by the applicants, would undermine that balancing of rights if it required an automatic disclosure of potentially privileged documents simply because they were material to a statement in a party's opposition papers. Moreover, as pointed out by the respondents, there are very compelling public policy arguments for rejecting any proposition that the commencement of judicial review procedures by a potential suspect seeking to challenge an ongoing criminal investigation gave rise to some form of automatic requirement the disclosure of materials generated by that investigation. It is not far-fetched or speculative to suggest that this would have a profoundly damaging effect on the public interest in the proper investigation and prosecution of criminal offences.

70. That being so, the court rejects the arguments made by the applicants to the effect that disclosure of the documents sought should be ordered by reference to the respondents' duty of candour. I will now turn to the question of discovery.

SUMMARY OF DISCOVERY CATEGORIES

71. The applicants initially sought voluntary discovery of three categories of documents by letter dated the 1 June 2022. The first voluntary discovery letter is described in and exhibited to an affidavit sworn by Kevin Winters, the solicitor for the applicants, on the 30 November 2022. Following receipt of the opposition papers, the applicants sent a further letter dated the 19 February 2024 seeking an additional category of document. The second voluntary discovery letter is described in and exhibited to an affidavit sworn by Colin McMenamin, a solicitor acting for the applicants, on the 12 March 2024. Further correspondence was exchanged concerning the requests for voluntary discovery, but no agreement was reached.

72. At the outset it is essential to reiterate that discovery has been sought within the context of judicial review proceedings. The core issues raised in these proceedings relate to the legality of the searches carried out by An Garda Síochána. With very few exceptions, there is little disagreement around the central facts. The disagreement lies in the competing contentions about whether the Information that grounded the application for the search warrant was sufficient to allow the District Court to make the decision that was made. This case is not about the nature or extent of the obligations of the State to disclose information if charges are brought. The respondents have made clear that they will make full and proper disclosure in the ordinary way in the event that charges are brought. This case is concerned with the legality of the search warrant, the treatment of the data taken from the first applicant's mobile device, and the extent to which (if any) the Directive requires disclosure of information to suspects during the course of an investigation and before a charging decision has been made.

73. The categories of discovery are listed (A) to (D):

Category A

74. Under Category A, the following documents are sought:

> "*A copy of all of the materials which An Garda Síochána put before the District Court in its application for the Search Warrant, the subject of these proceedings, and which comprised and formed the basis of the "information on oath and in writing" sworn by Detective Sergeant Gary Sheridan of the Garda National Economic Crime Bureau on the 3rd March 2022 as referred to in the Search warrant*."

75. The Applicant claims that discovery of the documents in Category A are relevant and necessary. This is predicated on their submission that the Search Warrant was issued unlawfully because the District Court Judge could not have been satisfied upon the "*information on oath and in writing"* furnished by the second respondent that there were reasonable grounds for suspecting evidence of an arrestable offence at the offices of the second applicant. In that regard they refer to the reliefs sought at paragraphs (d)(1) – (d)(2) of the statement of grounds and the grounds set out at paragraphs (e)(1) – (e)(3) in the same document.

76. The relief sought in (d) 1 and 2 are orders quashing the search warrant and orders compelling An Garda Síochána to provide copies of the materials which formed the basis for the Information. The grounds relied on in support of the application for those reliefs are that the search warrant was unlawful and breached the privacy rights of the applicants. In turn, this is asserted to be because the District Court could not have been satisfied upon "*the information on oath and in writing*" that there were reasonable grounds for suspecting that the evidence of or relating to the commission of an arrestable offence was to be found at the firm's office. Other elements of the claim include assertions relating to the status of the applicants as "designated persons" for the purposes of section 25(1)(d) of the 2010 Act, claims that no regard

was had to the whether the applicants had carried out or were compliant with their due diligence, reporting or training obligations under the 2010 Act, and claims relating to the fact that the premises was a law office. The breach of privacy rights claims are grounded in the fact that the applicants were engaged in the practice of law.

77. In the letter seeking voluntary discovery the applicants assert that the documents are required because the District Judge is not a party to the proceedings, and therefore, it is said, sight of the documents is required to make a determination on the issue. The applicants highlight that the respondents' opposition papers and in particular an affidavit of Garda Inspector Meighan of the 19 May 2022 includes an averment that there "*is no evidence to support the claim that the Search Warrant was unlawfully issued*". Insofar as the applicants were provided with a copy of the Information after the commencement of the proceedings, they contend that this is not sufficient, and that they require the documents that formed the basis of the Information.

78. The respondents gave a number of common reasons why discovery of the documents sought under all the categories should not be provided. These were addressed substantively in regard to the Category A discovery request, but have been repeated in each subsequent category of discovery. The respondents also made clear that in the event that discovery was ordered, they intended to assert a claim of privilege because of the context of the ongoing criminal investigation. The pertinent reasons are set out below.

79. In relation to the materials under Category A, relating to the search warrant, the respondents make the point that the Information has been provided to the applicants. The contention is that the decision on the lawfulness of the search warrant will depend on the content of the Information itself and not on the documents that may have been considered by the members of An Garda Síochána who formed the requisite belief underpinning the application for the warrant.

80. More broadly, the respondents contend that the discovery sought generally is in the nature of a fishing expedition and is a mechanism to permit the applicants to trawl the respondents' files relating to an ongoing criminal investigation. The respondents assert that it is incorrect for the applicants to place reliance on averments in the respondents' affidavits to the effect that the applicants' case is weak or unstateable. They say that those averments do not give rise to a material factual dispute which justifies discovery.

81. Fundamentally, the respondents say that sight of the documents sought is not necessary. While the documents may be connected in a broad sense to the reliefs sought in the proceedings, they do not relate to factual issues that fall to be resolved in order to determine whether the applicants are entitled to the relief claimed.

82. Finally, the respondents repeatedly reject the proposition that the applicants should be entitled to discovery of materials where disclosure of those materials is a substantive relief sought in the proceedings.

83. In relation to Category A, my view is that the applicants have not made out a proper basis why this category of discovery should be ordered. The question of whether the District Court acted lawfully in issuing the search warrant does not require disclosure of the documents that may have been considered by the Gardaí who prepared the Information. The issue will be determined by reference to the Information itself, and that has been provided to the applicants.

84. Essentially this is an issue that falls to be determined by the well-established requirement that the documents sought must be relevant to a dispute that needs to be adjudicated and are necessary in the context of that adjudication. I do not accept that the applicants have explained how the determination of the legality of the search warrant will require access to the materials that informed the preparation of the information.

85. I should also say that in circumstances where the respondents have set out an extensive narrative account of the events that led to the issue of the search warrant, I am not persuaded

that isolating certain comments from an affidavit that simply assert that the claim is unfounded or unsupported by evidence renders the subject matter of the comment a fact in issue in the proceedings.

86. In addition, the relief sought at (e)(2) is a substantive relief, which the applicants are asking the court to decide upon after a full hearing. There is a definite incongruity in the applicants seeking and being granted leave to apply for an order of *Mandamus* compelling the respondents to produce the documents that formed the basis of the information and then seeking those documents in an interlocutory application for discovery. However, it is not necessary to make any final decision on that issue in this application. In the premises, it is not necessary either to address the question of the sequencing for the determination of any claim to public interest privilege and whether the court ought to have determined the request for discovery in light of that proposed claim.

Category B

87. Under Category B, the applicants seek:

> *Copies of the correspondence and supporting materials sent from the Central Bank of Ireland ("CBI") to An Garda Síochána and dated 24 April 2020 (received by An Gard Síochána on 27 April 2020) by which the CBI made a referral under s.19 of the Criminal Justice Act 2011.*

88. The Applicant claims that the Category B data is necessary, predicated on their submission that the Search Warrant was issued and/or executed unlawfully as there were no "*reasonable grounds*" for suspecting evidence of an arrestable offence, relating to Grounds of Relief (d)(1) – (d)(4); (e)(1) – (e)(3). The applicants rely on the fact that both An Garda Síochána and the CBI refer to a letter dated the 24 April 2020 sent by the CBI to the GNECB

referring an allegation of a criminal offence but do not exhibit the relevant documents. The applicant also relies on the averment of Detective Inspector Meighan wherein he stated that the applicants had failed to adduce evidence in support of the relief sought.

89. It can be seen that this category of document is sought effectively on the basis that it is a subset of the broader tranche of documents sought under the Category A heading.

90. The respondents take issue with the applicants' argument that they are entitled to know the nature of the offence averred to in the letter dated the 24 April 2020 – arguing that this is either a legal submission or a ground of relief – but, regardless, it is not a ground for discovery. The respondents repeat that the applicants have failed to identify any factual contest which would justify this disclosure, and repeat their disagreement that Detective Inspector Meighan's rejection of the applicants' allegation that there were no reasonable grounds for the search warrant in and of itself generates a need for discovery.

91. In my view the application for discovery of the Category B documents must be refused for the same reasons that related to the refusal of the Category A documents. I have not been persuaded that these materials are relevant to or necessary for the resolution of the question whether the District Judge could have been satisfied that the requisite test for a search warrant had been met. As explained above, it seems to me that the question will be resolved by considering the Information in light of the relevant statutory provisions and by reference to the legal arguments that will be made. There is no need to interrogate the investigatory material that was gathered by An Garda Síochána and that informed the preparation of the Information.

Category C

92. Category C is described as:

> *A copy of any relevant forensic reports including but not limited to the forensic report designated "Report exhibit AFI FSI Larry Shield's €4950" which An Garda Síochána presented to the First Named Applicant in the course of his interview at Irishtown Garda Station on 4th and 5th March 2022.*

93. In almost identical terms to the reasons given for seeking the Category A and B discovery, the applicants states that the Category C data is necessary. This is rooted in their assertion that the search warrant was issued and/or executed unlawfully as there were no "*reasonable grounds*" for suspecting evidence of an arrestable offence, and is said to be related to the issues set out in grounds of relief (d)(1) – (d)(4); (e)(1) – (e)(3).

94. The applicants argue that this discovery is necessary because exhibit AF1 FS1 appears to refer to a forensic report on the bank notes that were sought to be exchanged with the CBI and which relate to Lawrence Shields. In that regard, the applicants emphasise what they characterise as a dispute regarding separate proceedings brought by Mr. Shields. They submit that that dispute supports the need for discovery.

95. The respondents refused voluntary discovery on the basis that "*no attempt to provide any coherent reason for discovery of this category*" had been given by the applicants, and nor has there been an attempt to explain the necessity nor identify any issue between the party that warrants this discovery.

96. In my view the applicants are conflating a potential factual dispute that may be identified within the affidavits, with a factual dispute that requires to be adjudicated in order to resolve the legal disputes on the pleadings. Again, the difficulty with the application is that there is no cogent or satisfactory explanation as to how having access to the report sought is

relevant to or necessary for the resolution of the question of whether the District Court could form the requisite view to issue a search warrant. In those premises, and for the reasons given in relation to categories A and B, I consider that this aspect of the application should be refused.

Category D

97. In relation to Category D, the applicants seek the following:

> *A copy of all the contemporaneous notes of the members of An Garda Síochána present during the search at the Law Offices of JT Flynn on 4th March 2022 including both the "search team" and "arrest team" as described at paragraph 19 of the Affidavit of Shane Fennessy, sworn on 30th January 2024, including but not limited to, the contemporaneous notes of Detective Sergeant Sheridan, Inspector Meighan, Detective Garda Ciarán Cummins, Detective Garda Brian Murphy.*

98. The applicants state that the Category D data is necessary in order to determine whether in fact the mobile phone was seized under the search warrant, or seized pursuant to arrest under s. 7 of the Criminal Justice Act, 2006 – relating to Grounds of Relief (d)(3) – (d)(9); (e)(1)(vi) – (viii); (e)(2); and (e)(5).

99. The applicants refer to the averments in an affidavit sworn by Detective Inspector Fennessy where he states that the first applicant's phone was not seized by a "*search team*" but rather by an "*arrest team*". The applicants therefore suggest that the contemporaneous notes of the Gardaí listed above will inform the contested use of search and arrest powers.

100. In their reply to the request for voluntary discovery the respondents state that the discovery of Category D is neither relevant nor necessary for the disposal of the issues in the application. They contend that the attempts at obtaining this category of data amounts to an

inappropriate attempt to interfere in a criminal investigation. Further, the respondents highlight that the contemporaneous notes sought under Category D would be provided if the first named applicant was charged with an offence.

101. The respondents' refusal of discovery was addressed in Mr. McMenamin's affidavit. Mr. McMenamin relies on articles 6 and 7 of Directive 2012/13/EU on the Right to Information in Criminal Proceedings.

102. In the first instance, I am not persuaded that the documents sought are relevant to the claim that the respondents have not complied with their obligations pursuant to Directive 2013/13/EU. There is no dispute that the applicants have sought a large amount of material from the respondents by reference to the Directive, and the respondents have refused those requests primarily on the basis of their contention that any obligations within the Directive are not engaged until a stage in the criminal process that has not yet been reached. Hence, access to the documents will not assist in resolving that legal issue, which largely is one of statutory interpretation.

103. There is however a factual dispute around the question of whether the applicant's phone was seized on foot of the search warrant or, as was contended for by the respondents, it was seized by the arrest team using a separate power. Clearly, as highlighted in the judgments to date, in this case there are real and substantial legal issues concerning the search and seizure of devices that contain data on foot of a search warrant that relates to a specified physical premises. In that regard, there will be a factual issue to be determined: what power was used to take the phone. This factual issue is relevant to some of the legal issues to be determined: how the downloaded data should be treated. I consider that the discovery is necessary on the basis that there is an appreciable prospect the documents sought constitute contemporaneous evidence that may corroborate either side's contentions. As such, I am satisfied that this category of document is likely to be both relevant and necessary.

104. The question then is how the court should address the application in light of the respondents' clear averments that the documents are confidential and will be subject to a claim of public interest privilege.

105. In *A. v. B. and the Commissioner of An Garda Síochána* [2024] IECA 95 (*A. v. B.*), the Court of Appeal dealt with issues of public interest privilege that arose in family law proceedings. The mother in that case had made audio recordings that she said evidenced abusive behaviour on the part of the father. The audio recordings, and later, the device on which they were recorded were provided to An Garda Síochána who commenced a criminal investigation. The father brought judicial separation proceedings in which he sought access to and custody of the children. He applied for non-party discovery of the recordings against the Commissioner. Following a hearing the High Court ordered that the court should be provided with the recordings so that it could assess the claims of privilege and the competing claims of the public interest in the administration of justice. The High Court in a later judgment concluded that the recordings should be disclosed notwithstanding the fact that they were the subject of an ongoing investigation.

106. The Commissioner appealed to the Court of Appeal. The core argument made by the Commissioner was that once the claim of public interest privilege was asserted the High Court should not have embarked on a consideration of whether the recordings should have been disclosed. The Court of Appeal was satisfied that the privilege had been properly invoked. The question was whether the High Court was entitled to embark on the balancing exercise in order to decide whether the documents – which had been listed and over which privilege had been claimed – should be produced.

107. This required the Court of Appeal to consider the interaction between what had been decided in cases such as *Murphy v. Dublin Corporation* [1972] IR 215, *Ambiorix v. Minister for the Environment (No.1)* [1992] IR 277, and *Keating v. RTÉ* [2013] ILRM 145, and certain

observations in *Dillon v Dunnes Stores* [1966] IR 397 and *McLaughlin v Aviva* [2012] 1 ILRM 487. The question was whether the recognised public interest privilege in materials gathered for the purpose of a criminal investigation effectively rendered those documents immune from production until the investigatory process was complete because that privilege presumptively outweighed any competing public interest in the administration of justice, and therefore should not be subject to the balancing test that applied in other situations where public interest privilege is asserted.

108. The Court of Appeal concluded that a claim for public interest privilege over materials relating to an ongoing criminal investigation did not operate to preclude the court from carrying out the balancing exercise required where production of the documents was sought in civil proceedings. In essence there is no basis for claiming a form of absolute privilege over such documents: materials generated by a criminal investigation are to be treated as a subset of the documents that may attract a claim of public interest privilege and not a separate category of document in and of themselves.

109. It seems to me that the court should not at this point refuse an order for the discovery of the documents in Category D because a claim of public interest privilege will be asserted. The documents sought constitute contemporaneous notes prepared by members of An Garda Síochána in relation to specific operations on a specified date. In light of the observations of the Court of Appeal in *A. v. B.*, this will trigger a chain of events that allow for a proper consideration of the separate question of whether the discovered documents should be disclosed, whether by inspection or production. In that regard it must be borne in mind that at this stage all that will happen is that a deponent will be required to swear an affidavit listing the documents concerned and, if this is thought appropriate, they can be scheduled in the privileged section of that affidavit. If such a claim of public interest privilege is asserted, something the Commissioner is fully entitled to do, and if the applicants assert that the public

interest in the administration of justice outweighs the public interest in the confidentiality of materials prepared in the context of an ongoing criminal investigation, that dispute can be resolved by the High Court in the manner explained in the authorities.

CONCLUSION

110. In the premises, I am refusing the application for discovery of the documents sought in categories A to C. This is on the basis that I am not satisfied that they are relevant and necessary for the determination of the issues presented in these proceedings. Likewise, I am not satisfied that there has been any breach of the duty of candour by the respondents. For the reasons given I do not accept the applicants' contention that the State Litigation Principles can provide a basis for ordering the disclosure of any documents.

111. I will order the respondents to swear an affidavit of discovery concerning the documents in Category D of the amended notice of motion, as I have been persuaded that this narrow category of contemporaneous document may be relevant and necessary to the resolution of the question of whether the first named applicant's mobile device was seized as part of the process of executing the search warrant or alternatively as part of the arrest.

112. In the circumstances, I will list this matter before me at 11am on Friday the 13 December 2024 for argument on the final form of order, including the question of costs. At that hearing, I expect that the respondents will identify a deponent for the affidavit of discovery and that the parties will have endeavoured to agree a timescale for the delivery of that affidavit. In addition, I request that the parties seek to come to an agreement on the question of the costs of the application.