THE COURT OF APPEAL

Court of Appeal Record No: 2024/67

No 2022/261JR

Neutral Citation Number [2024] IECA 278

Edwards J.
Kennedy J.
Burns J.

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

APPLICANTS/APPELLANTS

V

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

RESPONDENTS

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 Edwards delivered on the 4th of November 2024.

Introduction

1. On Friday, the 31st of May 2024, this Court heard an appeal by the applicants/appellants (i.e., "the appellants") against the judgment of Barr J. delivered on the 2nd of February 2024 in High Court judicial review proceedings in this matter (bearing record no 2022/261JR) and his subsequent Order perfected on the 11th of March 2024, refusing the appellants' claims for certain interim and/or interlocutory injunctive relief.

2. This judgment, which addresses a further claim to this Court for interlocutory injunctive relief pending the trial of the action (events having moved on somewhat since the matter was before the High Court), ought to be read in conjunction with the High Court's said judgment bearing the neutral citation [2024] IEHC 51, and this Court's earlier judgment dated the 4th of June 2024, bearing the neutral citation [2024] IECA 191, refusing the appellant's claim for interim injunctive relief during the period of reservation of this Court's judgment.

Background to the Claim

3. On the 4th of March 2022 gardaí from Garda National Economic Crime Bureau (i.e., "GNECB"), who were in possession of a search warrant, dated the 3rd of March 2022, from the District Court issued pursuant to s. 10(1) of the Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by s. 6(1)(a) of the Criminal Justice Act 2006 ("the Act of 1997, as substituted), conducted a search of the offices of the second-named appellant, a firm of solicitors. This was in the context of an investigation into suspected money laundering offences. The first-named appellant who is a solicitor and partner in the

said firm was present at the time. He was arrested on that occasion pursuant to s. 6 of the Criminal Law Act 1997, and his mobile phone was seized by gardaí in exercise of their powers under s. 7(1) of the Criminal Justice Act 2006.

4. The said mobile phone was not immediately interrogated for its data. Rather, it was submitted by the GNECB to the Garda National Cyber Crime Bureau (i.e., "GNCCB") to be forensically downloaded, and this was done on the 31st of March 2022, and two copies of the data were created. One copy was furnished to the first-named appellant with an invitation to him to specify areas of the data over which he wished to claim legal professional privilege (i.e., "LPP"). The other was furnished, in password encrypted format, to the GNECB (with the password being withheld by Detective Sergeant Michael Ryan of the GNCCB, pending the ascertainment of the extent to which LPP was being claimed). The phone itself was returned to GNECB and placed in a secure storage locker at GNECB headquarters.

5. The appellants initiated judicial review proceedings seeking, *inter-alia*, to quash the search warrant in question by order of certiorari, an injunction restraining an Garda Síochána from examining any of the data downloaded from the first named appellant's mobile phone, an order of prohibition for the destruction of the downloaded data, an order of mandamus compelling the return of the mobile phone and various declarations, including a declaration that s.10(1) of the act of 1997, as substituted, was incompatible with Article 40.3.2o of the Constitution and/or Article 8 of the European Convention on Human Rights (i.e., "ECHR"). The appellant subsequently amended their claim, to embrace somewhat more elaborate suite of reliefs, including an injunction 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 appellants mobile phone by the GNCCB.

6. Then in light of subsequent Supreme Court jurisprudence concerning police searches of "*the digital space*", particularly the decision in *People (DPP) v. Quirke (No. 1)* [2023] 1 I.L.R.M. 225, it was considered by the respondents that in order to lawfully interrogate the data on the first named appellant's mobile phone they would require another search warrant pursuant to s. 10(1) of the Act of 1997, as substituted, specifically authorising such interrogation. Further, it was considered appropriate by the respondents to seek to engage with the appellants to see if agreement could be reached between the parties as to a mechanism that would on the one hand enable the gardaí to progress their investigation and on the other hand safeguard the first named appellant's privacy rights and respect LPP.

7. Accordingly, on the 3rd of November 2023 the Chief State Solicitor's office (i.e., "CSSO") wrote to the appellants setting out the intention of An Garda Síochána to apply to the District Court for a further warrant that, in effect, would specifically authorise the interrogation of the digital space in respect of the mobile phone that had been seized on foot of the earlier warrant, and proposing a "*protocol for the examination of relevant*

data". That protocol was aimed at protecting the first-named appellant's privacy rights and respecting LPP.

8. It is appropriate at this point to set out in full the terms of the CSSO's letter of the 3rd of November 2023:

> **"Re James Flynn and anor v The Commissioner of An Garda Síochána and Ors (High Court Record No 2022/261JR)**
>
> Dear Colleagues,
>
> We refer to the above proceedings.
>
> As you are aware, on the 4th of March 2022 a search of the First Named Applicant's premises at J. T. Flynn & Co Solicitors, Ken Anglesea Street, Dublin 2 was carried out by officers of the Garda National Economic Crime Bureau acting on foot of a search warrant issued pursuant to section 10 of The Criminal Justice (Miscellaneous Provisions) Act 1997, as substituted by section 6 of the Criminal Justice Act 2006 ("the 1997 Act"). The said search warrant was issued on the basis that a District Court Judge was satisfied that there were reasonable grounds to suspect that evidence of an offence of money laundering contrary to section 7 of The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 was to be found at the said premises.
>
> On that date, in addition to, and independent of, the search team, an arrest team entered the premises under authority of section 6 of the Criminal Law Act 1997, in order to effect an arrest of the First Named Applicant. Whilst effecting the arrest of the First Named Applicant, his mobile phone was subsequently seized from his person by the arrest team pursuant to section 7 of the Criminal Justice Act 2006 as amended, as 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 Garda investigation into suspected money laundering offences remains ongoing. It is the intention of An Garda Síochána to apply to a Judge of the District Court for the issue of a further warrant under section 10 of the 1997 Act to search the First Named Applicant's mobile phone for evidence of money laundering offences.
>
> We understand that the First Named Applicant is a solicitor and that he has asserted a claim of legal professional privilege over certain data, communications and documents contained on his mobile phone.
>
> The purpose of this letter is to establish a protocol for the examination of relevant data contained on the First Named Applicant's mobile phone while respecting his assertion of legal professional privilege.

To that end we set out below how we propose to proceed. The process can be summarised as follows:

1. An Garda Síochána use an appropriate forensics software to produce an extract a full download of the mobile phone. From this full download a limited sub-dataset from the mobile phone will be established through the use of defined search terms and date parameters.
2. You will be provided with a copy of the contents of the said sub- dataset before it is examined by the investigation team. It will then be for your client to identify the material within that sub- dataset over which he is maintaining a claim of legal professional privilege and an outline of the reasons for said claim of privilege.
3. The parties will agree to nominate an independent third party to carry out an assessment of the material over which privilege has been claimed.
4. Any materials in respect of which the claim of privilege is upheld will not be examined by the investigation team.
5. Any materials in the sub- dataset in respect of which privilege is not claimed, or in respect of which a claim of privilege is not upheld, will be examined by the investigation team after the conclusion of privilege assessment by the independent third party.
6. No materials will be examined other than those identified using the appropriate forensic software tool searches described below and in respect of which no claim of privilege is made or upheld, i.e. materials on the phone which fall outside the sub- dataset created on the basis of the appropriate forensic software tool searches described below will not be considered for examination and accordingly it will not be necessary for your client to assert a claim of privilege over any such materials.

To date, none of the data on your client's phone has been examined by the investigation team.

Protocol for legally privileged material.

An Garda Síochána will use an appropriate forensic software tool to produce a full download of the mobile phone. From this full download a limited sub-dataset will be established from the mobile phone using defined search terms and date parameters. It is proposed to examine the phone for any communications by text message, email, social media apps or equivalent messaging apps by reference to the following contacts:

- [Named person 1]
- [Named person 2]
- [Named person 3]
- [Named person 4]

The mobile device will be examined for any communications between the First Named Applicant and either [named person 1] or [named person 2] or [named person 3] or [named person 4] between the **1st January 2019** and the **4th March 2022**.

The device will be also examined for communications between the First Named Applicant and any third parties where said communications relate to [Named person 1], [named person 2], [named person 3] [named person 4], money laundering, dyed money, damaged notes, the Central Bank of Ireland, anti-money laundering obligations, [named person 5], Libya or IRA. To that end, an appropriate forensic software tool search in accordance with the following search terms will be conducted to identify any relevant data generated between the **1st January 2019** and the **4th March 2022**

"[Named person 1]"
"[Named person 1's christian name]"
"[Named person 1's surname]"
"[Named person 1's initials]"
"dyed money"
"dyed cash"
"dyed note"
"dye"
"dirty money"
"dirty"
"Banknotes"
"Banknote"
"Bank"
"Note"
"damaged note"
"damaged cash"
"exchange"
"stolen"
"ML"
"AML"
"money laundering"
"Central Bank"
"CBI"
"crime"
"offence"
"caught"
"ink"
"Firepit"
"Fire pit"
"fire"

“burnt”

“furnace”

“chemical”

“Acetone”

“Fibreglass”

“Guards”

“Garda”

“Gardai”

“Dug”

“Dug up”

“Dig”

“Dig up”

“Buried”

“[Named person 2]”

“[Named person 2’s christian name]”

“[Named person 2’s surname]”

“[Named person 2’s initials]”

“Fur coat”

“Fur”

“Coat”

“[Named person 3]”

“[Named person 3’s christian name]”

“[Named person 3’s surname]”

“[Named person 3’s initials]”

“Carrickmacross”

“Northern Ireland”

“NI”

“The North”

“The Border”

“Border”

“[Named person 5]”

“[Named person 5’s christian name]”

“[Named person 5’s surname]”

“[Named person 5’s initials]”

“Rathcoole”

“Libya”

“Libyan”

“INLA”

“IRA”

“RA”

“[Named person 4]”

“[Named person 4’s christian name]”

“[Named person 4’s surname]”

“[Named person 4’s initials]”

"GNECB"
"Fraud Squad"
"Fraud"
"Investigation"
"Bureau"
"Arrested"
"Arrest"
"Prison"
"Search Warrant"
"Search"
"Warrant"

The said search will be conducted in respect of data contained in text messages, email (Outlook, Gmail etc.) and social media (WhatsApp, Facebook, Instagram, Messenger etc.).

All such searches will be limited to data generated between the **1st January 2019** and the **4th March 2022**. The timeframe selected is proportionate and reasonable. The start of the said date range reflects the history of the application to exchange damaged bank notes as described in *Shields v. The Central Bank of Ireland* [2020] IEHC 518, [2022] IECA 241 and *Shields v. The Central Bank of Ireland (No. 2)* [2021) IEHC 444, [2022] IECA 250, as referred to in the Applicants' Statement of Grounds and Grounding Affidavit in the within proceedings. The end date is the date of the premises search and arrest of the First Named Applicant.

When the above-described appropriate forensic software tool searches are complete, a full dataset comprising the documents, files, images and other materials identified in accordance with the said search will be copied and saved onto a hard-drive by a member of An Garda Síochána.

The said dataset will be generated by an appropriate forensic software tool on the basis of the above-described search terms and date parameters. While the search terms and date parameters require to be inputted by a human operator, the investigation team will not access or examine the said sub-dataset until after it has been subject to the privilege protocol outlined in this letter.

A copy of the said sub-dataset will be provided to your client. If your client has a claim to make in relation to documents, files, images or other material being subject to legal privilege then it is incumbent on your client to identify the material in question which is submitted to be subject to such legal privilege. This should be done by means of a schedule which identifies:

(i) A description of the document;
(ii) The date of creation of the document;

(iii) The author(s) and recipient(s) of the document;
(iv) The location of the document within the defined sub-dataset, including a description that will allow it to be identified and located;
(v) The basis upon which the document is said to be legally privileged including some brief description of the nature of the document;

The above information in respect of each specific document is necessary as the onus of establishing that legal privilege applies to any item falls upon your client(s). This is in accordance with the comments of Charleton J. in *CRH v. Competition and Consumer Protection Commission* at paragraph 262.

Please also note that legal privilege is not absolute and communications in furtherance of conduct which is criminal, fraudulent or injurious to the interests of justice is not protected by privilege (see *Hussain v. Commissioner of An Garda Síochána* [2016] IEHC 612).

You should provide the schedule of documents which you have identified as being subject to legal professional privilege in the terms outlined above within 14 days of receipt of the materials provided by An Garda Síochána following their extraction from the mobile phone in accordance with the process outlined above.

Thereafter the specific documents you identify will be copied and saved onto a hard-drive by a member of An Garda Síochána.
The parties will agree, within 7 days of the said copying being completed, to the appointment of an independent person (who shall be a barrister or solicitor) assessing the claims of privilege in relation to the said documentation and to provide a report within an agreed timeframe having regard to the amount of material concerned. The costs of the assessor in preparing the report will be borne by the Garda Commissioner. In the event that the parties are unable to agree who is to be appointed as assessor the Garda Commissioner will request the Chair of the Bar Council to appoint an assessor.

Any documents in respect of which the assessor upholds the claim of privilege shall then be deleted, destroyed or otherwise rendered inaccessible.

Any documents within the defined dataset in respect of which the assessor does not uphold the claim of privilege or in respect of which privilege is not claimed, will be examined by An Garda Síochána following the conclusion of the assessment of privilege.

An Garda Síochána will not examine any materials on the First Named Applicant's phone in respect of which a claim of privilege is upheld or which are not part of the data extracted according to the defined search terms and parameters outlined above.

We would welcome any proposals you may have in relation to the process outlined above. We await hearing from you.

Yours faithfully,"

(Underlining and emboldening as per the original.

Name redactions in square brackets by the judgment writer)

9. The response on behalf of the appellants to this letter was an assertion in replying correspondence from the appellants' solicitors dated the 6th of November 2023 that what was being proposed was "*constitutionally offensive and in blatant disregard of the nature of our clients judicial review proceedings*.". While the letter went on to emphasise the nature of the judicial review proceedings, and the matters in dispute in those proceedings, and to make a complaint about outstanding discovery, there was zero engagement with the proposed protocol that had been put forward by the CSSO. Instead, the appellants flagged to the respondents an intention to apply to the High Court for interlocutory injunctive relief restraining any application by An Garda Síochána for a second warrant.

10. The intention to seek interlocutory injunctive relief having been flagged by the appellants, the respondents undertook to defer applying for a second warrant until such time as the appellant's application for such relief was determined by the High Court. The matter came on before Barr J., who delivered judgment on the 2nd of February 2024 refusing the application. In doing so, the High Court judge stated:

> "*102. … 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 …".

11. The allusions in the judgment of the High Court to the decisions of the Supreme Court in the *Quirke* and *Corcoran* cases, respectively, and to that of the European Court of Human Rights in the *Saber* case, are more specifically to *The People (DPP) v. Quirke* [2023] IESC 5 ("the *Quirke* case"); *Corcoran & Anor v. The Commissioner of An Garda Síochána & Anor* [2023] IESC 15 ("*the Corcoran case*"), and to *Saber v. Norway* [2020] ECHR 912

("the *Saber* case"). The potential relevance of this jurisprudence to this case is as follows.

12. In the *Quirke* case the Supreme Court held that while a search warrant authorises a physical search of a physical place or location and the potential seizure of physical items found there as evidence and their physical examination, a further authorisation is required for the search of any digital space outside of the physical location of the item the search and seizure of which is enabled by the statutory power on foot of which the warrant was obtained. The lawful entry and search of a digital space where data or information may be stored in electronic memory, such as on a computer or personal electronic device such as a mobile phone, requires additional express judicial authorisation on the settled authority of *Damache v DPP* [2012] 2 I.R. 266.

13. The *Corcoran* case was concerned with the lawfulness of the warrant obtained pursuant to s. 10(1) of the Act of 1997, as substituted, to search the home of a named individual in circumstances where it was contended by An Garda Síochána that evidence might be found there, including on the mobile phone of the individual concerned, which might assist them in their investigation into a serious incident which had taken place in Co. Roscommon some days earlier in which, during the repossession of property pursuant to a court order, a number of masked and armed people were said to have attended the premises and attacked and injured security personnel then present, and to have set a number of vehicles alight. A significant feature of that case, which led to the warrant in question being quashed, was that the information on foot of which the warrant was sought failed to disclose to the relevant District Judge that the individual whose property was to be searched was a journalist, and that the material of interest was material potentially protected from disclosure by journalistic privilege. The specific relevance of the *Corcoran* case to the present litigation, however, arises from the fact that two judges of the Supreme Court, in their respective judgments, make comments *obiter dictum* that were critical of the terms in which s. 10 of the Act of 1997, as substituted, had been enacted, suggesting shortcomings and deficiencies existed within the section which were beyond the capacity of the courts to cure, and which could only be addressed by the Oireachtas. In particular, concern was expressed about a lack of safeguards in the section to protect privileged or protected material from inappropriate disclosure.

14. In the *Saber* case the applicant was a possible victim of an alleged crime. As part of the investigation, the police seized the applicant's smart phone and captured a mirror image copy of it, which they wished to search. The phone contained correspondence between the applicant and his lawyers, including correspondence with his lawyers concerning another criminal case in which he was a suspect, meaning that some of the content was subject to LPP and therefore exempt from the search under domestic law. Through applying domestic law provisions on search and seizure by analogy, there was initial agreement that the data on the mirror image copy had to be sifted through by the City Court and any LPP data removed before the police could search the remainder. However, in a subsequent decision of the Supreme Court, which did not involve the applicant, it was determined that procedures relating to surveillance data were applicable instead. In light

of that decision, the City Court abandoned its filtering procedure and sent the mirror image copy back to the police, who examined the data. The applicant claimed that his right to privacy and respect for his correspondence under article 8 ECHR had been breached. His claim in that regard was upheld by the ECtHR which was critical of the lack of an established framework for the protection of LPP in cases such as the applicant's.

15. Returning to the chronology in the present case, the order reflecting Barr J.'s judgement was finalised on the 7th of March 2024, and a request by the appellants for a stay on his order was refused. On the 8th of March 2024 the respondents declined a request from the appellants to further defer the making of an application for a second search warrant.

16. On the 8th of March 2024 the appellant applied to the Court of Appeal *ex parte* for limited orders and were granted liberty to file a Notice of Appeal without a perfected Order, together with a notice of motion seeking injunctive relief, returnable for the 22nd of March 2024.

17. The solicitors for the appellants wrote to the CSSO on the 8th of March 2024 requesting whether An Garda Síochána still intended to (a) proceed with an application for a warrant under s. 10 of the Act of 1997 to search the first named appellant's mobile phone, and (b) implement a search of the mobile phone in accordance with the suggested protocols. On the 11th of March 2024 the CSSO replied saying that their client's position remained unchanged and that "*no further undertaking would be made at this point*.".

18. On the 12th of March 2024 the appellant issued a motion in the Court of Appeal seeking interlocutory injunctive relief with short service returnable for the 14th of March 2024. For various reasons the matter did not proceed on that date and was adjourned initially to the 22nd of March 2024, whereupon it was adjourned again and ultimately did not proceed until the 31st of May 2024. Following a full day's hearing on that date the Court of Appeal reserved its judgment.

19. A second warrant was duly applied for by An Garda Síochána and was obtained on the 29th of March 2024. The sworn information grounding that warrant, which has been exhibited before us, is extremely detailed (running to 16 pages in length). It sets out the background to the matter, discloses that the first-named appellant is a solicitor and that the second-named appellant is a solicitors' firm, and acknowledges an appreciation that potentially some of the data on the mobile phone could attract LPP. The sworn information outlined the proposed protocol containing safeguards prepared by the Chief State Solicitor, and it contained an express commitment that the investigation team would use the protocol in question in any interrogation of the data on the mobile phone. Further, in accordance with Barr J.'s direction the District Judge was provided with copies of the High Court's judgment, and of the judgments in the *Quirke* case, the *Corcoran* case and the *Saber* case respectively.

20. As events had moved on somewhat from the position that had obtained at the time of the hearing before the High Court by the time the matter came on before this Court, namely the proposed second warrant had in fact by that stage been obtained, the appeal was

confined to a claim for an interim / interlocutory injunction restraining An Garda Síochána from examining any of the data downloaded from the first-named applicant's mobile phone pursuant to the aforementioned second warrant.

Submissions on the appeal

Submissions on behalf of the appellants

21. The appellants submitted that Barr J. erred in failing to find that the applicants met the four-part test set out in *Okunade v Minister for Justice* [2012] 3 I.R. 152. They say, that essentially two issues arise: (i) whether the appellants have an arguable case (which Barr J. found in the case, and which the respondents in *arguendo* at the oral hearing of this appeal conceded, albeit maintaining that it is a weak arguable case) and (ii) whether the balance of justice favours the appellants (or to put it another way that the balance of justice favours the granting of interlocutory injunctive relief).

22. The appellants say that a refusal of injunctive relief would mean that An Garda Síochána have free rein to take further action which will arguably reach the appellant's constitutional and/or ECHR rights. They assert that the gardaí seek to violate the hitherto sacrosanct principle of LPP. They suggest that this is by no means ameliorated by its proposed *ad hoc* protocol, which the appellants have rejected. They say that the fact that an *ad hoc* protocol has been proposed demonstrates the weakness of the respondent's position as it demonstrates the absence of necessary statutory safeguards.

23. The appellants submit that if injunctive relief is not granted the harm resulting from breaches of their rights will be irremediable. They will have lost the right to an effective remedy. They suggested that this cannot be a proper application of the *Okunade* principles.

24. The appellants say that the right to an effective remedy is clear and arrives both from the Constitution and the ECHR. Citing the case of *DPP v. JC* [2017] 1 IR 417 at [833], they emphasised that the "*State, and in particular the courts, has a duty to vindicate the constitutional rights of all cannot be doubted*.". They further rely upon article 13 of the ECHR which expressly refers to the entitlement to an "*effective remedy*". It was submitted that the *Okunade* principles must be applied in a manner that ensures that injunctions are issued where necessary to ensure an effective remedy for potential constitutional and ECHR violations.

25. In regard to the balance of justice, it was submitted that if the appellants are successful, and section 10 of the Act of 1997, as substituted, is found to be unconstitutional it will be deemed to be void *ab initio*, and they cite *Murphy v. A.G.* [1982] IR 241 and *A v Governor of Arbour Hill Prison* [2006] 4 IR 88 in support of this proposition. It was further submitted that even if the legislation is not unconstitutional, there are clear issues about its compatibility with the ECHR. Even if s. 10 is constitutional, they say it will be open to the Court to conclude that the application of s.10 in the circumstances of this case violated the constitution and/or the ECHR and/or was otherwise unlawful.

26. The appellants suggest that Barr J. gave excess weight to "*the orderly implementation of measures*" which are *prime facie* valid. Further, they say that Barr J. found that s. 10 of the Act of 1997 "*must be presumed*" as being constitutionally valid until set aside by the High Court following a successful challenge by a person with *locus standi* to do so. However, they suggest that the *dicta* of Hogan and Collins J.J., in the *Corcoran* case cast doubt on the constitutional validity of s. 10 of the Act of 1997 and that there can be no public interest in the orderly operation of an unconstitutional scheme or one which violates privacy rights.

27. The appellants' submissions point to a number of matters that are said to demonstrate a public interest in granting an injunction:

    a. there is a public interest in upholding the constitutional rights, reflecting Article 40.3.1o of the Constitution, and the right to an effective remedy.
    b. There is also an important public interest in upholding LPP. In support of that we were referred to MacMenamin J.'s judgment in *CRH plc & Ors v The Competition and Consumer Protection Commission* [2018] 1 I.R. 521 ("the *CRH* case") at [58], and also to passages in the *Saber* case.

28. The appellants submitted that Barr J. erred in finding that a risk to the public interest in delaying the continuation of a Garda investigation should trump the public interests identified above.

29. They further submitted that Barr J. erred in giving undue and/or disproportionate weight to both "the public interest in the effective investigation of suspected criminal offences by the Gardai" and "the adverse effect on the public interest" where an order would "effectively dis-applied an extent legislative provision for the duration of the injunction". It was submitted that an "effective investigation" cannot be an unlawful investigation that breaches the Constitution and/or the ECHR. Further, it was not accepted by the appellants that there was a sufficient basis for suspecting an offence. They complain that certain information, which they contend was exculpatory, was not brought before the District Court.

30. It was submitted that it was insufficient to safeguard the public interest for Barr J. to have directed that his judgment (and also the *Quirke, Corcoran* and *Saber* judgments) be furnished to the District Court. The appellants had no entitlement or opportunity to address the District Court prior to the issue of any new search warrant.

31. It was emphasised in submissions that the privacy interests of the appellants carry significant weight, and that if injunctive relief is refused it would mean that the appellants would be denied effective remedies for breaches of their constitutional and ECHR rights. Once the second s. 10 warrant is executed, relief in the form of an order requiring the return of the mobile phone will be of no value to the appellants. They say that it is difficult to see how an injunction will be effective if only granted at the conclusion of proceedings after An Garda Síochána have accessed the data.

32. It was further submitted that Barr J. erred in relying on the fact that there will be a period of delay until the substantive hearing of the judicial review. The point is made that any delay is not attributable to the appellants and should not have been weighed against them. They say that delay can neither justify the refusal to grant an injunction until the appeal is heard and/or justify the dismissal of the appeal.

33. Accordingly, the appellants fundamental submission is that the balance of justice favours the granting of injunctive relief and the allowing of the appeal.

Submissions on behalf of the Respondents

34. In replying written and oral submissions on behalf of the respondents, it was argued that when considering the balance of justice, significant weight must be attached to the public interest in the continued operation of a statutory provision pending the outcome of a constitutional challenge. In support of this, the respondents cited the authority of *Krikke v. Barranafaddock Sustainable Electricity Ltd* [2020] IESC 42, from which there was a substantial quotation in this Court's earlier judgment concerning the application for interim injunctive relief during the period of reservation of this judgment – see [2024] IECA 191 at [19]. Reliance was also placed on comments to similar effect in *Murphy v Ireland* [2014] 1 I.R 198 at [9].

35. We were further referred to *M.D. (an Infant) v. Ireland* [2009] 3 I.R. 690, where Clarke J. (as he then was) held that the jurisdiction to grant an injunction which would have the practical effect of preventing the operation of a statute pending the determination of a challenge to its constitutional validity "*must be most sparingly exercised*," and that:

> "*If it were to be the case that persons who were able to establish a fair case to be tried concerning the validity of the relevant legislation having regard to the provisions of the Constitution (which is not a particularly high threshold) were able to obtain an injunction preventing, in practice, the application of the legislation to them until the proceedings had been determined, then it would follow that legislation could, in practice, be sterilised pending a final determination of the constitutional issues raised*." (para. 17).

36. We were reminded that in Okenade it was further observed that:

> *"[S]ignificant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. … Lower courts are entitled to decide. … All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases*".

37. The respondents submitted that there had been no meaningful engagement by the appellants with this line of authority. Insofar as the appellants had suggested that the *Okunade* principles must be applied in a manner that ensured that injunctions are issued where necessary to ensure an effective remedy for potential constitutional and ECHR

violations, the respondents contend that this submission reflects neither the *Okunade* judgment itself nor the decisions cited already which make clear that the default position is that an individual ought not to be able to disapply the law – even as it applies to them – pending a constitutional challenge. The respondents submitted that to interpret *Okunade* as requiring an injunction to be granted where the litigant challenging the legislation can point to an arguable case that his rights might be breached through the continued operation of that law would be entirely contrary to these authorities.

38. The respondents submitted that the High Court judge had been entirely correct in expressing the view that an injunction would supply an extant legislative provision or hold a criminal investigation, and we were referred to the *State (Llewelyn) v. Ua Donnchadha* [1973] IR 151, *Burke v District Judge Hamill* [2010] IEHC 449 and *Foley and D2 v. Workplace Relations Commission* [2016] IEHC 585, as offering support for their position in that regard. They submitted that Barr J. correctly recognised the chaos that would ensue in the criminal justice system if the courts were to hold that criminal suspects could bring Garda investigations to a halt by challenging the constitutionality of statutory provisions conferring police powers.

39. The respondents have contended that the public interest in the investigation of crime, and particularly serious offence such as money laundering, lies against granting an injunction. They submitted that *a fortiori* the public interest is particularly strong where a member of the legal profession is suspected of committing such an offence. They have suggested that if the examination of digital material is delayed by way of injunction this will necessarily give rise to a very real risk of spoliation of evidence.

40. On the issue of the proposed protocol for the protection of LPP, and private material not relevant to the investigation, the respondents reject the appellants' contention that it will permit the violation of the hitherto sacrosanct principle of LPP, and facilitate a wholesale breach of the appellants privacy rights. They make the point that apart from boldly asserting that there is no legal basis for such a protocol (a position which the respondents say is bluntly at odds with that identified by the Supreme Court in *CRH v. The Competition and Consumer Protection Commission* [2018] 1 I.R. 521) the appellants have not identified any aspect of the proposed protocol which they say is unfair or inappropriate. The respondents submitted that it is not open to the applicants to simply ignore the terms of the protocol for the purposes of this application as it clearly identifies precisely what will occur absent the grant of an injunction. The respondents' position is that the applicants' refusal to engage with the proposed protocol clearly underlines the artificiality position.

41. The respondents therefore submitted that the balance of justice would not be served by injuncting An Garda Síochána from taking a step that it is lawfully entitled to take under a provision of primary legislation that continues to enjoy the full presumption of constitutionality.

Analysis and Decision

42. The parties being *ad idem* that the appellants have established a fair issue to be tried and have an arguable case in so far as the substantive reliefs that they seek in their proceedings are concerned (albeit that the respondents characterise it as being a "weak" arguable case), I agree with counsel for the appellants that what the case is really about at this point is where the balance of justice/balance of convenience lies in terms of the interlocutory injunctive relief that the appellants' seek.

43. The expression "*balance of justice*" has tended to be used in some of the more recent caselaw, particularly where because of the nature of the case i.e., whether the issue is one involving public or private law, or the fact that the interlocutory application may in reality determine the litigation so that the matter is unlikely to proceed to a substantive trial, a court may not be concerned with whether damages would be an adequate remedy, in the same way as it would in some other cases; whereas, certainly in older caselaw, the expression "*balance of convenience*" was favoured, particularly in cases involving private law issues where the court was required to ask itself whether damages could be an adequate remedy. However, in *Merck Sharp and Dohme v Clonmel Healthcare Ltd* [2019] IESC 65, O'Donnell J. (as he then was) treated them as being in effect synonymous – see para 35 of his judgment where he refers to "*the balance of convenience, or the balance of justice, as it is sometimes called*", albeit that the *Merck, Sharp* and *Dohme* case involved purely private law issues. If there is a slightly nuanced difference between the two, it is my understanding that consideration of the balance of justice required a Court to determine, as between two competing positions, which is the least likely to lead to injustice, in deciding whether, and as to how, it might exercise its discretion as between either granting or withholding interlocutory injunctive relief.

44. I remain of the view, expressed in my earlier judgment of the 4th of June 2024, that the consideration identified in both *Okunade v Minister for Justice & Ors* and in *Krikke v. Barranafaddock Sustainability Electricity Ltd* (both cases cited earlier in this judgment), namely, that the enforcement of the law is itself an important factor and that even temporary disapplication of the law gives rise to a damage that cannot be remedied in the event that the claim does not succeed, is of very great importance, and that it is very much something that I must take into account in weighing where the balance of justice lies.

45. However, that is not the beginning and end of the matter because the appellants contend that they will equally be exposed to damage that cannot be remedied, if injunctive relief is not granted. It is necessary, however, to subject this assertion to some critical analysis grounded in the evidence and what has been established with regard to the circumstances of this case, including the respondent's contention that damage could be avoided by agreement to and operation of the protocol which has been proposed, alternatively some agreed variation thereof to be achieved through reasonable negotiations conducted through good faith engagement between the parties. Before addressing this aspect of the case, it will be helpful to review certain potentially relevant caselaw.

CRH plc & Ors v The Competition and Consumer Protection Commission

46. The case of *CRH plc & Ors v The Competition and Consumer Protection Commission* [2018] 1 I.R. 521 ("the *CRH* case"), while not on all fours with, and indeed distinguishable in several respects, from the present case, represents nonetheless an important and influential Supreme Court precedent which offers valuable guidance of potential application to this case.

47. The *CRH* case arose out of the purported exercise by the Competition and Consumer Protection Commission (i.e., "the CCPC") of certain of its powers of search and seizure arising under the Competition and Consumer Protection Act 2014 ("the Act of 2014"). The CCPC suspected that Irish Cement Limited (i.e., "ICL"), a subsidiary of a public limited company CRH plc (i.e., "CRH"), was or had been engaged in anti-competitive activities. In the course of an investigation into that, an authorised officer of the CCPC obtained from the District Court a warrant pursuant to s. 37(3) of the Act of 2014 to search the premises of ICL at Platin, Drogheda, Co. Meath, the said authorised officer having sworn an information on oath that he had reasonable grounds for suspecting that evidence of, or relating to, an offence under the Competition Act 2002 was to be found at that place, and the District Judge having been satisfied as to that.

48. The warrant so obtained was in due course executed and amongst the documents seized were the entirety of the email account of the former managing director of ICL, a Mr. Seamus Lynch, which consisted of over 100,000 individual emails. The CCPC was advised by lawyers for persons and companies concerned, that many of the emails seized were unrelated to the business and activity of ICL but rather related to the business and activity of CRH, alternatively they were private to the former managing director of ICL, Mr. Lynch. The CCPC did not accept this.

49. There were discussions between lawyers representing those said to be concerned, and the CCPC, but it was not possible to resolve the disputes in respect of material seized. In consequence of this CRH, ICL and the aforementioned Mr. Lynch, issued plenary proceedings in the High Court as co-plaintiffs seeking declaratory and injunctive relief against the CCPC on various grounds. The plaintiffs complained that many of the documents seized were outside the scope of the search warrant, and further that the search and seizure constituted an unlawful interference with the private life, correspondence and home of the second and third plaintiffs (ICL and Mr. Lynch, respectively), contrary to article 8 of the ECHR and Article 40.3 of the Constitution.

50. The defendant conceded in its defence that there was a high probability that not all of the seized emails related to the activity under investigation but submitted that it would not have been practical to review the data to identify the material concerned during the search, and that the seizure of the emails was justified due to the time required to carry out a proper forensic examination of the material.

51. The High Court (Barrett J.) 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 Act of 2014. The Court further 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 article 8 of the ECHR (see [2016] IEHC 162). The defendant appealed to the Supreme Court.

52. The five member Supreme Court (Denham C.J., Laffoy, Dunne and Charleton J.J., concurring *inter se* and MacMenamin J. not concurring in part) dismissed the appeal, but in doing so substituted for the order of the High Court an order restraining use of the unrelated electronic documents other than in accordance with agreement between the parties and granting liberty to apply to the High Court.

53. Much of the litigation was concerned with interpretation of the nature, extent and limits of the powers granted to the CCPC by the Act of 2014 and for the most part it is unnecessary to review so much of the Supreme Court's judgments as related to such issues. However, certain observations of wider application were made, and these are of potential relevance to certain issues with which we are concerned in the present case.

54. An important feature of the statutory scheme under the Act of 2014 was that s. 33 of that Act specifically addressed what was to be the position if, the CCPC in seeking to exercise its powers of search and seizure, encountered material in respect of which legal professional privilege applied or potentially applied. Section 33 provided:

> (1) Subject to subsection (2), nothing in this Act, the [Competition] Act of 2002 or the [Consumer Protection] Act of 2007 shall compel the disclosure by any person of privileged legal material or authorise the taking of privileged legal material.
>
> (2) The disclosure of information may be compelled, or possession of it taken, pursuant to this Act, notwithstanding that it is apprehended that the information is privileged legal material provided that the compelling of its disclosure or the taking of its possession is done by means whereby the confidentiality of the information can be maintained (as against the person compelling such disclosure or taking such possession) pending the determination by the High Court of the issue as to whether the information is privileged legal material.
>
> (3) Without prejudice to subsection (4), where, in the circumstances referred to in subsection (2), information has been disclosed or taken possession of pursuant to this Act, the person—
>
> (a) to whom such information has been so disclosed, or
> (b) who has taken possession of it,
> shall (unless the person has, within the period subsequently mentioned in this subsection, been served with notice of an application under subsection (4) in relation to the matter concerned) apply to the High Court for a determination as to whether the information is privileged legal material and an application

under this section shall be made within 30 days after the disclosure or the taking of possession.

(4) A person who, in the circumstances referred to in subsection (2), is compelled to disclose information, or from whose possession information is taken, pursuant to this Act, may apply to the High Court for a determination as to whether the information is privileged legal material.

(5) Pending the making of a final determination of an application under subsection (3) or (4), the High Court may give such interim or interlocutory directions as the court considers appropriate including, without prejudice to the generality of the foregoing, directions as to—

(a) the preservation of the information, in whole or in part, in a safe and secure place in any manner specified by the court,

(b) the appointment of a person with suitable legal qualifications possessing the level of experience, and the independence from any interest falling to be determined between the parties concerned, that the court considers to be appropriate for the purpose of—

(i) examining the information, and
(ii) preparing a report for the court with a view to assisting or facilitating the court in the making by the court of its determination as to whether the information is privileged legal material.

(6) An application under subsection (3), (4) or (5) shall be by motion and may, if the High Court directs, be heard otherwise than in public.

(7) In this section—

"computer" includes a personal organiser or any other electronic means of information storage or retrieval;

"information" means information contained in a book, document or record, a computer or otherwise;

"privileged legal material" means information which, in the opinion of the court, a person is entitled to refuse to produce on the grounds of legal professional privilege.

[Additions in square brackets by Edwards J]

55. While it was accepted in the *CRH plc* case that by virtue of s. 33 statutory safeguards were incorporated in the Act of 2014 in so far as legally privileged material was concerned, in that it provided for resolution of any disputes in regard to whether material was or was not in fact covered by such privilege by the High Court, and further that the section contemplated a degree of engagement *inter partes* with a view to maintaining the confidentiality of any such material pending any such determination, the plaintiffs in that case complained that there were no corresponding mechanisms to address non-legally privileged material disclosure of which might breach a party's rights to privacy under Article 8 ECHR or under Article 40.3 of the Constitution.

56. It bears observation at this point that in so far as the present case is concerned, s. 10 of the Act of 1997, as substituted by s. 6(1)(a) of the Act of 2006, contains no analogue of s. 33(1) & (2) of the Act of 2014, nor, ostensibly, any express safeguards to protect either legally privileged, or non-legally privileged material disclosure of which might breach a party's rights to privacy under Article 8 ECHR or under Article 40.3 of the Constitution, from inappropriate disclosure. It was this absence of safeguards that was criticised in *obiter dicta* of Collins J. and of Hogan J., respectively, in *Corcoran v. Commissioner of An Garda Síochána* [2023] IESC 15.

57. Returning, however to the *CRH plc* case, in her judgment as one of the majority in the Supreme Court, Laffoy J. made the following comments, to which I attach considerable importance in the context of the present case. She said (at pp 622-624 of the report of the case in the Irish Reports):

> *"**[209]** … in addressing the article 8 issue, the observations of the ECtHR in relation to Prysmian SpA. v. Commission (Case T-140/09) (Unreported, General Court of the European Union (Eighth Chamber), 14 November 2012) in Vinci Construction v. France (App. Nos. 63629/10 and 60567/10) (Unreported, European Court of Human Rights, 2 July 2015) are instructive. This case proceeded in the High Court on the basis that, as a result of the search and seizure at the Platin premises, at least some material the property of CRH or Mr. Lynch, which the Commission was not entitled to seize under the search warrant granted under s. 37(3), was removed, albeit with the cooperation of ICL, and retained by the Commission. The appeal in this court has proceeded in a similar vein. On the basis of that premise, on the authority of the decision of the ECtHR in Vinci Construction v. France (App. Nos. 63629/10 and 60567/10) at para. 78, CRH or Mr. Lynch, or both, must be in a position "to be able to ensure that the lawfulness of the seizures could be actually and effectively reviewed after they took place", unless they "were able to prevent the seizure of documents that were unrelated to the investigation". What happened in this case is that, although the plaintiffs did not seek to prevent seizure of the*

documents in question when it took place, in the plenary proceedings they did seek to prevent, to use the terminology used in the ECN Recommendation, the continued inspection post-seizure, which is unregulated and which they contend would, in relation to the out-of-scope data, be unlawful and in breach of article 8.

[210] *The outcome of the hearing in the High Court was that the intended continued inspection by the Commission of the material which had been seized was prevented by the terms of the injunctive relief granted. One gets an interesting perspective on that outcome if one considers what the position would have been if a permanent injunction in the terms granted by the trial judge had not been granted in the High Court. The Commission would have continued in possession of, and no doubt would have retained, all of the material it had seized, including the material which, admittedly, was unrelated to the investigation. It would be free, without having to refer to its owner, to access, review and use the unrelated material, although it was not being retained lawfully and it was being retained in breach of the owner's rights under article 8. Further, the Commission could not be compelled to return the unrelated material to its owner, be it Mr. Lynch or CRH, nor could it be compelled to erase or render invisible the unrelated electronic data in its possession. In short, Mr. Lynch and CRH would have been utterly devoid of any remedy to effectively enforce their rights under article 8 of the Convention.*

[211] *For that reason, I am satisfied that, in addressing the claim of the plaintiffs that there had been a breach of article 8 of the Convention, the trial judge was correct in law in granting the declaratory relief and the permanent injunction in terms which prevents the Commission breaching the right to privacy of Mr. Lynch or CRH or both under article 8 of the Convention through its continued inspection, if not restrained, of all the electronic data seized, having regard to the factual basis that, as a matter of high probability, some of the material seized was outside the scope of the search warrant. On the basis of the jurisprudence of the ECtHR on article 8 and, in particular, the decision in Vinci Construction v. France (App. Nos. 63629/10 and 60567/10) (Unreported, European Court of Human Rights, 2 July 2015), the orders made by the trial judge were the appropriate orders to ensure that safeguards are in place which effectively protect the rights of CRH and Mr. Lynch under article 8. Unfortunately, those reliefs do not provide a resolution to the underlying dispute between the parties, which prompted the view the trial judge expressed, at para. 50, p. 42, that the outcome does not appear to be "a fully effective remedy". However, it is the Commission, which is the party at fault, which is at a loss by not being in a position to access, review or use the data within the scope of the search warrant, which the plaintiffs acknowledge it is entitled to seize.*

> ***[212]*** *The inclusion of s. 33 of the 2014 Act to expressly save legally privileged material from inspection highlights the lacuna in the legislation arising from the absence of a mechanism which could be utilised to identify and separate digital material unrelated to the investigation being conducted under the 2002 Act, which may be mixed with digital material which the Commission is entitled to seize under the powers conferred on it by s. 37. It is for the Oireachtas to fill that lacuna. However, there is no reason why, in a particular case, an undertaking or an individual whose digital material has been seized and is to be searched could not reach an agreement with the Commission on an appropriate mechanism to resolve the difficulty, which might include a keyword search process and a rendering of out-of-scope material invisible or, alternatively, which might follow the template contained in s. 33 of the 2014 Act. It is for the Commission, not the court, to take the steps necessary to resolve its difficulty on the facts of this case.*".

58. In his concurring judgment in the case, Charleton J. offered some further observations. After a detailed consideration of the nature of privacy in Irish law (see pp 642 to 645), and attempts through litigation to stop the examination of material that has been copied in consequence of statutory authority, he observes that it is inevitable that in granting a warrant, intrusions into the private space occur, and that it is certain that matters outside those of even potential relevance to a criminal or regulatory investigation will come to the attention of those authorised to search. He commented:

> *"**[247]** … Hence, the importance of the interposition of judicial scrutiny to authorise such intrusions. That judicial authorisation is only given where the statutory parameters are fulfilled to satisfy the necessity for the search; most usually that of reasonable suspicion about a crime that has been perpetrated or is in planning. Mirroring the nature of entry into the private space which a judicially authorised search engages, the taking or copying of records, of data or email necessarily moves into the private space. But, it may be necessary and that depends on the nature of what suspicion is held and the nature of the crime. It may be proportionate because of the nature of investigations, conducted as they are for the benefit of society for the detection of crime, with a view to gathering both what will assist a prosecution and what may offer a defence to an accused.*".

59. Following the giving of several examples of hypothetical circumstances in which arguably proportionate intrusions might be made by investigators or regulators, Charleton J. considered the non-equivalence of legal professional privilege with data in respect of which an entitlement to privacy might otherwise exist, commenting further, before proceeding to set out in full the terms of s. 33 of the Act of 2014, that:

> *"**[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. Thus it is not surprising that s. 33 of the 2014 Act deals with instances in which the documents found provide legal advice".

60. Observing that the protection offered by s. 33 of the Act of 2014 was available in a different context to that presented by the controversy before the Supreme Court, he continued:

> "*Nonetheless, on the basis of the analysis of Laffoy J., a situation of the seizure of out-of-scope material has occurred and what needs to happen now to advance matters is to find a mechanism for the lawful examination of the material while enabling representations as to the nature of what is private to be taken into consideration.".*

61. Later in his judgment, Charleton J. considered the availability or otherwise of safeguards to protect the rights of the plaintiffs in the *CRH plc* litigation in light of what the CPCC was proposing to do. He framed the issue in this way:

> *"**[256]** … Here, the problem is in justifying the examination of many thousands of emails which are accepted by the Commission to be outside the scope of anything that could be said to be relevant. A solution must be found to enable the proportionate scrutiny of that material. Laffoy J. rightly suggests that the parties correspond as to this issue. Some suggestions as to the scope of a proper compromise are also within the competence of a court*.".

62. Charleton J. noted that the plaintiffs asserted multiple arguments. He noted that firstly, the right not to be searched had been claimed but he was satisfied to reject that in circumstances where the search had been authorised by law. Secondly, it had been argued that the taking or copying of documents outside what was expressly relevant to a contemplated charge was unlawful. He was again satisfied to reject that on the basis that it had been authorised by law. Thirdly, the plaintiffs claimed an entitlement that scrutiny of the material at issue should now be proportionate to the purpose pursued: that the investigation into the alleged crime should continue but that they should have an input into the exclusion from detailed examination of private family communications. In the extraordinary circumstances of this statutory model, which differed from the powers generally available for searches in criminal law, and in the absence of justification by the CPCC for the examination of private communications, a proportionate response, the plaintiffs urged, included an entitlement by way of safeguards to be present when all files were scanned through the use of key search terms, an entitlement to influence the choice of such terms, and an entitlement to be present while any email targeted by the CPCC was perused or further examined as to metadata. Any dispute that were to arise (and in that regard Charleton J. accepted that a dispute would easily arise if the proposals of the plaintiffs were to be adopted) was, the plaintiffs suggested, to be treated in an equivalent

way to the assertion of LPP, the absolute right of a client provided for under s. 33 of the Act of 2014. That, in turn, was said to be subject to judicial scrutiny. Finally, it was argued by the plaintiffs that any data found not to be relevant ought to be destroyed.

63. By way of commentary on what the plaintiffs were proposing, Charleton J. remarked:

> "*What is crucial to this analysis is the obligations arising under European law within this particular context, and in particular as analysed by Laffoy J., and the complete absence of justification for such a wide seizure of hundreds of thousands of emails. Despite not justifying the seizure of an entire email account over several years of an individual, the Commission have not proposed, in the first instance, what is to happen to obviously irrelevant material, in the second instance, how proposed search terms could not have been used on-site when the search was conducted, in the third instance, why it was necessary for the plaintiffs' legal representatives to protest before any search terms were even proposed and, finally, that legal representatives having been allowed to attend during the search, why these may not assist in at least attempting to settle the basis for the analysis*.".

64. Turning to a consideration of the logistics of what was being proposed, Charleton J. observed:

> *"**[260]** …. Having protocols … makes clear to everyone what should happen. Such may operate as a guide to circumstances as extreme as in this case where a vast capture of irrelevant material has occurred. The plaintiffs, fortunately, know what has been copied because they have the original material. The individual suspected of complicity in breaches of competition law, who has an entitlement to be presumed innocent, has been specifically targeted. This is not, therefore, a case where material has been taken and where the context enables a court to find that the searched individual or undertaking has no precise knowledge of what has been taken in the search. In such circumstances, the rights of defence may be compromised as it will then be probable that legitimate representations as to what was directly or potentially relevant to the investigation could not precisely be made. Here, such precise representations can be made. …*
>
> ***[261]** Consequently, the plaintiffs are not at a disadvantage in seeking to assert that certain documents within the email account of Séamus Lynch relate to genuinely private engagements or concerns. They have the ability to assert that certain precisely defined and described emails bear no relationship to the nature of the investigation, which is amply described in the warrant and in the sworn statement which accompanied it. It is thus incumbent on the plaintiffs to assert the proportionality of the coming scrutiny by making a detailed submission as to what communications on this business email server have been entirely for private or family purposes.*
>
> ***[262]** In reality, the plaintiffs have, on the facts as laid before the trial judge in the High Court, made an entirely separate and incorrect case as to the incompatibility*

of executive duties within the cement industry with the pursuit of breaches of competition law. Any taking of or copying of email material in the course of a valid search will capture ordinary day-to-day stuff like conversations about hurling matches or clothes or recipes for Irish stew. It would have assisted the process for genuinely private and sensitive material to be precisely specified by the plaintiffs in their legal submissions to this court. This has not been done, certainly that is not the fault of counsel, and it should have been done by them in order to assist in this process. It is clearly important to the outcome of a case that such specification be done; that a party the subject of a search and seizure should simply state that particular items of genuinely private concern and of no relevance to the case under investigation have been taken and state clearly what these are. To fail to do that is to undermine any such later case that might be made; Janssen-Cilag S.A.S. v. France (App. No. 33931/12) (Unreported, European Court of Human Rights, 21 March 2017). But, of course, the searching authority may display an unwillingness to consider any such submission, as is pointed out in the judgment of Laffoy J.

[263] *The entitlements contended for by the plaintiffs, relating to attendance at any examination of documents, exist in some jurisdictions pursuant to protocols where a vast seizure of electronic material has been made and where that input may assist in identifying a proportionate examination of material that is accepted to contain out-of-scope material. It is to be noted that in some codes of practice concerning the copying of digital material, it is thought that it may be desirable that a representative from the party searched be present for the examination of the documents. The jurisprudence on article 8 shows that the European Court of Human Rights has not found that there is any general right for the party searched to be present for the opening or scrutiny of copied digital material. The circumstances in which this occurs must be fact-specific. For instance, in a terrorist investigation, it is surely proportionate to conduct an immediate scrutiny in order to head off an impending atrocity or prevent yet another gross breach of human rights which public bombings or assaults with vehicles, or other weapons, represent. A suspect may have fled; or may be required to be kept from material where the legitimate purpose of preventing dissemination as to methods occurs. Any such cases will, in any event, have their own statutory matrix and it is not proposed that any change in the methodology of examination is necessary. Anyone believing that more material has been seized than necessary may of course make a representation as to precisely what that is and the investigating authorities may consider their methodology in the light of it. … As Barrett J. did not make a specific suggestion as to a way forward, in the context of this case, it is within the scope of this court's function on appeal to consider a way forward*.".

65. Moving then to address a complaint by the plaintiffs that there was an absence of an effective remedy by means of which they could seek a judicial review of the process by means of which it was proposed to identify and exclude from scrutiny non-relevant data in respect of which an entitlement to privacy might exist, and/or which might be the subject of legal professional privilege, Charleton J. remarked:

> "*Such a process is specifically provided for in s. 33 of the 2014 Act in relation to claims that particular documents constitute professional advice on legal issues. It has been commonplace in this jurisdiction that those searched may wish to make a precise representation as to property taken in the course of an investigation and seek its return. The possibility of judicial involvement has never been ruled out from this process, nor has the taking of an action for damages, should a civil trespass occur through an exercise of bad faith by authorised parties under a search warrant, or through actions outside the scope of legitimacy conferred by a warrant. No judge would validly entertain such a case had not representations of a sensible and precise kind first been made in such a detailed way as to enable the party holding the material after the search to respond. In this case, that has not occurred. Instead, a vague and entirely erroneous case was essayed. Thus it has been necessary to hold that the search was within the scope of the legislation, as was taking material off-site, and that corporate structure is in no way an answer to legitimate suspicions.".*

66. In conclusion, Charleton J. was prepared to hold that the order of the High Court was correct in the context in which the case was presented and that it should be upheld. Further:

> "*As Laffoy J. suggests in her judgment, the forward movement of the investigation can easily be effected through the agreement of the parties. To some extent, positions have become entrenched. Thus, a suggestion as to what might now be addressed may be helpful to the concerns expressed and which are ruled on in this judgment and in the separate judgment of Laffoy J., with which this concurs.*".

67. With that, Charleton J. proceeded to make suggestions as to an appropriate protocol or procedure by means of which the matter might, it was hoped, be progressed. As the specific protocol suggested was context specific it is unnecessary for the purposes of this judgment to reproduce it.

Commission for Communications Regulation v Eircom Ltd

68. It bears further commenting upon that issues, echoing some of those which arose in the *CRH plc* litigation, were considered earlier this year in the commercial division of the High Court, in a case entitled *Commission for Communications Regulation v Eircom Ltd* [2024] IEHC 49, where Twomey J. was required to consider the statutory investigative powers of the Commission (i.e., "ComReg"), including its powers of search and seizure, under the Communications Regulation Act 2002, in the context of an investigation by ComReg, as a regulator, into the activities of a regulated entity, Eircom, and specifically with respect to the publication by Eircom of a proposed discount scheme for access by its wholesale customers to Eircom's fibre connections into homes and businesses. The concern was that that proposed discount scheme did not meet regulatory requirements and also that it would have an adverse impact on competition. In the context of their investigation into this matter, ComReg had conducted an unannounced search of the premises of Eircom over three days and it seized some of Eircom's digital data.

69. While there was no challenge at any stage to the lawfulness of the search and seizure, or its scope, the statutory scheme under which it was effected made provision (in s. 61 of the Communications Regulation Act 2002 as inserted by s. 133 of the Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023) for how privileged and irrelevant/private material that was part of seized data was to be treated. In many respects the provisions of the said s. 61, as inserted, mirrored (although not exactly) those in s. 33 of the Act of 2014 which had been considered in the *CRH plc* case.

70. It was accepted by ComReg that some of the seized data would be irrelevant to its investigation and that it could also contain legally privileged material. Hence, it had proposed a "Step Plan", to enable it to analyse the seized data, in order to exclude privileged and irrelevant material, for the purposes of its investigation into Eircom. In broad terms, this Step Plan envisaged doing a series of electronic word searches of the seized data, in each case taking into account any submissions of Eircom regarding what search terms should be used, in order:

    • to search for file/domain names which relate for example to healthcare providers, airline reservations etc which are clearly personal and so to eliminate irrelevant information,

    • to search for domains, names and email addresses of lawyers etc to eliminate privileged material,

    • to search using terms which will identify relevant material to its investigation.

    After completing these electronic word searches, ComReg would then propose to commence its analysis of the seized data for the purposes of its investigation into Eircom.

71. The matter came before the High Court in circumstances where, for the reasons set out below, Eircom was not prepared to agree the proposed Step Plan for the identification and exclusion of privileged/irrelevant information. In those circumstances ComReg brought an application under section 61 of Communications Regulation Act 2002 as inserted seeking to have the High Court approve its proposed Step Plan. The specific issue which the Commercial Court was required to determine was whether the requirement arising under s. 61, and imposed jointly on the parties, to maintain confidentiality pending a determination by the High Court of whether information at issue was privileged meant that the *regulated entity*, rather than the *regulator*, should conduct any proposed electronic search of the seized information with a view to trying to identify privileged/irrelevant information so that it might be excluded from any proposed scrutiny by investigators. Eircom claimed that if ComReg conducted the electronic keyword search to remove privileged/irrelevant information, then, by virtue of ComReg being the party conducting the search, it was likely that ComReg would have access to privileged or private/confidential information, which belonged to Eircom. On this basis, Eircom claimed that this would mean that the confidentiality of its information was not 'maintained', as required by statute. Accordingly, Eircom claimed that it should be allowed to conduct the electronic search of its own data, as seized by ComReg, and then provide the refined data

to ComReg, after the removal of privileged and irrelevant information. Not surprisingly, ComReg argued that if a regulated entity, under suspicion of a regulatory breach, was entitled to determine which material was relevant to the offence for which it was being investigated by the regulator, without any possibility of verifying the information which had been removed, this would undermine to a very significant degree the investigative powers of the regulator and so one of the purposes of the relevant Act.

72. The Commercial Court concluded that the party which should conduct the search of the seized Data was the regulator, ComReg, rather than the regulated entity, Eircom. Otherwise, the very purpose of search and seizure powers, by a regulator as part of its investigation of a regulated entity, would be undermined. In the circumstances the Court approved the Step Plan, involving the use of an Electronic Word Search designed to eliminate privileged and irrelevant material from the seized Data, which plan was provided by ComReg to the Court, subject to a small number of minor modifications, referenced in the judgment.

Identification of privileged/irrelevant information in the present case

73. The circumstances of the present case are certainly distinguishable from those in both the *CRH plc* case, and the *Commission for Communications Regulation v Eircom Ltd* case, to the extent that in those cases there was a scheme for statutory regulation of an industry sector, which afforded specific powers of search and seizure to the regulator, and which schemes made specific provision for a party the subject of a search, who was concerned that legally privileged or irrelevant material should not be inspected or interrogated, and where the parties were unable to agree a mechanism to achieve that, to have recourse to the High Court for an adjudication on the dispute. There is no corresponding facility of which the parties in the present case could avail.

74. That having been said, as was made clear in *CRH plc*, and illustrated by the *Commission for Communications Regulation v Eircom Ltd* case, it is always open to the parties to seek to agree and implement an *ad hoc* arrangement to safeguard legally privileged or private or irrelevant material against unlawful or inappropriate disclosure. Further, if such an agreement proves impossible or unworkable then, even absent an express statutory mechanism for doing so, recourse can be had to the courts. As Charleton J. observed in the *CRH plc* case (and as previously quoted):

> "*It has been commonplace in this jurisdiction that those searched may wish to make a precise representation as to property taken in the course of an investigation and seek its return. The possibility of judicial involvement has never been ruled out from this process, nor has the taking of an action for damages, should a civil trespass occur through an exercise of bad faith by authorised parties under a search warrant, or through actions outside the scope of legitimacy conferred by a warrant*.".

75. Accordingly, even in the absence of an express statutory scheme (such as that in s. 33 of the Act of 2014, or s. 61 of the Communications Regulation Act 2002) dealing with how privileged/irrelevant material that has been seized in the course of a search ought to be

dealt with, and expressly providing for a court adjudication of disputes; and even if it proves impossible for parties, who have genuinely engaged with each other in good faith, to agree and apply an *ad hoc* scheme, or protocol, of suitable safeguards to govern the circumstances of their case; an aggrieved party may initiate stand-alone litigation by Plenary Summons (or if appropriate by initiating Judicial Review proceedings, as was done in the present case) seeking appropriate relief including declarations and/or injunctions (including interim, interlocutory and permanent injunctive relief) in vindication of their rights.

76. To have to proceed in that way is admittedly not as straightforward or convenient or expeditious a mechanism for seeking a potential remedy as that which exists under the statutory schemes cited by way of example, but as a route or mechanism for doing so it exists, and so, at least arguably, there is a means of seeking an effective remedy and of ensuring that the statutory provision at issue can be operated constitutionally. Whether or not it is a sufficient means of doing so, or adequate and fit for purpose in the circumstance of this case, represents an issue to be determined at the trial of the substantive constitutional challenge in the present case. It is not a matter, however, to be decided at this time in the context of this application for interlocutory injunctive relief. Rather, this Court must have regard, *inter alia*, to the fact that s. 10(1) of the Act of 1997, as substituted, currently enjoys a presumption of constitutionality and, for the reasons stated in our judgment on the motion seeking interim relief ([2024] IECA 191) a law which enjoys such a presumption ought not to be lightly disapplied in the granting of interlocutory relief.

77. Where, as in the present case, interlocutory injunctive relief is sought, it requires to be borne in mind that such relief is discretionary, and, assuming the other well-established requirements for the granting of such relief have been demonstrated to exist, such relief will nonetheless only be granted, where the balance of justice favours it.

78. An important issue for determination in any consideration of where the balance of justice lies in such a case will be whether there has been genuine engagement between the parties for the purpose of seeking to agree a mechanism or protocol by means of which data, which is either legally privileged or irrelevant, can be excluded from any consideration of material seized by the relevant investigators, i.e., in this instance An Garda Síochána. The presence or absence of, or the sufficiency or adequacy of, a mechanism by means of which to seek a court adjudication on a dispute between the parties concerning whether an item or items of data, said by one party to be legally privileged and/or private and/or irrelevant, should be excluded from any proposed consideration of the data seized by investigators, and/or concerning the adequacy of safeguards proposed to that end, is neither here nor there if there has been no meaningful engagement by the party seeking injunctive relief.

79. Of course, if the parties have negotiated in good faith in an effort to reach agreement on a workable inspection protocol, and have reached a *bona fide* impasse, a court might need to intervene in some appropriate way, including potentially by the granting of

interlocutory relief, in vindication of the rights of the party whose data has been seized on the basis that the balance of convenience could well in those circumstances be considered as favouring the granting of the relief being sought. However, a court is most unlikely to do so if no serious and good faith effort has been made by the applicant to at least engage reasonably with proposals to agree a workable arrangement aimed at identifying and excluding privileged and/or irrelevant data from disclosure, and maintaining the privacy of relevant material in so far as possible consistent with the entitlement of the investigator to lawfully investigate, much less if an applicant has actively sought to obstruct or frustrate the putting in place of such a process.

80. What requires to be considered at this point is whether there have been good faith efforts between the parties to agree a workable way forward, and in so far as the applicants seek to have this Court intervene in their favour by granting discretionary interlocutory relief, whether in their case they, as the moving parties, have demonstrated genuine engagement with any proposals that may have been put forward by the respondent with a view to trying to put in place a workable *ad hoc* regime of safeguards and mechanism to allow relevant and non-privileged material to be accessed by Garda investigators.

81. I am satisfied that the proposed protocol put forward by the respondents in this case represents a reasonable and good faith effort on their part to agree a workable way forward. In offering that view I am not to be taken as endorsing in every, or indeed in any respect, the specifics of the proposal that has been put forward. One would anticipate that there could be perfectly good arguments mounted both for or against either the scheme as a whole, or aspects of it. It might not therefore be possible for the parties engaging in negotiations in good faith to achieve agreement with regard to it either in its original form, or the basis of some variation of it. However, where a party or parties to whom such a proposal has been proffered has refused point blank to engage in any meaningful way with the proposal, what can be said with certainty is that they have not negotiated in good faith or made genuine efforts to see if a workable way forward could be achieved. Regrettably, I must characterise the appellants as having taken that stance, and as not having exhibited a willingness to engage with the proposals in good faith, or to consider them on their merits.

82. That being so, I am satisfied that that want of good faith engagement on the appellants' part, coupled with the *Okunade* and *Krikke* considerations alluded to at paragraph 44 above, and the well-established commendation that the jurisdiction to grant an injunction which would have the practical effect of preventing the operation of a statute pending the determination of a challenge to its constitutional validity should most sparingly be exercised, leads me to conclude that the balance of justice does not favour the granting of interlocutory injunctive relief in this case at this stage.

83. Accordingly, I consider that the present application should be refused, and that the High Court judge was correct in also refusing such relief in in the circumstances as established before him.

Kennedy J.
I have read the judgment and record my agreement.

Burns J.
I also have read the judgment delivered by Edwards J and record my agreement.