THE HIGH COURT

[2021] IEHC 96

[2020 No. 102 M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995, AS AMENDED BY THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN

A

APPLICANT

– AND –

B

RESPONDENT

[2020 No. 95 M]

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964, AS AMENDED, (AND IN THE MATTER OF THE CHILDREN AND FAMILY RELATIONSHIPS ACT 2015 AND IN THE MATTER OF [STATED NAMES], INFANTS

BETWEEN

B

APPLICANT

– AND –

A

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 12th February 2021.

I

Notices of Motion

i. *Mr A's Notice of Motion*

1. By notice of motion of 4th February 2021 in the first of the above-entitled proceedings, Mr A seeks, inter alia, the following reliefs:

> *"1. An Order, whether pursuant to Order 31, Rule 29 of the Rules of the Superior Courts or otherwise, directing the Commissioner of An Garda Síochána, his servants or agents, to make discovery on oath of all documents within his power, possession and/or procurement, within such time as may be fixed by Order of this Honourable Court, that falls within the following category of documents:-*
>
> > *All documents relating to and/or evidencing recordings of the Applicant in these proceedings (including but not limited to audio and video recordings, and to include the recordings themselves), which were created on, are being stored on and/or have been obtained from, any electronic device or devices which An Garda Síochána lawfully seized from the Respondent herein and which concern, relate to and/or are in connection with a criminal investigation of the said Applicant,*
> >
> > *and*
> >
> > *to make provision for the Applicant his servants or agents for the inspection and/or searching of facilities of the said electronic device or devices using such information and communications technology system which is either*

owned or operated by or on behalf of the Commissioner of An Garda Síochána, or as may be agreed between the parties."

ii. *Ms B's Notice of Motion*

2. In her notice of motion, Ms B seeks*, inter alia*, the following reliefs:

"…a direction that:

(1) The recordings of the interaction between the Respondent and the children of the marriage…[made in] Autumn 2020 be furnished to [STATED NAME]…to facilitate [the]…Section 32 Assessment".

II

Background

3. The following summary of the facts have respectfully been extracted from the written submissions of counsel for Mr A:

"a. An audio recording ('the recording') of the Applicant was played to --- District Court on the 3rd November 2020 in the course of an ex parte application for an interim barring order and/or on the 10th November 2020, being the occasion of a contested application for a barring order. The Respondent contends that this recording is corroborative of her experience of the Applicant as being threatening to herself and the children.

b. The Applicant has appealed to the Circuit Family Court against the granting of the barring order. The Applicant apprehends that the Respondent will seek to introduce the recordings (and perhaps other materials, including audio or video recordings) into evidence at the hearing of the appeal.

c. The Applicant has heard a single recording only once, being in the District Court on the 10th November 2020. The Applicant is now represented by a different legal team, none of whom have heard the said recording. The Applicant has had no legal advice concerning the contents of the recording.

d. The Respondent has, in opposing the Applicant's efforts to have supervised and/or unsupervised access to his children, placed reliance not only on the fact of the Barring Order but also on the said recording and the further recordings.

e. The Applicant served a Notice to Produce in these proceedings relating to the recordings on or about the 16th December 2020….

f. The Respondent did not provide the recordings by reference to the Notice to Produce, but on the 18th January, while acknowledging the Applicant's entitlement to have a copy of the recordings, indicated that there were technical difficulties which prevented her solicitor from copying and sending the recording to the Applicant's solicitor. On this occasion, the Respondent's solicitor mentioned recordings in the plural.

g. *Upon an application being made by counsel on behalf of the Applicant on the 19th January, a direction was made by [Barrett J.]…requiring the Respondent to furnish the Applicant with the recordings by close of business on the 22nd January.*

h. *Despite the fact that the Respondent did not contest the direction given by [Barrett J.]…the Applicant learned – for the first time – having received the Affidavit of Inspector F--- which was sworn on the 8th February 2021, that it was the Respondent who contacted the Gardaí on the 20th January – the day after the said direction was given – and she informed Detective D--- … that the Applicant 'requested' a copy of the recordings.*

i. *On the 22nd January, the Court gave liberty "to An Garda Síochána to make a submission regarding their holding of a mobile phone device belonging to the Respondent which said device contains recordings which [the] parties wish to access", albeit with liberty to the Gardaí on the 2nd February to make representations concerning the meetings which were on the Respondent's phone.*

…

5. *The Respondent, in defence of this application has relied at paragraph 23 of her Affidavit which was sworn on the 15th December 2020 on the unspecified and/or unparticularised recording offered in her evidence at [the] hearing of the Barring Order [application] as evidence of the Applicant's unsuitability to have supervised and/or unsupervised access with his children.*

6. *Additionally, the Respondent has averred to the existence of further or other 'recordings' – as yet unspecified and/or unparticularised…in defence to the Applicant's access application and to further underscore the appropriateness of her resistance to supervised and/or unsupervised access.*

7. *…[In] his affidavit sworn on 9th December 2020 for the purpose of grounding his application for access, the Applicant has particularised his concerns about the manner, context and/or motive by which the Respondent had…recorded him without his knowledge and consent inside the family home….*

8. *The Applicant apprehends and/or is seriously concerned that an effort might be made to play a recording or recordings to this Honourable Court, without his ever having had the benefit of being able to consider them in advance and to instruct his lawyers about them. This is…what occurred at the hearing of the Barring Order….*

9. *The Applicant also apprehends that continuous reference being made by the Respondent to unspecified recordings which are not particularised and not otherwise in evidence, creates an overhanging cloud of concern in the mind of the Court which may serve to undermine his efforts to persuade the Court to permit him to have further supervised or unsupervised access to the children.*

[Court Note: The court respectfully considers this apprehension to be a misapprehension. Something is either in evidence or it is not. Part of the daily business of the courts is to separate evidential 'wheat' from non-evidential 'chaff'. In all cases, admitted evidence will be considered, non-admitted/inadmissible evidence will not be considered, and bare averments as to non-admitted/inadmissible evidence will not advance one's case. These proceedings are no different from other cases in this regard.]

10. *The Respondent has issued a Notice of Motion, in the context of her own legal proceedings…which is also returnable to 9th February seeking a direction to furnish the unspecified and unparticularised recordings to the Section 47/32 assessor,* [Name Stated]….

11. *Further, the Respondent has not grounded her application for the said direction on affidavit evidence. Order 70A, Rule 11 of the Rules of the Superior Courts require applications for directions in family law proceedings to be grounded on affidavit."*

[Court Note: As to this last point, the Rules are there to ensure that proceedings proceed as fairly as possible to all and that justice is despatched openly and efficiently. So the respondent needs to comply with the Rules. That said, the Rules are the servants of justice, not her master, in all the circumstances presenting the court does not see that anyone has been prejudiced by the above-mentioned omission; in particular all the relevant parties were on notice of the proceedings and knew what was in play. So beyond noting the important need ever to comply with the Rules the court considers that to be the end of matters so far as the above omission is concerned.]

III

Grounding Affidavit in Discovery Application

4. Mr A's solicitor, in his grounding affidavit of 4th February 2021, avers*, inter alia*, as follows:

"2. I make this Affidavit on behalf of the Applicant to ground the within Notice of Motion which has been brought on behalf of the Applicant to seek for discovery to be made by or on behalf of the Commissioner of An Garda Síochána who is a non-party in these proceedings and pursuant to the direction made by [Barrett J]…on 2 February 2021….

4. On the 2 February 2021, having heard oral submissions from counsel on behalf of the Commissioner who confirmed that An Garda Síochána intend to assert investigative privilege over the said items or documents as more particularly described herein and in the notice of motion accompanying, and having heard further submissions for counsel on behalf of the parties, [Barrett J]…deemed it appropriate and directed the Applicant to bring the within application for non-party discovery concerning the said device or devices and recordings held by An Garda Síochána returnable to the 9th February 2021.

5. *In the ordinary course, an application such as the within application would require that evidence is given by or on behalf of the Applicant to show that the discovery of the said documents is relevant and necessary for the fair hearing of the matter and/or the saving of costs. However, it is the Respondent who has relied on the said recordings in her sworn evidence already offered….In such circumstances, the position of the Applicant is that he is entitled to production of all such documents, including electronic recordings, and [Barrett J]…has already made an order directing the Respondent to do so.*

6. *Accordingly, given the peculiar circumstances of this particular matter, the Applicant may at a later date wish to argue against the recordings being relevant and necessary and/or may argue that the recordings are inadmissible evidence in these proceedings. Therefore, in the circumstances in which the Applicant finds himself in so far as the Applicant asserts that the recordings are relevant and necessary for the fair hearing of the matter and/or for the saving of costs, I do this on behalf strictly on a without prejudice basis to the above position.*

7. *As these family law proceedings are subject to the in camera rule, I am cognisant that the involvement of the Commissioner, his servants or agents in this matter is or ought to be strictly limited to the within motion concerning non-party discovery.*

8. *I am also cognisant that the Applicant was formally made aware by An Garda Síochána, as recently as the 2nd February 2021, that he is the subject of an unspecified investigation concerning matters which have a bearing on aspects of these proceedings. This recent notification was provided to the Applicant in circumstances where An Garda Síochána were made aware of these proceeding as early as December 2020.*

9. *I say that the Respondent has asserted, in her evidence…that An Garda Síochána are conducting an investigation in relation to alleged assaults, as particularised below, by my client on [certain]…children of the marriage.*

10. *By letter dated the 5th January 2021, I wrote on behalf of the Applicant to Detective Garda D--- to express concern about assertions or representations, which were made by or on behalf of the Respondent in the course of these proceedings, that An Garda Síochána were conducting a criminal investigation concerning said alleged assaults….I sought for Detective Garda D--- to confirm whether the Applicant was in fact the subject of the said criminal investigation. No reply was received….*

11. *I say that on the 2nd February 2021, counsel and solicitor on behalf of the Commissioner appeared before [Barrett J.]…and confirmed that An Garda Síochána are conducting an investigation against the Applicant. I understand from my client and believe that this is the first formal notification and/or confirmation of any criminal investigation concerning the Applicant. An Garda Síochána have not*

informed the Applicant of the nature, scope and/or status of the investigation and when same commenced.

12. *The Applicant contends that the Respondent has offered evidence to this…Court and/or the District Court in* [STATED PLACE]…*which is materially incorrect and inconsistent with other facts and circumstances. The Applicant contends that the Respondent has omitted to inform and/or explain material matters to this…Court and/or the District Court. The Applicants contends that the Respondent has contrived a version of events against him which is untrue and/or inaccurate and which portrays that the Respondent exercises a significant degree of malign influence over the dependent children.*

13. *I say that in the course of these proceedings, the Respondent has asserted, in her sworn evidence offered to this…Court, that the reason she applied on an urgent and ex parte basis for an interim barring order on or about the 3rd November 2020 and on notice for a barring order on or about the 10th November 2020 was as a result of an alleged assault on…[a stated] child of the marriage on the 3rd April 2020. The only witness against the Applicant at that hearing was the Respondent. My understanding is that a recording was played aloud to the District Court.*

14. *The Respondent accepts that that she was not present at the time of the alleged assault on the…[stated] child of the marriage. The Applicant contends that despite the sworn assertions made by the Respondent of her serious concerns for the safety and welfare of the dependent children, that the Respondent has never offered any explanation to this…Court and/or the District Court as to why she did not return to the family home until around two hours after the alleged incident on the 3rd April 2020 notwithstanding that she says that she was at a place located around 30 minutes' drive from the family home.*

15. *The Applicant contends that despite the sworn assertions made by the Respondent of her serious concerns for the safety and welfare of the dependent children, the Respondent has omitted to inform this…Court and/or the District Court that she did not stay at the family home on the night of the 3rd April 2020 and that the dependent children stayed all night at home with their father.*

16. *The Respondent has asserted, in her sworn evidence offered to this…Court that the* [stated]…*child of the marriage was assaulted on the 7th of September 2020 at* [STATED RETAIL OUTLET]. *I believe that the Respondent accepts that she was not at* [STATED RETAIL OUTLET] *on the said date. The Applicant contends that CCTV is available from* [STATED RETAIL OUTLET] *which supports his position.*

17. *In an affidavit sworn on the 1st February 2021, the Respondent has – for the first time – introduced new and further allegations of assault on the second eldest dependent child. These new allegations are broadly asserted and/or general in nature. The Respondent has failed [to] explain to this…Court as to why she failed to*

raise such alleged matters before now. It is noted that thus far these allegations, such as they are, are so vague and generalised.

18. *The Respondent has never previously asserted or indicated to this…Court that she made or has ever had any recording of the above alleged matter. I say that in the course of these proceedings, the Respondent has referred to and/or has sought to rely upon unspecified readings which she has offered to this Honourable Court as evidence of the Applicant acting in an aggressive, abusive and violent manner.*

19. *The Applicant contends that one or more or all of the recordings were made of him covertly, secretively, selectively and/or opportunistically by the Respondent whilst located inside the family home and without the consent, permission and/or awareness of the Applicant. The Applicant*, inter alia*, asserts his constitutional rights, including but not limited to his right to privacy inside and/or outside his dwelling have been seriously breached by the Respondent….*

20. *The Applicant has bever been furnished with a copy of any such recordings made by the Respondent and referred to by the Respondent on affidavit. This has placed the Applicant at a clear disadvantage in the given circumstances. Unless and until the Applicant is furnished with the recordings, he is clearly unable to address same in any meaningful manner and it would be highly inappropriate and prejudicial for him to attempt to do so and he has been advised by his legal advisors not [to] do so.*

21. *An Garda Síochána are aware of their obligation, in their unique prosecutorial role to seek out and preserve evidence which is exculpatory of the Applicant.*

22. *On or about the 5th January 2021, I furnished the solicitor for the Respondent with a Notice to Produce the recordings referred to in the sworn evidence offered to this Honourable Court by the Respondent. Despite numerous reminders to furnish a copy of the said recordings to the Applicant, the Respondent has failed, refused and/or neglected to do so.*

23. *The Respondent through her solicitor has indicated a willingness to provide copies of the relevant recordings and explained that the failure to produce the recordings to that point was as a result of the Respondent's inability to download the recordings from her device. I say that the simplicity and convenience of transferring and copying recordings from a telephone device is well known, and my client is sceptical about whether any such difficulties had in fact been encountered.*

24. *The Respondent has not clarified to the Applicant and indeed to this…Court whether she has ever made any copies of the recordings and/or whether same are within her possession, power and/or procurement.*

25. *On the 19th January 2012, the High Court acceded to an application made by counsel on behalf of the Applicant and made an order compelling the Respondent to*

furnish the Applicant with a copy of the recordings by the 25th January 2021. As the Court is aware that order has not to date been complied with.

26. *By letter dated the 21st January 2012, the solicitor for the Respondent informed the Applicant that Detective Garda D---…informed the Respondent that An Garda Síochána were 'seizing her telephones' and had directed the Respondent to not disclose the recordings to the Applicant or to his legal advisors. The Respondent does not say whether or not she had informed Detective Garda D---…of the existence of the above High Court order compelling the disclosure of the recordings….*

27. *The date and time for when An Garda Síochána took possession of the electronic device or devices has not been disclosed. The power invoked by An Garda Síochána to seize the said device or devices has never been explained or whether any such power was invoked. In the given circumstances, I say that these serious matters require to be fully clarified and explained to the Applicant and to this…Court.*

28. *I say that before An Garda Síochána may assert and/or be entitled to assert privilege over the device or devices and the information stored therein, it befalls the Commissioner to show this…Court that the purported seizure and retention of the said property occurred lawfully, whether by the voluntary surrender by the Respondent or by a lawfully issued warrant and to show that such evidence is relevant for the proper investigation of the Applicant.*

29. *On or about the 22nd January 2021, this Honourable Court granted liberty to An Garda Síochána to make submissions to the court on the 2nd February 2021 regarding their holding of a device belonging to the Respondent which contains the said recordings which this…Court has ordered the Respondent to furnish to the Applicant.*

30. *For the sake of completeness, if this…Court is mindful to deem it appropriate to attach investigative privilege to one or more of the recordings, it would remain to be determined what precisely should occur with the sworn evidence offered to this…Court by the Respondent concerning her reliance on the recordings.*

31. *The category of documents sought by way of discovery and the reasons they are sought are as follows:*

Category

All documents relating to and/or evidencing the recordings of the Applicant in these proceedings, including but not limited to audio and video recordings, which were created on, are being stored on and/or have been obtained from the electronic device or devices which An Garda Síochána seized from the Respondent and which concern, relate to and/or are in connection with a criminal investigation of the Applicant and to make provision for the Applicant, his servants or agents for the inspection and/or searching facilities

of the said electronic device or devices using an information and communications technology system which is owned or operated by or on behalf of the Commissioner of An Garda Síochána.

Reasons:

The Respondent has relied on the said documents in one or more swore affidavits offered as evidence to this Honourable Court and/or has used one or more recordings as evidence against the Applicant in other civil proceedings and therefore the Applicant is entitled to be furnished with a copy of the said documents in the interests of fairness and to avoid any or any further prejudice being caused to the Applicant.

32. *Where An Garda Síochána seek to assert privilege over any of the documents in the above category, it is required to particularise all documents, including the time, date and location of any recording being discovered on oath and also to specify which documents and on what basis privilege is being asserted over same."*

IV

Garda Affidavit

5. Detective F--- of An Garda Síochána has sworn an affidavit of 8th February, in which he avers*, inter alia*, as follows:

"3. The category of documents sought by way of non-party discovery and inspection is as follows:

Category:

All documents relating to and/or evidencing the recordings of the Applicant in these proceedings, including but not limited to audio and video recordings, which were created on, are being stored on and/or have been obtained from the electronic device or devices which An Garda Síochána seized from the Respondent and which concern, relate to and/or are in connection with a criminal investigation of the Applicant, and to make provision for the Applicant, his servants or agents for the inspection and/or searching facilities of the said electronic device or devices using an information and communications technology system which it owned or operated by or on behalf of the Commissioner of An Garda Síochána.

4. I say that I have in my possession or power the documents relating to the category of documents relating to the matters in question in this suit set forth in the First Schedule hereto.

5. I object to producing the said documents set forth in the Second Part of the said First Schedule hereto.

6. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the Second Schedule hereto….

Seizure and Retention of Mobile Phone Devices by An Garda Síochána

8. *I say and believe that on or about 11 December 2020, the Respondent attended at --- Garda Station where she informed Detective Garda D--- that the Applicant had been physically and emotionally abusive towards both the Respondent and her children. The Respondent provided a statement to Detective Garda D--- in respect of this abusive behaviour and informed Detective Garda D--- that she had several audio recordings contained on two mobile devices which evidenced the said abusive behaviour by the Applicant. These audio recordings were downloaded onto a USB device and retained by Detective Garda D---. Detective Garda D--- did not seize the mobile phone devices from the Respondent at this point in time as the Respondent informed her that she needed the mobile phone devices to allow her to conduct her business in [Stated Country]….*

9. *I say and believe that on 20 January 2021, the Respondent contacted Detective Garda D--- stating that the Applicant had requested a copy of the audio recordings contained on her mobile phone devices from her. I say and believe that Detective Garda D--- informed the Respondent that she should speak to her solicitor in this respect.*

10. *In the interests of clarity, I say and believe that Detective Garda D--- was not aware of the presence of any court order as against the Respondent mandating her to furnish the Applicant with a copy of the recordings and certainly did not instruct the Respondent to disregard any court order. Furthermore, I note that the Commissioner of An Garda Síochána has still not had sight of a copy of any court order in this respect and remains a stranger as to the contents of same.*

11. *I say and believe that on 23 January 2021, at --- Garda Station, Detective Garda D--- seized two mobile phones from the Respondent in accordance with section 7 of the Criminal Justice Act 2006. These mobile phones are currently in the custody of Garda S--- and are undergoing forensic examination and analysis.*

Claim of Public Interest/Investigative Privilege over Mobile Phone Devices and Recordings

12. *I can confirm that the criminal investigation into the Applicant is ongoing in respect of alleged assault against his children and coercive control as against the Respondent. It is my opinion and the opinion of the investigating team which I am a part of, that these mobile phone devices and the audio recordings contained thereon form a material part of this criminal investigation.*

13. *Furthermore, it is my opinion and the opinion of the investigating team which I am part of, that the mobile telephone devices in possession of An Garda Síochána and the audio recordings contained thereon or any copies of same should not be disclosed/produced to the Applicant at this juncture as to do so*

would impede the criminal investigation into the Applicant which is currently ongoing. Specifically, if a prosecution was to be brought against the Applicant and these audio recordings were disclosed to the Applicant prior to any arrest, it would affect the spontaneous response made by the Applicant during interview.

14. *Therefore, the Commissioner of An Garda Síochána objects to the production/disclosure of the documents set out in the Second Part of the First Schedule upon the grounds that said documents attract public interest/investigative privilege on the basis of the public interest in the detection, investigation and prosecution of suspected criminal offences.*

15. *I say that it would not be in the public interest if the Applicant, being the subject of an ongoing criminal investigation could, by the pursuance [pursuit] of an application for non-party discovery, obtain such documents prior to either a decision being made not to prosecute him or a Book of Evidence being served on him in respect of any such prosecution.*

16. *The Commissioner of An Garda Síochána claims the aforementioned public interest/investigative privilege over the category of documents sought for a limited period of time, specifically until either a decision is made not to prosecute the Applicant or a decision is made to prosecute the Applicant and a Book of Evidence is served on him in respect of this prosecution.*

[Court Note: There was suggestion at the hearing that the court might set a time limit for the making of the last-mentioned decisions. That would in effect be to issue an order of *mandamus* against the Gardaí and/or the DPP, due application would need to be made for same and the law applicable to the granting of such orders would apply.]

V

Issues Arising For Adjudication – Part 1

6. It seems to the court that the following matters, as identified by counsel for Mr A in his written submissions, arise for adjudication in the within proceedings:

"[1] …To establish the entitlement (if any) of the Gardaí to maintain investigative privilege in the circumstances….

[2] To establish whether in the circumstances a balance can be struck between the undoubted duty of the Gardaí to investigate criminal complaints, versus the entitlement to fair procedures in the various strands of the civil matters before the Courts and also having regard to the interests of the dependent children and the considerations contended for by Ms B in her submissions….

[3] If investigative privilege is established, to clarify whether or not it is to be understood to extend to the other strands of litigation between the parties as set out above….

[4] If investigative privilege is established, to clarify whether such privilege extends to both originals and copies of any recordings….

[5] If investigative privilege is established, to clarify the appropriate and/or necessary steps required to be taken concerning the sworn evidence offered to date in these proceedings by the Respondent concerning, relating to and/or in connection with the recordings".

[Court Note: Point [5] does not require the input of An Garda Síochána and falls to be resolved between the parties only.]

VI.

Public Interest Privilege

i. *Public Interest Privilege in General*

7. At common law, the Crown enjoyed a prerogative, known as 'Crown privilege', to refuse to produce documents or even to disclose their existence. That privilege was recognised by the courts of the Irish Free State *in Leen v. President of the Executive Council* [1926] IR 456. There, the eponymous plaintiff claimed, as owner of Ballyheigue Castle, County Kerry, a declaration against the President and the other Ministers of State, and members of the Executive Council of Saorstát Eireann, that he was entitled to payment by them out of the Central Fund of*, inter alia*, certain monies determined by the inter-governmental Compensation (Ireland) Commission in May 1924, to be the fair and reasonable compensation payable to him in respect of the malicious destruction of his castle in May 1921. (A shell of the main part of the castle survives today). The defendants pleaded*, inter alia*, that the plaintiff's claim had been satisfied by the payment of £5,000 by Lloyd's underwriters and that the said Commission was set up to report to the British Government and the Irish Free State upon certain matters and its determinations/reports conferred no legal right on any person. In the course of the pleadings certain interrogatories issued from the plaintiff. In July 1925, the defendants answered the said interrogatories indicating*, inter alia*, that they declined to answer certain interrogatories on the ground (1) of privilege, (2) that the disclosure of the information required was (a) contrary to public policy, and (b) would be detrimental to the public interest and service, and (c) that the information was neither material nor relevant; (2) communications between the Government and its Departments and the Commission (as an advisory body set up to advise and report to Government) were privileged. The plaintiff then sought an order for better answers to certain of the interrogatories.

8. In his judgment, in which he recognised public interest privilege, Meredith J. observed*, inter alia*, as follows, at pp. 463-64:

> *"The remaining interrogatories with which the plaintiff's notice of motion deals are Nos 4, 5, 6, and 8. These seem to me to be also relevant; but in respect of them the defendants object to answer on the ground of privilege, and that the disclosure would be detrimental to the public interest and service, and is contrary to public policy. If the defendants are entitled to the privilege that the Crown would have, I cannot go behind this objection. It is contended, however, by the plaintiff that the*

privilege can only be claimed by the Crown as such. I can find nothing, however, in the authorities on this privilege in respect of discovery to suggest that the rule of law which has always been in force, and which has to be administered as heretofore under the Constitution of the Irish Free State, is dependent upon the magic of any particular nomenclature. On the contrary, it appears to me to be broad-based upon the public interest, and in this connection the remarks of Rigby LJ in Attorney-General v. Newcastle-upon-Tyne Corporation [[1897] 2 QB 395]: *'I may say that in these days the prerogative of the Crown is about equivalent to the rights of the public,' cited by Mr Costello, are apposite. The principle has roots in the general conception of State interests and the functions of Courts of Justice, which make it independent of the particular type of constitution under which the body of law which recognises that principle is administered. So* in Beatson v. Skene [5 H & N 853-4] *Pollock CB said: 'The administration of justice is only a part of the general conduct of the affairs of any State or nation, and we think is (with respect to the production or non-production of a State paper in a Court of Justice) subordinate to the general welfare of the community.'*

…

The exception on the ground of privilege must therefore be allowed. But as this is the first occasion on which this important question has come before these Courts, it may not be out of place if I refer to an observation of Rigby LJ in the case already cited of Attorney-General v. Newcastle-upon-Tyne Corporation [[1897] 2 QB 395]: *'There has always been the utmost care to give to a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain over-ruling principle of public interest concerned which cannot be disregarded.' That observation testifies to the studious care with which the Crown, with a long tradition behind it, has, in the exercise of its privilege, avoided all suspicion of high-handed action. The observance of this zealous consideration as far as possible for the rights of individual subjects may be a matter of sound policy, hardly less important than the clear recognition of the privilege itself. It would be a matter of much regret if the plaintiff in this case were, for lack of sufficient information, unable to obtain a decision on the substantial issues in this action. Having clearly recognised that the decision as to the application of the grounds on which privilege is claimed to the matters as to which discovery is sought must be left to the judgment and word of the defendants, I venture to express confidence that, if it turns out in the course of any subsequent examination that some portion of the information sought can be safely imparted, the defendants will of their own initiative file a further affidavit, or include the information in the affidavit dealing with the first three interrogatories."*

9. Though renamed, initially public interest privilege retained the same governing principles as the old Crown privilege. Hence, once a claim of privilege was made in the appropriate form, it had to be accepted by the courts without any further inquiry. This can be seen in *O'Leary v. Minister for Industry and Commerce* [1966] IR 676. There, the ESB, in the

course of the execution of a hydroelectric scheme, submerged a bridge in the neighbourhood of the plaintiffs' lands pursuant to powers conferred by the Electricity (Supply) (Amendment) Act 1945, and thus became bound under the Act to construct a suitable new bridge, unless relieved from such obligation by an order made by the Minister. A relieving order was made and challenged. In the course of the challenge, the plaintiffs, being dissatisfied with the affidavits of discovery filed on behalf of the defendants, applied to the High Court for an order compelling the defendants to make further and better discovery and to produce the documents disclosed. At the hearing of the application the Minister for Transport and Power submitted that it should be dismissed on the ground that further discovery by him was against the public interest (and it was agreed that the position of the third-named defendant should be governed by the findings in relation to the second-named defendant). In dismissing the plaintiffs' application it was held*, inter alia*, as follows, by Budd J., at p. 688, in terms that seem notably conservative/deferential to a 21st century audience:

> *"In the present case the Minister has sworn an affidavit which contains the averments upon which his claim of privilege is based, and I am satisfied that they are sufficient for that purpose. The contents of this affidavit are quite clear and leave no doubt as to his views on the matter. In my opinion I must accept his statement as conclusive on this matter, and hold that it is not open to me to make an order for production of the documents so that they can be inspected."*

10. Although the decision of Budd J. was successfully appealed, the Supreme Court did not find it necessary to consider public interest privilege in detail.

11. A refreshingly liberal turn in the stance of the Irish courts in this regard came in *Murphy v. Dublin Corporation* [1972] IR 215. There, certain of Mr Murphy's lands were situated within the functional area of Dublin County Council. That Council, in its guise of relevant planning authority, refused to grant outline planning permission to the plaintiff for the development of those lands. Shortly afterwards, Dublin Corporation, being the housing authority for an adjacent area, made a compulsory purchase order for the acquisition by the Corporation of the plaintiff's lands under the Housing Act 1966. The objections of the plaintiff and others were the subject of a public inquiry held by an inspector appointed by the Minister for Local Government. The inspector furnished a written report of the inquiry to the Minister who confirmed the purchase order. The plaintiff issued a plenary summons seeking a declaration that the purchase order was invalid. The Minister, having disclosed the existence of the report on a motion for discovery of documents, claimed to be entitled to withhold the report on the ground that its production was contrary to public policy and the public interest. The Supreme Court held that the Minister's claim to executive privilege was mistaken, Walsh J. observing*, inter alia*, as follows in this regard, at pp. 234-5:

> *"Where documents come into existence in the course of the carrying out of the executive powers of the State, their production may be adverse to the public interest in one sphere of government in particular circumstances. On the other*

hand, their non-production may be adverse to the public interest in the administration of justice. As such documents may be anywhere in the range from the trivial to the vitally important, somebody or some authority must decide which course is calculated to do the least injury to the public interest, namely, the production of the document or the possibility of the denial of right in the administration of justice. It is self-evident that this is a matter which falls into the sphere of the judicial power for determination. In a particular case the court may be able to determine this matter having regard to the evidence available on the subject and without examining the document in question, but in other cases it may be necessary, as the court may think, to produce the document to the court itself for the purpose of inspecting it and making the decision having regard to the conflicting claims made with reference to the document."

12. The principles applicable to public interest privilege received further elaboration in *Ambiorix Ltd. v. Minister for the Environment (No. 1)* [1992] 1 IR 277. There, by virtue of a decision of the Minister for the Environment, made with the consent of the Minister for Finance, a site belonging to Irish Life Assurance plc was declared to be a "*designated area*" under s. 6 of the Urban Renewal Act, 1986. As a result, certain economic and fiscal advantages accrued to Irish Life. The plaintiff property development companies sought a declaration that the decision was *ultra vires* and contrary to the purposes of the Act of 1986. The High Court ordered discovery of documents/memoranda which had come into existence for the purpose of reaching the challenged decision. The defendants appealed the order on the grounds of privilege in the public interest based on the confidentiality of Cabinet communications the disclosure of which could prejudice the collective responsibility of the Government. The appeal was dismissed (though the order for the High Court was varied), the Supreme Court holding that the law relating to public interest privilege was correctly stated in *Murphy*. In his judgment, Finlay C.J. held*, inter alia*, as follows, at pp. 282-83:

"I have carefully considered the submission that this Court should resile from the decision formerly reached by it in Murphy v. Dublin Corporation [1972] IR 215. I have come to the conclusion that it should not, and that that decision correctly states the law in Ireland concerning this question of a claim of 'privilege' to exempt certain documents from production in litigation on the basis of the public interest.

It appears to me that the fundamental flaw in the submission made on behalf of the defendants that a proper development of the law in this country concerning this question of privilege by the Executive in regard to documents dealing with Government decisions should follow a line of authority which appears to have developed in recent times in the English courts on that same issue, is that it ignores the fundamental constitutional origin of the decision of this Court in Murphy…which, of course, has no application to the consideration of English courts dealing with the same question of privilege.

It appears to me appropriate that I should re-state by way of summary, but not by way of expansion or qualification, what appear to me to be the clear principles laid down by this Court in the judgment of Walsh J. in Murphy…and which, in my view, are a correct statement of the law on this topic. They can be summarised as follows.

1. *Under the Constitution the administration of justice is committed solely to the judiciary by the exercise of their powers in the courts set up under the Constitution.*

2. *Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the State.*

3. *Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.*

4. *The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.*

5. *It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision."*

13. Notable in the foregoing, at least to a court tasked with adjudicating in proceedings such as those now presenting is that the court is the sole decisionmaker when a claim of public interest privilege is asserted. This was confirmed again recently in *Keating v. RTÉ* [2013] ILRM 145. There, Mr Keating issued proceedings against the defendant seeking damages for*, inter alia*, defamation. The defendant applied for third party discovery against the first and second non-parties. The High Court granted discovery. The court rejected an argument that the discovery sought was oppressive and that it should be refused on the ground that the documentation sought would be privileged. The second non-party brought a failed appeal against this decision to the Supreme Court. In the course of his judgment, McKechnie J. observed*, inter alia*, as follows, at paras. 32-38 of his judgment:

"32. The primary submission articulated by the appellant in oral argument is one which, in essence, seeks to avoid the consequences of Murphy v. Corporation of Dublin [1972] I.R. 215 ('Murphy'), and a host of later cases all of which endorsed, supported and followed that particular decision. In Murphy, as part of his challenge to the validity of a compulsory purchase order, the plaintiff sought discovery of an inspector's report prepared for the minister under art.5(2) of the Third Schedule to

the Housing Act 1966. Such an application was resisted on two main grounds: firstly, that the document fell within a 'class of documents' which should be withheld on public interest grounds; and secondly, that in any event disclosure should also be denied as the same would be contrary 'to public policy and detrimental to the public interest and the public service'.

33. Underpinning this argument was the crucial submission that on so certifying the minister, as part of the executive organ of government, should, as such and by reason of his own judgment, be allowed to withhold such document. That argument gave rise to a central issue in the case which Walsh J. characterised as follows:

> *'[t]he present claim of privilege is that in a civil action the executive organ of government may by its own judgment withhold relevant evidence from the organ of government charged with the administration of justice and engaged in the determination of the rights of the litigants, and that this may be done when the claim of privilege is made on either or both of the grounds already mentioned' (p.233 of the report).*

34. The court emphatically rejected this contention on constitutional grounds, holding that it was solely for the judicial power, as part of its exclusive competence in the area of administrating justice, to make such judgment. It was therefore impermissible to allow any other body or entity to embark upon such an inquiry or to reach such a decision.

35. Several years later the Supreme Court was asked to revisit Murphy: it did so in Ambiorix, but rejected any alteration to the stated principles, which Finlay C.J. (not by way of expansion or qualification), summarised at pp.283/212–213 as follows:

> *'1. Under the Constitution the administration of justice is committed solely to the judiciary by the exercise of their powers in the courts set up under the Constitution.*
>
> *2. Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the State.*
>
> *3. Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.*
>
> *4. The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other*

public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.

5. It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision.'

36. In the implementation of these principles the following practice has developed:

(i) in general, where competing interests conflict the court will examine the text of the disputed document and determine where the superior interest rests: it will carry out this enquiry on a case-by-case basis;

*(ii) this exercise may not always be necessary. On rare occasions, it may be possible for the court to come to a decision solely by reference to the description of the document as set out in the affidavit; that is, without recourse to an examination of the particular text of the document itself (*Breathnach *pp.469/763);*

(iii) in all cases however (and this is the crucial point) it will be for the examining court to both make the decision and to decide on what material is necessary for that purpose; and finally

(iv) in performing this exercise, no presumption of priority exists as between conflicting interests.

37. As can therefore be seen, as a result of this constitutional position, which is mandated by the separation of powers and which permits of no exception, it is for the courts alone to resolve, in a justiciable setting, any conflict or tension which may arise between the public interest in the administration of justice on the one hand, and the public interest, howsoever articulated, which is advanced as a ground for non-disclosure of documents on the other. That being so, neither the Executive nor any other person can arrogate to themselves the power to make a decision such as the one in issue in this appeal. If it were otherwise, it would be, in the words of McCarthy J. in Ambiorix (pp.289/217) 'to lessen or impair judicial sovereignty in the administration of justice'. Such an occurrence in fact would in itself be inimical to the common good as the public also has a vital interest in the role which this organ of government is committed to perform under the Constitution.

38. Given the complexity of modern government, at both national and local level, it is no surprise to see that many different forms of public interest, asserted in support of the effective functioning of the public service, have been offered as a defence to disclosure requests. Some of these include:

(i) the conduct of an investigation into the affairs of Bord na gCon (Fitzpatrick v. Independent Newspapers *[1988] I.R. 132; [1988] I.L.R.M. 707;*

(ii) *the making of a complaint to the Director of Consumer Affairs, who has important law enforcement functions (*Director of Consumer Affairs*);*

(iii) *the general investigation and prevention of crime (*Breathnach*); and*

(iv) *the statutory functions of the Garda Síochána Complaints Board (*Skeffington v. Rooney *[1997] 1 I.R. 22; [1997] 2 I.L.R.M. 56).*

Whatever the particular interest relied upon, it should be noted that its terms must be formulated by reference to the issues in question and must be particularised in such a way that the courts can properly adjudicate thereon."

14. The principles in Murphy have latterly been described in *A.P. v. The Minister for Justice and Equality* [2014] IEHC 17 at [3], as "*well settled". A.P*. is also of interest because it shows how the High Court has in practice approached attempted invocations of public interest privilege, McDermott J. observing*, inter alia*, as follows:

"1. This is an application seeking the inspection of documents in the course of judicial review proceedings pursuant to the provisions of O. 31, r. 18 of the Rules of the Superior Courts….Order 31, r. 18 empowers the court to make an order for inspection in such place and in such manner as it may think fit….

2. The respondent is entitled to resist an application for inspection of otherwise relevant documents by claiming that the documents are privileged on the basis of public interest and the security of the state.

3. The parties in this case agreed that the legal principles applicable to the determination of whether a public interest privilege is properly asserted are well settled. In Ambiorix v. Minister for the Environment (No. 1) *[1992] 1 I.R. 277, Finlay C.J. summarised the relevant principles initially elaborated in Murphy v. Dublin Corporation [1972] I.R. 215….*

4. For the purpose of that determination the court has been furnished at its request, with three documents over which privilege has been claimed in order to assist in its determination of the relevance, if any, of the documents to the issues that arise between the parties. The court has considered each of the documents separately and their cumulative effect in the context of the evidence in the case.

5. This Court granted leave to the applicant to apply for judicial review on 13th May, 2013, seeking, inter alia*, a declaration that the failure by the respondent to disclose the reason for his decision to refuse to grant the applicant a certificate of naturalisation on 30th April was unlawful, and an order of certiorari quashing the decision refusing to grant naturalisation to the applicant….*

6. The relevant elements of the statement of opposition delivered by the respondent are as follows:-

'1. It is denied that the refusal of the respondent to disclose his reason for refusing the applicant's application for naturalisation is unlawful. The respondent has refused to disclose the reasons for refusing the said application on the ground that disclosure of the said reasons would be inimical to the interests of the state.

2. It is denied that this has breached the applicant's rights to fair procedures and/or to constitutional justice and/or to seek an effective judicial remedy. It is denied that it prohibits the applicant from examining whether the refusal to grant the applicant a certificate of naturalisation is lawful or that it impairs him from bringing an effective application in the future. Without prejudice to the foregoing, the respondent's bona fide interest in the protection of the State's legitimate interests justifies the withholding of the reasons for the decision, notwithstanding any alleged prejudice to the applicant….

10. It is also claimed that in carrying out these investigations, the Minister receives information on a strictly confidential basis from external sources which it would not otherwise be able to obtain….

11. In that context, it is also claimed that disclosure of even the nature of the reason for refusal of a certificate may give rise to a wider risk beyond the specific application in question….

…

21. It is important to recognise also the state's legitimate interest in this area. As stated by Walsh J. in *Murphy v. Dublin Corporation* [1972] I.R. 215 at pp. 233-4:-

> *'There may be occasions when the different aspects of the public interest 'pull in contrary directions'…If the conflict arises during the exercise of the judicial power then, in my view, it is the judicial power which will decide which public interest shall prevail. This does not mean that the court will always decide that the interest of the litigant shall prevail. It is for the court to decide which is the superior interest in the circumstances of the particular case and to determine the matter accordingly. As the legislative, executive, and judicial powers of government are all exercised under and on behalf of the State, the interest of the State, as such, is always involved. The division of powers does not give paramountcy in all circumstances to any one of the organs exercising the powers of government over the other. It is clear that, when the vital interests of the State (such as the security of the State) may be adversely affected by disclosure or production of a document, greater harm may be caused by ordering rather than by refusing disclosure or production of the document. In such a case the courts would refuse the order but would do so on their own decision. The evidence that the courts might choose to act upon to arrive at that decision would be determined by the courts, having regard to the circumstances of the case. Again, taking the example of the*

safety of the State, it might well be that the court would be satisfied to accept the opinion of the appropriate member of the executive or of the head of the Government as sufficient evidence of the fact upon a claim being made for non-disclosure or non-production, as the case may be, on that ground. I have referred to non-disclosure and non-production as distinct matters because in certain circumstances the very disclosure of the existence of a document, apart altogether from the question of its production, could in itself be a danger to the security of the State. As this is not such a case it is unnecessary to deal further with this aspect of public interest.'

22. *This matter was again touched upon by McKechnie J. in* Keating v. Radio Telefis Eireann *[2013] IESC 22. However, it does not appear that the privilege claimed in this case is primarily or immediately concerned with a threat to the 'safety of the State'. The claim is put on the basis that to furnish reasons would be inimical to the interests of the State….*

24. *The three documents furnished to the court in respect of which privilege is claimed, are clearly relevant to the determination of whether the refusal to furnish reasons for the refusal of a grant of a certificate of naturalisation to the applicant is unlawful, and whether the decision to refuse the certificate itself is unlawful. I am satisfied that each of the documents contains information which may directly or indirectly enable the applicant to advance his case or damage that of the respondent.* (See Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Company *[1882] 11 Q.B.D. 55). The court has reviewed the three documents furnished in the light of the principles set out in the authorities referred to earlier in this judgment. Reference to the nature and content of these documents is necessarily limited by the requirement to preserve the interests of the parties in the matter. I have reached the following conclusions.*

Document A

25. *This is a note concerning the applicant's application for a certificate of naturalisation. This is a relevant document and I am not satisfied that there is any risk to the public interest presented by its inspection by the applicant or his legal team. As stated by Mr. Kelly in his affidavit, the document contains a recommendation prepared for the consideration of the respondent in respect of the application. In the normal course, this is a document which the court would expect to be furnished as a matter of fair procedures to the applicant, particularly having regard to the last paragraph on the first page of the document.*

Document B

26. *This document is referred to by Mr. Kelly as a confidential note 'referring to certain information concerning the applicant which had been provided to the Minister in the strictest confidence'. I am satisfied that this document is a confidential document and that the asserted claim of privilege should apply to a considerable portion of its contents. I am satisfied that there is a public interest in maintaining the confidentiality of the information and information gathering process referred to in*

this confidential note, but that elements of it may be safely redacted for the purposes of affording inspection of the un-redacted portions.

27. I would allow inspection of this document with the following redactions….

Document C

28. This document formed part of and was attached to the confidential note, Document B. I am satisfied that this document is confidential and having considered the contents of the document, I am entirely satisfied that it is in the public interest that it and its contents remain confidential."

ii. *Public Interest Privilege in Overlapping Proceedings*

15. The principles governing public interest privilege and how it should apply where a criminal investigation overlaps with civil proceedings were given extensive consideration by the Supreme Court in *McLaughlin v. Aviva Insurance (Europe) Public Limited Company* [2011] IESC 42. There, Mr McLaughlin owned a bar, insured by Aviva, which had been destroyed by fire. Mr McLaughlin gave the CCTV surveillance system from the bar to Aviva who passed it on to the Gardaí. A dispute arose as to whether Mr McLaughlin was insured by Aviva, which claimed that Mr McLaughlin himself had started the fire. A file had been forwarded to the DPP who had yet to decide on whether to prosecute. Non-party discovery was granted by the High Court but public interest privilege was asserted by the Commissioner, pending the decision not to prosecute, or pending the service of a book of evidence on Mr McLaughlin. The matter came before the Supreme Court where Denham C.J. gave the lead judgment for the majority, observing*, inter alia*, as follows:

"11. There is a public interest which arises in some cases whereby certain matters may be privileged and may not be produced in evidence. The decision as to whether evidence is privileged or not is a matter for the courts: Murphy v. Dublin Corporation *[1972] 1 I.R. 215. There may be different aspects of the public interest. Walsh J. noted in Murphy v. Dublin Corporation at p. 233:-*

> *'There may be occasions when the different aspects of the public interest 'pull in contrary directions'—to use the words of Lord Morris of Borth-y-Gest in Conway v. Rimmer [1968] A.C. 910, 955. If the conflict arises during the exercise of the judicial power then, in my view, it is the judicial power which will decide which public interest shall prevail. This does not mean that the court will always decide that the interest of the litigant shall prevail.'*

[Court Note: In *Conway*, the plaintiff, a former probationary police constable, began an action for malicious prosecution against his former superintendent. In the course of discovery, the defendant disclosed a list of documents in his possession or power, relevant to the plaintiff's action, including four reports made by him about the plaintiff during his period of probation, and a report by him to his chief constable for transmission to the DPP in connection with the prosecution of the plaintiff on the criminal charge, on which he was acquitted, and on which his civil action was based. The Home Secretary objected in proper form to production of all five documents on the ground that each fell within a class of documents the

production of which would be injurious to the public interest. The Judicial Committee of the House of Lords held*, inter alia*, that the documents should be produced for their inspection, and if it was then found that disclosure would not be prejudicial to the public interest or that any possibility of such prejudice was insufficient to justify their being withheld, disclosure would be ordered. In the passage to which Denham C.J. refers, Lord Morris observes*, inter alia*, as follows, at pp. 954-55:

> *"It is, I think, a principle which commands general acceptance that there are circumstances in which the public interest must be dominant over the interests of a private individual. To the safety or the well-being of the community the claims of a private person may have to be subservient. This principle applies in litigation. The public interest may require that relevant documents ought not to be produced. If, for example, national security would be or might be imperilled by the production and consequent disclosure of certain documents, then the interest of a litigant must give way. There are some documents which can readily be identified as containing material the secrecy of which it is vital to protect. But where disclosure is desired and is resisted there is something more than a conflict between the public interest and some private interest. There are two aspects of the public interest which pull in contrary directions. It is in the public interest that full effect should be given to the normal rights of a litigant. It is in the public interest that in the determination of disputes the courts should have all relevant material before them. It is, on the other hand, in the public interest that material should be withheld if, by its production and disclosure, the safety or the well-being of the community would be adversely affected. There will be situations in which a decision ought to be made whether the harm that may result from the production of documents will be greater than the harm that may result from their non-production."]*

12. *There is a public interest in criminal investigations carried out by An Garda Síochána. Lord Reid stated in* Conway v. Rimmer *[1968] A.C. 910 at p. 953 – 954:-*

> *'The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities. And it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution: but after a verdict has been given or it has been decided to take no proceedings there is not the same need for secrecy.'*

I agree with the analysis that in general documents material to an ongoing criminal investigation by An Garda Síochána should not be required to be disclosed in civil proceedings. However, after the verdict in the criminal trial or after it has been decided not to prosecute, there is no need for the privilege.

13. *It is an important part of an analysis of this type of privilege that it exists only for a limited time. Thus, it would apply only until the criminal trial is concluded or until the Director of Public Prosecutions has decided not to prosecute. It is not unusual that a civil trial awaits the conclusion of a criminal trial.*

14. *The special position of the Director of Public Prosecutions was referred to by Keane J. in* Breathnach v. Ireland (No.3*) [1993] 2 I.R. 458 at 471:-*

> *"As has also been frequently pointed out, the privilege is that of the client and may only be waived by him. The position of the Director of Public Prosecutions is, of course, somewhat different: he does not stand in the relationship of 'client' to any other lawyer. He is in a sense both lawyer and client, since he formulates the legal opinion on which the institution or non-institution of a prosecution is based and he then becomes one of the parties to the subsequent litigation. However, be that as it may, the public policy which protects from discovery communications in the first category undoubtedly applies equally to communications between the Director of Public Prosecutions and professional officers in his department, solicitors and counsel as to prosecutions by him which are in being or contemplated."*

In this instance, the privilege sought is different and is only for a limited time i.e. until the case is prosecuted or a decision is made not to prosecute in the criminal courts….

15. *The items of which the Commissioner seeks to claim privilege are required for the purpose of civil proceedings between the plaintiff and the defendant and also for a criminal investigation. The Commissioner claims privilege pending the decision not to prosecute or pending the service of a Book of Evidence, which would contain the items.*

16. *There is a public interest privilege in documents which are a material part of a criminal investigation. There is a public interest privilege in documents created, sought, or obtained for, and relevant to, a criminal prosecution by a prosecutor.*

17. *The fact that the documents and/or items were not originally created by a prosecutor does not exclude them from privilege as there is a public interest privilege in documents and/or items which are a material part of a criminal investigation.*

18. *The onus to establish that the privilege lies upon the person seeking the privilege. In this case, the Commissioner carries the onus.*

19. *I am satisfied that it is established that the documents and items sought, being the two DVR recorders and the two forensic reports, are privileged. This privilege exists until the decision is made not to prosecute or until the decision is made to prosecute, when the matters will be disclosed in the Book of Evidence.*

20. *The fact that these documents and/or items were not originally created by An Garda Síochána does not prevent them attracting privilege. They are now material documents and items in a criminal investigation by An Garda Síochána and they attract privilege on the basis of public interest and investigative privilege.*

21. *The fact that the documents arose in civil proceedings does not mean that the privilege does not apply to them. They are now a material part of a criminal investigation and, as a consequence, privilege attaches to them.*

22. *On occasions, when considering a privileged document, the court may have to balance interests. However, the issue of balancing interests does not arise in this case.*

23. *Thus I would order that the items are privileged and may not be discovered until either the decision has been made to prosecute, when disclosure will be made in the Book of Evidence, or a decision is made not to prosecute, when the privilege ceases.*

24. *This case is decided upon its facts and circumstances. The issues raised are important and may arise for further consideration in another case, where there would be more elaborate argument and scrutiny than was available in both the High Court and in this Court in this case….*

26. *In conclusion, for the reasons given, I would allow the appeal and order that there is a public interest privilege in the items and would therefore order that there be no discovery until the privilege has ceased to exist either by way of a decision not to prosecute, or by a decision to prosecute when the matters will be disclosed in the criminal proceedings."*

16. It is difficult to avoid the sense when reading the above that *McLaughlin* represents something of a conservative, even counter-evolutionary lurch by the Supreme Court (by reference to its own previous jurisprudence), at least in the overlapping proceedings context, reverting more closely to the traditional position in which but to assert public interest privilege was to yield such privilege, with even a balancing of interests by the court not always being required (*McLaughlin*, at para.22) – though, as will be seen, O'Donnell J., in the Supreme Court, at para.5 of his judgment:

> *"[did] not see that this case [McLaughlin] raises any issue as to priority between civil and criminal proceedings. In this case the Commissioner does not seek a stay on the civil proceedings: he merely seeks to maintain a public interest immunity which it is arguably his duty to assert. As it happens that immunity is limited in time, and as a result the parties to the litigation have the choice whether to proceed without the material in the same way as a party might proceed having failed in the challenge to legal professional privilege, or they can wait until the issue of public interest immunity falls away…"*

17. It is, with respect, difficult to see, offhand, how having to elect between proceeding now on limited evidence or proceeding later on fuller evidence does not raise a question as to priority, in that notwithstanding the election of the civil plaintiff the clearest priority is being given to the Commissioner in her/his actions. Moreover, a complicating factor that comes into play in the within proceedings and which did not feature in *McLaughlin* is the requirement in s.3 of the Guardianship of Infants Act 1964 that*, inter alia*, "*Where, in any proceedings before any court, the– (a) guardianship, custody or upbringing of, or access to, a child…is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration".* Although the motions now under consideration are not directly concerned with guardianship, custody, etc., they have the potential to impact on same and in any event (a) they arise in proceedings where custody and access are in question, and (b) it is "*proceedings*" (not incidental motions) that are the focus of s.3. It follows that the matters now under consideration come within the protective scope of s.3.

18. Notably, Denham C.J., in what was the lead judgment for the Supreme Court, acknowledges, at para.24, that the issues addressed in *McLaughlin* may require to be re-addressed in a future case, an observation which seems to counter to some extent the following observations of O'Donnell J., at paras. 2-3 of his concurring judgment:

> *"[This] case…raises the general issue as to the entitlement of the Gardaí to withhold from disclosure in civil proceedings documentation which is bona fide required for the purposes of an ongoing investigation which may result in a criminal prosecution….That issue, is one on which I regard the law as well settled".*

19. A respectful question arises as to why, if the applicable law is *"well settled*", Denham C.J. would take the care to observe, at para.24 of her judgment, that:

> *"This case is decided upon its facts and circumstances. The issues raised are important and may arise for further consideration in another case, where there would be more elaborate argument and scrutiny than was available in both the High Court and in this Court in this case"?*

20. O'Donnell J.'s judgment in *McLaughlin* appears (from para.1 of same) to have come about because of a vigorous dissenting judgment by Hardiman J. In that dissenting judgment, Hardiman J. observes*, inter alia*, as follows:

> *"There is in my opinion no rule of law whereby a civil case which is ready to proceed, or to proceed to the next procedural stage must yield in priority even to a criminal case actually in being. Much less, therefore, is there a rule to the effect that a civil action, or a stage of a civil action, must yield to a purely hypothetical criminal case which may, or may not, ever actually come into being."*

21. Hardiman J. considered the true position at law to be "*quite clear*" following on the decision of the Supreme Court in Dillon v. Dunnes Stores [1966] I.R. 397, observing*, inter alia*, as follows:

"Our jurisprudence on this point seems to be quite clear since the case of Dillon v. Dunnes Stores *[1966] IR 397. There, the plaintiff had been employed by the defendant as a shop assistant. She was charged (with others) in the District Court with conspiracy to steal and with stealing certain goods from the defendant company and was returned for trial. On being charged she immediately commenced civil proceedings against the defendant. The jury in the criminal court was discharged and the case adjourned.*

Meanwhile the plaintiff proceeded in the ordinary way with her civil proceedings and, it should be noted, obtained both discovery and interrogatories without objection (see p.401 of the report). This Court held on the defendant's motion to stay the civil proceedings:

> *'… It is not easy to see why the trial of the alleged civil wrong should not take place without reference to the criminal proceedings… if there be a tactical advantage in getting one case ahead of the other, that is not a matter in which the Court should assist one party rather than another; rather should it let the cases find their date of trial as they become ripe for hearing. This is the position in the plaintiff's action, and no authority has been referred to which would warrant the Court in seeking to postpone it until after the final determination of the criminal proceedings. As the plaintiff could not have had an order to postpone the criminal proceedings until the determination of her civil action, equally the hearing of the civil action cannot be required to await the conclusion of the criminal proceedings.'*

That application related to an application to stay the civil proceedings pending the criminal but I do not see why its logic should not equally apply to an application to defer a step in the civil proceedings. If the Commissioner's application succeeds, it will have the effect of staying the civil proceedings.

Decision

I would dismiss the appeal and uphold the judgment of the learned trial judge. While it is terse in its expression, understandably, because it was given ex tempore on a busy Monday morning, I am quite satisfied that it is correct in principle and particularly in its finding that the Commissioner has failed to establish any element of privilege in circumstances where he has got the documents voluntarily from one party to the proceedings.

This distinguishes the case radically from cases such as Breathnach which are authoritative but which relate to documents generated by the Gardaí themselves in the course of an investigation. Garda investigations very often require persons, often the victims of crimes, to give voluntarily and informally to the Gardaí various items of possible evidential use, such indeed as CCTV footage. A person parts with such material voluntarily for the laudable purpose of assisting the investigation of crime, but I do not believe that, in doing so, he accepts that he will face its indefinite detention, so that it is not available to him even to prosecute or defend a

civil claim. If the Commissioner's contention in the present case were upheld it would be necessary for such persons to take legal advice about a process which is currently operated quite voluntarily. I do not believe that the existing law confers privilege from disclosure of such materials even disclosure to the person whose property they are and I would therefore uphold the learned trial judge's decision.

If the law were to be extended, and I am satisfied it would be an extension, in the direction desired by the Commissioner, it would be so significant a development that I do not think it should be undertaken by a court composed as this one is.

Moreover, in the circumstances of this case, where the plaintiff who applies for discovery has already seen the film footage, and where the Gardaí in any event do not object to producing the footage, the objection in truth relates only to such footage as may be extracted from two DVR boxes, containing three discs each, and one of which, (exhibit EX1) is not in proper functioning order. Accordingly, the objection is put along the lines that:

> *"I say and believe that An Garda Síochána for the purpose of the investigation ought to be in the position of viewing any recovered footage prior to the subject of the investigation, and for this reason, and to ensure the integrity of the investigative process, An Garda Síochána object to disclosure of EX1". (Affidavit of Inspector Kelly on 9 September 2010)*

This is an objection of a very novel sort, and for which I think there is no authority. It must be remembered that the objection is made not withstanding that the DVR box in question is the property of the plaintiff….

I believe that the objection based solely on the proposition that the Gardaí ought to have the first opportunity to inspect the material in question amounts to a claim of privilege over a particular class of documents viz. documents in the possession of the Gardaí. I can see no basis for it in principle and, inasmuch as it relates to material about a particular case, it would require to be established about that particular material in a context of that particular case (as in the case of reports on the material), and not in general terms. If the Commissioner is compelled to make discovery of the material he can at that stage raise in proper form any specific and case-related reason for its non-disclosure in this particular case. But I would reject the generic claim advanced in the affidavit of Inspector Kelly, quoted above….

It must also be borne in mind that the civil proceedings are at an advanced stage and pleadings have closed. No criminal proceedings have even been instituted and it has not proved possible to give any estimate as to when a decision about this might be taken.

Indeed, I would have thought it in the prosecution interest that an action in which the plaintiff will bear at least the initial the onus on the self-same issue - whether he himself set the fire which burnt the premises: that is the case the defendants

are making - should proceed in advance of the criminal proceedings since the prosecution, by the simple act of observing the civil action, will gain a great deal of information which they probably do not presently have. But that can form no part of the basis for this decision, which turns on whether the Commissioner is entitled to defer the plaintiff's access to his own recording machinery, and to the fruits of an examination of it, pending criminal proceedings which are entirely hypothetical. Nor do I believe that there is a principle such as that referred to in the affidavit of Inspector Kelly: that the guards, as such, have some kind of a priori right to withhold documents from one litigant (the other has already had them) on account of the possibility that there may be criminal proceedings. It is not necessary to make any comment on the position that would obtain if criminal proceedings were in being."

22. Of course Hardiman J.'s judgment is a dissenting judgment and so of no precedential value; however, what he points to is a judgment of the Supreme Court (in *Dillon*) which is binding on this Court and not obviously reconcilable with the decision in *McLaughlin*.

23. The observations made in the dissenting judgment of Hardiman J. in *McLaughlin* are directly addressed by O'Donnell J. in his judgment in that case. O'Donnell J. concurred with the Chief Justice but added "*some observations in order to explain why I respectfully differ from Hardiman J. both as to the outcome of the case and as to its significance*" (para.1), observing*, inter alia*, as follows:

"2 First, I do not regard the case as raising any particularly novel issue nor do I consider the judgment of Denham C.J. marks any departure in the law.

[Court Note: If that is so, it seems, with respect, unusual, that Denham C.J. took care to observe, at para.24 of her judgment that "*This case is decided upon its facts and circumstances. The issues raised are important and may arise for further consideration in another case, where there would be more elaborate argument and scrutiny than was available in both the High Court and in this Court in this case"].*

Furthermore the case does not in my view raise the question as to whether public interest immunity requires that documents be withheld from their owner in civil proceedings. In this case the claim for discovery encompassed not just the video tape, but also, and perhaps more importantly from all points of view, the two expert forensic reports prepared for the insurers and which were their property and not the property of Mr McLaughlin.

[Court Note: In this case, the sole issue that presents is that*, inter alia*, it is proposed that material be withheld from their owner (Ms B) in civil proceedings.]

The case therefore raises the general issue as to the entitlement of the Gardaí to withhold from disclosure in civil proceedings documentation which is bona fide required for the purposes of an ongoing investigation which may result in a criminal prosecution.

[Court Note: A complicating factor that comes into play in the within proceedings is the requirement in s.3 of the Guardianship of Infants Act 1964 that*, inter alia*, "*Where, in any proceedings before any court, the– (a) guardianship, custody or upbringing of, or access to, a child…is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration"].*

3 *That issue, is one on which I regard the law as well settled and indeed encapsulated in that portion of the speech of Lord Reid in Conway v. Rimmer [1968] AC 910, 953 referred to in both the judgments of my colleagues. The intervening period has not lessened the force and good sense of Lord Reid's observations and if the matter has not been the subject of more extensive discussion, it is only in my view because it is regarded as well settled.*

4 *It does not make any difference in my view that the footage may be considered to be the property of Mr McLaughlin if it too was bona fide required for the purposes of the gardai's investigation….*

5 *I do not see that this case raises any issue as to priority between civil and criminal proceedings. In this case the Commissioner does not seek a stay on the civil proceedings: he merely seeks to maintain a public interest immunity which it is arguably his duty to assert. As it happens that immunity is limited in time, and as a result the parties to the litigation have the choice whether to proceed without the material in the same way as a party might proceed having failed in the challenge to legal professional privilege, or they can wait until the issue of public interest immunity falls away either by the disclosure of the material in criminal proceedings, or by a decision not to prosecute.*

[Court Note: It is, with respect, difficult to see, offhand, how having to elect between proceeding now on limited evidence or proceeding later on fuller evidence does not raise a question as to priority, in that notwithstanding the election of the civil plaintiff the clearest priority is being given to the Commissioner in her/his actions].

6 *Finally I should say that I do not consider that this is a claim for class privilege. The immunity or privilege is not claimed because the documents or items belong to a certain class of material. The claim made is in respect of the particular significance of this material to an ongoing investigation, and not because of any generic significance of CCTV footage or expert reports. The Court is free to inspect the items if it considers it either appropriate or necessary to do so and is not bound to accept the Commissioner's claim. However, the Courts have repeatedly made it clear that the fact that the court may inspect material does not mean that the court must do so to verify any claim for privilege, if the nature of the claim is obvious from the description of the document. Here there was no issue as to the documents in question, or indeed as to the Commissioner's assertion that they were necessary for the purpose of criminal investigation. The only question was whether that raised*

a valid claim of immunity, and for the reasons set out by Denham C. J. I consider that it does…."

24. The difficulty that now presents for a lower court, and one essentially highlighted by Hardiman J., is that the dissatisfying position currently presents in which there appear to be two somewhat diverging (or, at the least, not readily reconcilable) lines of Supreme Court authority*, viz. McLaughlin* and *Dillon*, with the majority judgments in *McLaughlin* (a) avoiding any consideration of *Dillon*, and (b) the judgment of the Chief Justice in *McLaughlin* cautiously observing, at para.24, that "*This case is decided upon its facts and circumstances. The issues raised are important and may arise for further consideration in another case, where there would be more elaborate argument and scrutiny than was available in both the High Court and in this Court in this case*". Indeed, each of the three judgments in *McLaughlin* appear to take a somewhat mixed view of the law under consideration. Thus:

- Denham C.J., states that her judgment, at para.24, "*is decided upon its facts and circumstances"* and notes that "*The issues raised are important and may arise for further consideration in another case, where there would be more elaborate argument and scrutiny"*. So she seems to view the law as perhaps not quite settled.

- O'Donnell J. in his judgment takes the view, at paras. 2-4 that "*the general issue as to the entitlement of the Gardaí to withhold from disclosure in civil proceedings documentation which is bona fide required for the purposes of an ongoing investigation which may result in a criminal prosecution….is one on which I regard the law as well settled".*

- Hardiman J. disagrees with both majority judges and points to precedent binding on this Court (*Dillon*) in which the Supreme Court approaches matters in a manner that appears not readily reconcilable with its equally binding decision in *McLaughlin*.

25. Fortunately, in the within proceedings, the court does not have to reconcile the *McLaughlin-Dillon* quandary, to the extent that it presents (if it presents), because the parties to the within proceedings appear to be in agreement that the law as stated in *McLaughlin* represents the law as it falls to be applied by this Court. The law, as stated by Denham C.J. in *McLaughlin*, can be summarised as follows, so far as relevant to the within proceedings:

[1] There is a public interest which arises in some cases whereby certain matters may be privileged and may not be produced in evidence.

(*McLaughlin*, Denham C.J., para.11).

[2] The decision as to whether evidence is privileged or not is a matter for the courts.

(*McLaughlin*, Denham C.J., para. 11; *Murphy v. Dublin Corporation* [1972] 1 I.R. 215).

[3] There may be different aspects of the public interest. Per Walsh J. in *Murphy*, at p. 233:-

> *"There may be occasions when the different aspects of the public interest 'pull in contrary directions'. If the conflict arises during the exercise of the judicial power then it is the judicial power which will decide which public interest shall prevail. This does not mean that the court will always decide that the interest of the litigant shall prevail"*

(*McLaughlin*, Denham C.J., para.11; Murphy, p. 233).

[4] There is a public interest in criminal investigations carried out by An Garda Síochána.

(*McLaughlin*, Denham C.J., para.12).

[5] It would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution: but after a verdict has been given or it has been decided to take no proceedings there is not the same need for secrecy

(*McLaughlin*, Denham C.J., para.12, citing Lord Reid in *Conway v. Rimmer* [1968] AC 910, pp. 953-54).

[6] In general documents material to an ongoing criminal investigation by An Garda Síochána should not be required to be disclosed in civil proceedings. However, after the verdict in the criminal trial or after it has been decided not to prosecute, there is no need for the privilege.

(*McLaughlin*, Denham C.J., paras.12 and 19).

[7] There is a public interest privilege in documents which are a material part of a criminal investigation.

(*McLaughlin*, Denham C.J., para.16).

[8] There is a public interest privilege in documents created, sought, or obtained for, and relevant to, a criminal prosecution by a prosecutor.

(*McLaughlin*, Denham C.J., para.16).

[9] The onus to establish investigative privilege lies upon the person seeking the privilege.

(*McLaughlin*, Denham C.J., para.18).

[10] The fact that the documents and/or items were not originally created by An Garda Síochána and/or a prosecutor does not exclude them from privilege as there is a

public interest privilege in documents and/or items which are a material part of a criminal investigation

(*McLaughlin*, Denham C.J., paras.17 and 20) .

[11] The fact that the documents arose in civil proceedings does not mean that the privilege does not apply to them. Provided they are a material part of a criminal investigation privilege attaches to them.

(*McLaughlin*, Denham C.J., para.21).

[12] On occasions, when considering a privileged document, the court may have to balance interests.

(*McLaughlin*, Denham C.J., para.22).

iii. *Weighing Competing Interests*

a. Overview

26. It will be recalled that Denham C.J. observes at para.13 of her judgment in *McLaughlin* that "*It is not unusual that a civil case awaits the outcome of a criminal trial" and, at para.22 that "On occasions when considering a privileged document, the court may have to balance interests*". Denham C.J. went on to hold that the issue of balancing interests did not arise in *McLaughlin*. However, the impact of s.3 of the Guardianship of Infants Act 1964, is such that the court considers that this case does present with a need to balance certain competing interests.

b. Protecting Children's Interests

27. Article 42A.4.1☐ of the Constitution provides as follows:

> *"Provision shall be made by law that in the resolution of all proceedings…concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be of paramount consideration".*

28. Consistent with this constitutional mandate, s.3 of the Guardianship of Infants Act 1964, as amended, states*, inter alia*, as follows:

> *"(1) Where, in any proceedings before any court, the – (a) guardianship, custody or upbringing of, or access to, a child…is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.*
>
> *(2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V."*

29. In Part V of the Act ("*Best Interests of the Child*"), s.31 provides*, inter alia*, as follows:

"(1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.

(2) The factors and circumstances referred to in subsection (1) include…(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being".

30. As the court indicated above, although the motions now under consideration are not directly concerned with guardianship, custody, etc., they have the potential to impact on same and, in any event, (a) they arise in proceedings where custody and access are in question, and (b) it is "*proceedings*" (not incidental motions) that are the focus of s.3. Hence the matters now under consideration come within the protective scope of s.3. It might reasonably be contended in any event that, given the nature of the interests which s.3 seeks to protect, it is proper to give the widest interpretation to s.3, though it has not been necessary for the court to apply this wide interpretation in order to arrive at the conclusion reached in the immediately preceding sentence.

c. *P v. Q*

[2012] 3 I.R. 805

31. The court has been referred, by counsel for Ms B, to the decision in *P v. Q.* That was an application for discovery in relation to email accounts and phone records in a case where the husband alleged that the wife was a fetishist and had posted explicit pictures and comments on-line. The relevance was that the husband contended that the wife had an obsessive and addictive proclivity which affected her ability to care for her child; he was also concerned that their child, who was a teenager at the time, could access the posted images and content. The Circuit Court made an order for discovery. The wife stated that the application was for constitutionally protected private information which had come to the attention of her husband by his illegally accessing her information, and that her constitutional right to privacy outweighed any benefit to disclosure. The Circuit Court also had also made an order directing the effecting of a s.47 assessment. In the course of his judgment, Michael White J. observed*, inter alia*, as follows:

"[19] The welfare of a child in custody and access proceedings is a paramount consideration of the court. This is set out in s 3 the Guardianship of Infants Act 1964, as amended, which states:-

> *'Where in any proceedings before any court the custody, guardianship or upbringing of a child, or the administration of any property belonging to or held on trust for a child, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration.'*

[20] In G v. An Bord Uchtála *[1980] IR 32, at p. 76, Walsh J. stated as follows:-*

> *'The word 'paramount' by itself is not by any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word 'paramount' certainly indicates that the welfare of the child is to be the superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution applicable to any given case.'*

…

[33] The issue for the court to determine is complicated by the allegation that the respondent's privacy was breached illegally when the codes and passwords of her personal laptop were accessed, at a time subsequent to the commencement of family law proceedings Although disputed by the applicant, the evidence before this court heard on affidavit would indicate that the passwords and access codes to these particular websites were retained by the respondent in a locked safe. There are many occasions and opportunities in family law proceedings where parties to the proceedings access information which the other party regards as private, but which has not been obtained illegally. In this case the acquisition of the codes is tainted by illegality.

[34] I accept the submissions on behalf of the respondent, that there is a broad principle of constitutional law that evidence which is obtained by invasion of a constitutional personal right, such as a right of privacy must be excluded unless the court is satisfied that the breach was committed unintentionally or accidentally (which could not be the case here) or is satisfied that there were 'extraordinary excusing circumstances which justify the admission of the evidence in its discretion'. It is respectfully submitted that there are no extraordinary excusing circumstances in this appeal. I would accept that principle as applying to a criminal prosecution, in order to protect the absolute right to a fair trial.

[35] Where different constitutional rights have to be balanced, different principles apply.

…

[41] While the proceedings touching on the welfare of the child are adversarial in nature, there is an inquisitorial aspect to that portion of the proceedings dealing with his custody. Balancing the different constitutional rights and responsibilities the welfare of the child would take precedence over illegally gathered information touching on the child's welfare.

[42] In addition, the constitutional right to privacy of the respondent is protected in 'in camera' proceedings as the information disclosed is confined to the parties, their legal representatives and the court. The respondent's rights can be further protected by the addition of further conditions."

32. What points can be drawn from the foregoing? First, the welfare of a child in custody and access proceedings is a paramount consideration of the court. Second, that this is so derives from s.3 of the Guardianship of Infants Act 1964, as amended. Third, the word 'paramount' is not by any means an indication of exclusivity; if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. Fourth, the use of the word 'paramount' indicates that the welfare of the child is to be the superior or most important consideration, insofar as it can be, having regard to the law or the provisions of the Constitution applicable to any given case. Fifth, where different constitutional rights have to be balanced, different principles apply. Sixth, while proceedings touching on the welfare of the child are adversarial in nature, there is an inquisitorial aspect to that portion of the proceedings dealing with her/his custody. Seventh, in the case before him, balancing the different constitutional rights and responsibilities, Michael White J. considered that the welfare of the child would take precedence over illegally gathered information touching on the child's welfare. Eighth, an additional protection exists for the privacy of parties by the *in camera* nature of family proceedings (and, of course, additional conditions could be added).

d. The Interests At Play

33. It seems to the court that there are two key public interests in competition with each other in the within proceedings, *viz*:

- *Public Interest (1), being the public interest in the proper administration of justice in a case concerning the safety and welfare of children; and*

- *Public Interest (2), being the public interest in maintaining investigative privilege associated with the Gardai investigating an alleged criminal offence*

e. *Breathnach v. Ireland (No.3)*

[1993] 2 IR 458

34. It is useful at this point to pause to consider the judgment of the court in *Breathnach*, a case that seems to the court to be of assistance in the within proceedings, notwithstanding the dissenting observations of Hardiman J. in *McLaughlin*. There, the eponymous plaintiff had been arrested by the third defendant in connection with investigations into the armed robbery of a mail train. While in the custody of the Gardaí he made oral and written statements confessing his involvement in the offence. On appeal, his conviction was quashed, the Court of Criminal Appeal finding that the court of trial was not entitled to be satisfied beyond a reasonable doubt that the confessions were voluntary or came about fairly.

35. Arising from the foregoing, Mr Breathnach brought proceedings against the defendants claiming damages for various legal wrongs. The High Court ordered the Director of Public Prosecutions to discover "*all records relating to communications between (the third to tenth defendants) and any other members of An Garda Síochána in the months of March and April 1976, which are, or have been, in the possession or power of the Director of Public Prosecutions".*

36. The DPP then claimed privilege in respect of the documents on the grounds that disclosure would be contrary to the public interest. Most of these documents were Garda files connected with the investigation of the offence with which the plaintiff had been charged, as well as a report forwarded by the investigating Gardaí to the DPP for his decision as to whether a prosecution should be initiated against the plaintiff. (So the documents were of a very different nature to the recordings in issue in the within proceedings which are recordings done, as the court understands matters, are but mobile phone recordings done by one or two children of the family). The DPP claimed*, inter alia*, that it was necessary to maintain the confidentiality of such communications in order to ensure full disclosure by An Garda Síochána of any fact considered to be of relevance to the notice party in the discharge of his office; and that the documents might make reference to the opinion of An Garda Síochána as to the involvement in the offence of certain persons and whether or not those persons were members of particular organisations. (Again, no such interests present here).

37. Mr Breathnach successfully claimed*, inter alia*, that the DPP's claim of public interest privilege was misconceived, Keane J., as he then was, observed*, inter alia*, as follows, in the High Court, at p. 469:

> *"[T]he court, as I understand the law, is required to balance the public interest in the proper administration of justice against the public interest reflected in the grounds put forward for non-disclosure in the present case.*
>
> [Court Note: In the within case that involves weighing Public Interest (1) against Public Interest (2)].
>
> *The public interest in the prevention and prosecution of crime must be put in the scales on the one side. It is only where the first public interest outweighs the second public interest that an inspection should be undertaken or disclosure should be ordered. In considering the first public interest, it is necessary to determine to what extent, if any, the relevant documents may advance the plaintiff's case or damage the defendants' case or fairly lead to an enquiry which may have either of those consequences.*
>
> [Court Note: It is clear from the last-quoted sentence that in considering Public Interest (1) it is necessary to have regard to "*relevant documents*" or, as here, relevant recordings. A particular problem that presents in the within case is that while it seems to Mr A that the recordings may be of relevance, given that a portion of them has been deployed against him in the District Court, given the nature of the motion now brought by Ms B, and given all of the various submissions made on the different hearing-dates to date, he does not know precisely what has been recorded and whether any one recording is relevant. Likewise, although Ms B seems more familiar with what has been recorded, it is not clear to the court that even she knows precisely what has been recorded or how it may be relevant. Nor is the court currently in possession of any of the recordings.

It seems to the court that the only way the just-mentioned difficulty can be surmounted is if it (the court) privately listens to/views the recordings in the first instance and decides whether any or all of the recordings is/are relevant. In this regard, the criterion for relevance are as identified by Keane J. (echoing Brett L.J. in *Compagnie Financière du Pacifique v. The Peruvian Guano Co.* (1882) 11 Q.B.D. 55, at p. 63), *viz*. (when it comes to Mr A's motion) whether any one recording would "*advance*…[Mr A's*] case or damage* [Ms B's] case…*or fairly lead to an enquiry which may have either of those consequences*" and (when it comes to Ms B's motion) whether any one recording would "*advance*…[Ms B's] *case or damage* [Mr A's] *case…or fairly lead to an enquiry which may have either of those consequences*". (In passing, the court recalls the observation of Murray J. in *Framus Ltd and Ors. v. CRH plc and Ors*. [2004] 2 IR 20, at p. 38, that when it comes to discovery "*the primary test is whether the documents are relevant to the issues between the parties. Once that is established it will follow in most cases that their discovery is necessary*…").

As the court has none of the recordings before it at this time, it will require that they be placed before it by the Garda Commissioner so that it can listen to/view the recordings in order that the court can perform the weighing exercise in the manner contemplated by Keane J. in *Breathnach (No. 3).]*

…

[T]here may be documents the very nature of which is such that inspection is not necessary to determine on which side the scales come down. Thus, [1] information supplied in confidence to the Gardaí should not in general be disclosed, or at least not in cases like the present where the innocence of an accused person is not in issue….[2] [T]here may be material the disclosure of which would be of assistance to criminals by revealing methods of detection or combatting crime, a consideration of particular importance today when criminal activity tends to be highly organised and professional. [3] There may be cases involving the security of the State, where even disclosure of the existence of the document should not be allowed. None of these factors- and there may, of course, well be others which have not occurred to me - which would remove the necessity of even inspecting the documents is present in this case.

[Court Note: Points [2] and [3] are not in play on the facts of the within proceedings. Although the recordings in issue ostensibly come within [1], being *"information supplied in confidence to the Gardaí",* the court does not consider that this is the type of "*information supplied in confidence*" that Keane J. has in mind. He, it seems to the court, has in mind the type of information that a civic-minded citizen might report to a Garda hotline or that he might drop into his local Garda station to bring to the attention of Gardaí, for example alerting the Gardaí to the fact that Mr X has been selling an illegal drug to children in a particular area. The recordings at issue in the within proceedings seem to the court to sit in a

qualitatively different category, being information that was supplied to the Gardaí but some or all of which was always considered of potential use as evidence in the within proceedings.]."

f. *Gormley v. Ireland*

[1993] 2 IR 75

38. In *Gormley v. Ireland* [1993] 2 IR 75, Mr Gormley was employed as a clerical officer by An Post. In 1957 he was interned under the Offences Against the State Act 1939 and suspended from his duties at An Post without pay. He was released from internment in 1958 but his suspension was not lifted as he allegedly refused to sign a declaration in accordance with Government practice that he would respect the *Bunreacht* and the law and would not be a member of or assist any unlawful organisation. In 1983, Mr Gormley finally signed the declaration and was restored to his duties. He then issued proceedings seeking a declaration that he was entitled to a salary which reflected his age without any deduction for the interruption in his duties by reason of his suspension. In their defence the defendants denied*, inter alia*, that the plaintiff had been employed by An Post, or had been interned/suspended or that the Minister refused to lift the suspension until the plaintiff had signed the declaration aforesaid. An order for discovery was made and the defendants swore affidavits of discovery which claimed executive privilege.

39. On the plaintiff's motion for further and better discovery, Murphy J. held*, inter alia*, at pp. 79-80, that:

> *"The affidavit on behalf of An Post…refers to certain documents…and the claims that they are communications of a confidential nature with the Gardaí and that the disclosure of such confidential communications would be contrary to the public interest. It is further stated that those documents related to the exercise by the Minister for Posts and Telegraphs of the executive power of the Government of the State and to advices received by him and that it would not be in the public interest to disclose such documents. If An Post did disclose those documents it would destroy any claim of privilege which the Minister for Communications might otherwise have made.*
>
> *Of those documents it seems to me that inspection should be permitted of that numbered 52 but omitting (by pasting over or otherwise) a reference to the individual other than the plaintiff named therein. It seems to me that the other documentation which comprises largely correspondence with the Gardaí would be properly treated as highly confidential material, the disclosure of which might be significantly detrimental to the public interest. The information contained in those documents might be of some value to the plaintiff in the conduct of his case but they are in no sense fundamental to it. On balance it seems to me that it would be appropriate, therefore, to refuse inspection of any of the documents aforesaid other than that numbered 52."*

40. Counsel for the Garda Commissioner has submitted*, inter alia*, in his written submissions in the within proceedings that:

> *"[T]he public interest in the administration of justice should only outweigh the competing public interest where the documents sought are either crucial or very relevant to the Applicant's case. In Gormley v. Ireland [1993] 2 IR 75 at 80, Murphy J. refused to order the disclosure of "highly confidential material, the disclosure of which might be significantly detrimental to the public interest" because although the documents "might be of some value to the plaintiff in the conduct of his case", they were "in no sense fundamental to it"".*

41. However, it seems to the court, with respect, that when it comes to *Gormley* one must have regard to the type of documents that were in play when Murphy J. made the above-referenced observations, *viz. "communications of a confidential nature with the Gardaí…documents [that] related to the exercise by the Minister for Posts and Telegraphs of the executive power of the Government of the State and to advices received by him".* The facts at play in this case are light years removed from those that were at play in *Gormley*: there is no Offences Against the State dimension, the recordings are not confidential communications with the Gardaí, and issues pertaining to the executive power of the State or advices received in relation to same do not present. So the need for the level of caution which was brought to bear on the facts in *Gormley* does not arise.

VII

Conclusion

42. The court will order that a copy of the identified recordings currently in the possession of An Garda Síochána be provided to the court in order that it may undertake a weighing exercise of the type contemplated, e.g., by Keane J. in *Breathnach (No. 3).* The court does not wish to be supplied with the sole version of the recordings, so as to avoid any possibility that any or all of the recordings would inadvertently be erased.

43. As the court understands the recordings to have been downloaded to a USB stick, and as transferring the data of one USB stick to another is not typically an unduly time-consuming task, the court will order that the copy recordings be provided to it within 5 days of the issuance of its order.

44. Only after receipt of the copy of the recordings will the court be in a position to decide in respect of any one of the recordings whether the balance lies in favour of the claimed privilege or the release/sharing of the materials (or some of them) to the parties to the above-entitled proceedings for use in those proceedings.

45. There was suggestion by counsel for Mr A that any review of the recordings would require to be done by another judge, presumably so as not to colour the mind of this Court. The court does not accept that this is required. Such a process does not accord with general practice – see, for example the process adopted in *A.P. v. The Minister for Justice and Equality* [2014] IEHC 17 (considered above) – it would engender unnecessary cost (as the reviewing judge would need to be 'brought up to speed' by the parties on the facts of the proceedings and the issues presenting), and it seems in any event to be entirely unnecessary (trial judges are well used to disregarding evidence/material that falls to be disregarded).