THE COURT OF APPEAL

UNAPPROVED

Neutral Citation: [2023] IECA 278

Appeal Number: 2022/87

Noonan J.

Ní Raifeartaigh J.

Allen J.

BETWEEN/

PATRICK HYLAND

APPLICANT/

APPELLANT

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

Judgment delivered by Ní Raifeartaigh J. on the 14th day of November 2023

Introduction

1. Is it permissible for the Commissioner of An Garda Síochána to use material in *disciplinary* proceedings in respect of a member of An Garda Síochána where the material was found on the member's mobile phone, in circumstances where the phone was seized pursuant to a search warrant issued in the course of *a criminal investigation*? That is the key question raised in this appeal.

2. The appellant, a serving member of An Garda Síochána, is facing charges pursuant to the Garda Síochána (Discipline) Regulations, 2007 (S.I. No. 214 of 2007 (*"the Regulations"*). The following is a broad outline of events. Concerns were raised as a result of a video clip that the appellant sent to colleagues in a WhatsApp group. Two search warrants were obtained pursuant to the Child Trafficking and Pornography Act 1998 *("the 1998 Act")*, and the appellant, his station locker, and his home were searched. His mobile phone was taken and examined. A file was sent to the DPP, who ultimately directed that no charges should be brought. A disciplinary investigation commenced on the basis of the material found during the search of the appellant's phone. His complaint is that it is not lawful to deploy evidence obtained in the criminal investigation in the proposed disciplinary proceedings, specifically the material which was obtained pursuant to a search warrant issued under the 1998 Act.

More detailed chronology of events

3. The following account of events is set out in the appellant's Statement of Grounds. In April 2019, he was attached to the Regional Traffic Unit of An Garda Síochána, based in Dublin Castle. He was a member of a WhatsApp chat group which was mainly used to

forward humorous video clips and images. It seems that he was added to the WhatsApp group sometime during that month.

4. He says that on the 28th April 2019 he received a WhatsApp message containing a video clip which he forwarded without viewing. Later that day, he checked his phone and saw a message posted to the chat group from the group administrator advising all members to leave the group and wipe the chat group from their phones due to a post made earlier that day. He then realised that the post in question might have been the one he had sent out. He says he viewed it for the first time at this stage and realised that the clip featured what appears to be a fully clothed male teenager and another person in a position potentially suggestive of interaction of a sexual nature. There was no sound or audio on the clip. He says that on the next day he arrived into work and from then on he was ostracised by other people at work and was not detailed with any members of the chat group for work purposes.

The Searches pursuant to warrant

5. On 14th May 2019, Garda officers from the Garda National Child Protection Services arrived at the appellant's place of work and informed him that they had a search warrant. He was searched in the office. He provided his personal phone and access code upon request. He says that he asked if he could see a copy of the warrant and ring someone for advice but was told that *"he knew the score"* and was not shown a copy of the warrant. The warrant was issued pursuant to s. 7 of the Child Trafficking Pornography Act, 1998. It may be noted that the issue as to whether he was shown the warrant was not pursed in the court below or in this Court.

6. The appellant was then brought to his locker in the station and this was also searched pursuant to the warrant. During that search a bottle of methadone was found in his locker. He points out that there is no designated drug storage locker in Dublin Castle Garda Station. Following the search of his locker, he was directed to identify his car which was searched and a Kindle e-book reader was seized.

7. He subsequently spoke with Superintendent Murphy and Inspector Peter Woods who advised him not to enter any Garda Station or to access the Garda Pulse System. He says he was not informed at this point that he was suspended from duty. It seems he was suspended on the 17th May 2019.

8. When he returned home on the 14th May, the appellant learned that his home had been searched under warrant and that a number of electronic devices including his wife's work computer had been seized. A picture of the warrant was taken by the appellant's wife and showed that the warrant had been issued by a Judge of the District Court on 14th May 2019 pursuant to s. 7 of the Child Trafficking and Pornography Act, 1988. The suspicion grounding the warrant related to offences under ss. 3, 5 and 6 of the Act. Nothing material to the present proceedings was found during that search. What is in issue is material found during the search of his own phone.

Criminal investigation

9. The appellant was arrested and detained in June 2019 and questioned in relation to child pornography and possession of methadone.

10. On 19th July 2019, the appellant attended at Finglas Garda Station and provided a voluntary cautioned statement in which he denied any wrongdoing. He accepted that he had

been naïve to have forwarded a video which he had not reviewed but denied that he had ever knowingly accessed or distributed child pornography.

11. On 5th May 2020, the appellant was informed that the DPP had determined that there should be no prosecution.

Disciplinary investigation

12. Meanwhile, in September 2019, the appellant had been served with papers informing him that he was the subject of disciplinary investigation pursuant to Regulation 24 of the Regulations. This was signed by Superintendent Paul Costello and dated 30th August 2019. The alleged breach of discipline was that he had utilised a recently set up WhatsApp group to distribute images that included what appeared to be two minors engaged in a form of sexual activity.

13. As we have seen, the DPP directed no prosecution in May 2020. On 1st June, the appellant's suspension from duty was lifted and he was transferred to immigration duties in Dublin Port and attached to Store Street. He appealed that transfer and was assigned to the Fines Office pending the determination of the disciplinary matter.

14. By a second notice of investigation dated 17th July 2020, the appellant was advised that he was the subject of a further disciplinary investigation pursuant to Regulation 24 of the Regulations. The Notice was signed by Superintendent Martin Creighton. It identified additional matters which may constitute breaches of discipline:

- Possession in or around May 2019 on mobile devices of images *"which appear to be racist, misogynistic, anti-homosexual, antisemitic, supporters of Nazi ideology or 'rape culture'."*
- Possession in or around 2019 on mobile devices of *"images which appear to be CCTV images relating to garda investigations and practices; images which appear to be garda computers, including images of suspects, PULSE incidents and Command and Control incidents; images showing garda documents, garda members and of garda station interiors"*.
- Failure to adhere to proper protocols relating to the storage of controlled substances, namely a bottle of methadone.

Pre-proceedings correspondence

15. The appellant's solicitors engaged in detailed correspondence with various officers of An Garda Síochána. As a result of correspondence in May and June 2020, all property with the exception of the appellant's mobile phone was returned on 14th July 2020. There was then protracted correspondence seeking the return of the appellant's mobile phone or an explanation as to why it was being retained. It was asserted on behalf of the appellant that material found on his phone could not be used for disciplinary purposes.

16. Ultimately there was a reply dated 19th November 2020 from Chief Superintendent Nugent asserting that there was *"…no general rule preventing the use of material obtained in the course of a criminal investigation being utilised in a subsequent disciplinary hearing"*. The letter also referred to s. 71(5) of the Data Protection Act 2018. There was further correspondence over the following months, with each side setting out their position on this

issue, which correspondence included a letter in broadly similar terms from Chief Superintendent John Gordon and a letter on 19th January 2021 from Inspector Peter Woods confirming that the phone had been further retained for the purpose of disciplinary inquiry.

17. On the 8th March 2021, the appellant obtained leave to proceed by way of judicial review in relation to the retention of his phone and other matters set out below.

The pleadings, the legal issues, and the evidence

The Statement of Grounds and Statement of Opposition

18. The appellant brought judicial review proceedings seeking the following reliefs:

1. An Order of Prohibition restraining the respondent from utilising any material obtained from the appellant's phone other than in the course of a criminal investigation and prosecution.
2. An Order of Prohibition restraining the respondent from continuing disciplinary proceedings pursuant to An Garda Síochána (Discipline) Regulations 2007 in relation to the alleged breaches identified in the Notice of Investigation dated 30th August 2019 identifying Superintendent Paul Costello as the investigating officer.
3. An Order of Prohibition restraining the respondent from continuing disciplinary proceedings pursuant to An Garda Síochána (Discipline) Regulations 2007 in relation to the alleged breaches identified in the Notice of Investigation dated 17th July 2000 identifying Superintendent Martin Creighton as the investigating officer.

4. An Order of Prohibition restraining the respondent from relying upon or utilising any evidence gathered or obtained pursuant to the Search Warrant purported to be relied upon on 14th May 2019 for any purpose other than for a lawful criminal investigation and/or prosecution.
5. An Order of Mandamus compelling the respondent to return the applicant's phone seized on 14th May 2019.
6. An Order of Mandamus compelling the respondent to provide a copy of the warrant which authorised the seizure of the appellant's phone on 14th May 2019.
7. A Declaration that items seized on foot of a warrant for the purpose of a criminal investigation may only be retained for the purpose of that, or another, criminal investigation and/or prosecution.
8. A Declaration that evidence obtained utilising the criminal investigation powers available to An Garda Síochána may not be deployed in internal disciplinary investigation save and except where the evidence so obtained discloses the commission of a crime.
9. A Declaration that every person affected by a Search Warrant or from whom property has been seized pursuant to a Warrant is entitled to a copy of the Warrant.
10. A Declaration that the use of information recovered pursuant to criminal warrant for a purpose other than a criminal investigation is not lawful within the meaning of the Data Protection Act 2018.
11. A Declaration that inadequate reasons had been given by the respondent for the ongoing detention of the appellant's phone.
12. A stay on the investigation dated 17th July 2020 being conducted by Superintendent Martin Creighton until the conclusion of these proceedings.

13. A stay on the investigation notified by way of Notice of Investigation dated 30th August 2019 being conduct by Superintendent Paul Costello until the conclusion of these proceedings.

19. In his Statement of Grounds, the appellant asserts that it is contrary to law for the respondent to use material gained during a criminal investigation for a different purpose. He says that the processing of his data for the purpose of a disciplinary enquiry is contrary to the constitutional right of privacy; Article 8 of the European Convention on Human Rights; Articles 7 and 8 of the Charter of Fundamental Rights; and the Data Protection Act 2018.

20. Concerning the search warrant, he says that he is entitled to know the precise legal basis on which the warrant issued and, without prejudice to that general ground, he relies on his constitutional right to privacy; his personal rights as guaranteed by Article 40.3.1 of the Constitution; his right to private property as guaranteed by Article 40.3.2 of the Constitution; his right to privacy as guaranteed by Article 8 of the European Convention on Human Rights; and his right to privacy as guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights. He pleads that he does not know what precise offences are covered by the warrant and in those circumstances his ability to challenge the seizure of his property is unjustly fettered. Insofar as this ground arises out of the alleged failure to show him the warrant, as already noted this ground was not pursued in this appeal.

21. In relation to the physical phone, he asserts that there is no lawful basis on which his phone can be held by the respondent in circumstances where it was seized for the purposes of a criminal investigation which had concluded without charge.

22. He also contends that the respondent has failed to give him any, or any adequate, reasons for the ongoing detention of his property. He complains that it is insufficient simply to recite that the phone is held pursuant to a lawful authority without nominating the authority and setting out the reasons it applies in the circumstances.

23. He says that while search warrants represent legitimate and proportionate interference with various rights, the considerations which permit such interference only arise in circumstances similar to the exceptions set out in Article 8(2) of the European Convention on Human Rights; and that the proposed continuing interference with his rights is unreasonable, disproportionate and contrary to law. He asserts that the use of material obtained on foot of what he describes as a court warrant for a purpose other than that authorised by the warrant itself amounts to contempt of court. He asserts that reliance on the material obtained on foot of a court warrant for his own disciplinary affairs is *ultra vires* the respondent.

24. In the Statement of Opposition, the Commissioner relies on the terms of the Data Protection Act 2018 (as amended) including s. 71(2)(a) and (5) thereof. He says that the processing of this data was necessary for the performance of his functions, namely the prevention, investigation, detection or prosecution of criminal offences as specified in s. 79(1)(a) of the Data Protection Act 2018, and that the processing of the data is necessary and proportionate to the investigation of a breach of discipline as described in the Form IA32 Notices. He denies that the use of information recovered from the phone for a non-criminal purpose in the circumstances is contrary to law and refers to s. 71(5) of the 2018 Act. He

claims that the processing of his data is necessary and proportionate to the breach of discipline.

25. The Commissioner pleads that the phone had been retained for the investigation of breach of discipline described in the notices and that the phone was the actual exhibit which contains the allegedly offending material and is the best evidence of that material and therefore its retention is not unlawful. He says it has been retained pursuant to the respondent's entitlement to investigate pursuant to Regulations 23 and 24. He denies all breaches of rights and that there has been any contempt of court.

26. The Commissioner pleads in the alternative that if he is not so empowered by the legislative and regulatory framework, the powers may be regarded as incidental to or consequential upon those things which the legislation has authorised and/or they are necessarily and properly required for the carrying into effect the purposes of the legislation.

The affidavits

27. An affidavit was sworn by Mr. Alan Wallace, solicitor on behalf of the appellant, setting out the correspondence between the parties. The appellant swore an affidavit in which he says that he never knowingly accessed or distributed child pornography and describes the stress caused by his suspension. He describes the search and asking to see a copy of the warrant. He says that he did not provide the phone and passcode voluntarily to the investigation team but only did so on the basis he was told there was a warrant compelling it which he has never seen. He describes arriving home and his wife telling him the house had been searched and how she had taken a picture of the warrant, and he exhibited a copy of that picture.

28. Superintendent Paul Costello of Store Street Garda Station, investigating officer under the Regulations appointed on 6th August 2019, swore an affidavit on behalf of the respondent, saying that on 30th August 2019 the appellant was served with a form IA32 Notice of Investigation and gave his written consent to the abeyance of that investigation pending the outcome of any criminal proceedings instigated against him. He exhibited copies of his appointment and the form IA32.

29. Inspector Peter Woods swore an affidavit in which he says that he contacted the appellant on 12th October 2020 and told him that Superintendent Costello wished to interview him. He also refers to calling the appellant by telephone on 18th January 2021 and telling him that his mobile phone was being further retained by a Detective Superintendent Martin Creighton for the purpose of the disciplinary investigation. He also wrote to the appellant on 19th January 2021 by post and e-mail and informed him that his phone had been further retained by Detective Superintendent Creighton for the purpose of a Disciplinary Inquiry. He exhibited the letter and email.

30. An affidavit was sworn by Supt. Martin Creighton, who was appointed as investigating officer pursuant to the Regulations on 30th June 2020. He refers to the appellant being served with a form IA32 on 17th July 2020. He refers to receiving the mobile phone together with the integral USB Flash drive and one integral USB 3.0 from Det/Chief Supt. Declan Daly on 1st October 2020. He says the phone is the actual exhibit which contains the allegedly offending material and is the best evidence of the material, and that it has been retained for the investigation of breach of discipline as described in the form IA32 notice.

31. Sergeant Michael Smyth, formerly assigned to Garda National Child Protection Service Bureau at Harcourt Square, describes the obtaining and execution of the search warrant at the appellant's place of work. He claims the warrant was shown to the appellant at the time of the search.

32. None of the Commissioner's deponents gave evidence as to precisely what was found in the search of the phone, nor whether there was more than one search, nor of the date(s) of the search(es). The Court merely has the above information together with the statement of charges as described above at paragraph 14.

The High Court judgment

33. The High Court delivered judgment on the 18th February 2022 (neutral citation [2022] IEHC 106). At para. 38 of his judgment, Barr J. observed that the appellant was not pressing the challenge related to the non-production of the warrant to him and explained the reasons for that, which are not relevant for present purposes.

34. Having set out the arguments of the parties on the remaining issues, the trial judge said (para. 50 of his judgment) that the first issue to be determined was whether the respondent was entitled to use the material obtained on foot of the execution of the search warrants as evidence in a subsequent breach of discipline investigation into the conduct of the applicant. In determining this question, he said, it was important to note that the validity of the search warrants and their execution were not challenged in the proceedings. He contrasted this, later in his judgment, with the situation in *Criminal Assets Bureau v. Murphy* [2018] 1 I.R. 521. He said that the appellant accepted that if evidence was found on the execution of a search warrant which indicated the commission of further or different *criminal* offences, that

material could be used in any subsequent prosecution in respect of those offences but sought to differentiate between that and material uncovered as a result of a lawful search on foot of a search warrant issued in a criminal investigation and its use in a subsequent *disciplinary* investigation. Barr J. said that he did not see any difference between a subsequent criminal prosecution on different charges based on material found in the course of a lawful search and a subsequent disciplinary charge arising out of material found in the course of a lawful search.

35. The trial judge accepted the submission of the respondent that once material came into the possession of the respondent as a result of the execution of the search warrant, which suggested a possible breach of the Discipline Regulations, the respondent was obliged to act upon it and could not ignore the material found. Indeed, he said, the Commissioner was duty-bound to investigate the matter and that had he not done so, discipline within An Garda Síochána would have been adversely affected.

36. Barr J. distinguished *CRH plc v. Competition and Consumer Protection Commission* [2018] 1 I.R. 521, upon which the appellant had relied, on the basis that it was a totally different type of search warrant. He said that in *CRH* the search warrant was granted for a very specific purpose and that it was possible to do an effective targeted search using keywords; in those circumstances the Supreme Court had held that a trawl of 100,000 e-mails belonging to the third named applicant was unwarranted and therefore unlawful. In the present case it was not possible to do a key word or other limited form of search when looking for pictures of child pornography. It was necessary for the Gardaí to read text and other messages on the mobile phone to see if there was any indication that offences had been committed by the owner of the phone under the 1998 Act. Nor would there be any reason

to limit the temporal extent of the search to any specific time period in respect of the material on the phone. For that reason, the judge found the Gardaí had acted lawfully in looking at all materials on the appellant's mobile phone when executing the search warrant. That being so, there was no reason it should be excluded as evidence in any disciplinary inquiry.

37. In the High Court the appellant had argued that given the date of the notice of investigation served on him on 27th July 2020, containing the second set of charges, it must have been that the search which led to the uncovering of the material relevant to that disciplinary charge was conducted *after* the conclusion of the criminal investigation. Barr J. reached the opposite conclusion on the balance of probabilities, saying that he was satisfied that a complete search of the content of his phone was probably carried out prior to his arrest in June 2019.

38. The trial judge turned to what he described as the second issue to be determined, namely whether the respondent was entitled to retain the phone for the purpose of the disciplinary investigation. He accepted that *prima facie* once criminal proceedings are at an end, the owner of property in the possession of the Gardaí is entitled to its return. He referred to applications pursuant to the Police Property Act 1897 as amended, and *The King (Patrick Curtis) v. The Justices of County Louth* [1916] 2 I.R. 616, *Mansfield v. Superintendent Peter Duff* (Unreported, Dublin District Court, Judge O'Shea, 16th April, 2018) and *Donoghue v. His Honour Judge O'Donoghue & Ors.* [2018] IECA 26. The judge also accepted that the respondent had no power of compulsion at the preliminary investigation stage of a disciplinary investigation and that this power was given only to the Board of Inquiry.

39. However, the judge held that although in general the respondent is not entitled to retain property for the purposes of a disciplinary investigation, this did not mean that the respondent was obliged to return all of the material from the phone. He gave an example of a photograph taken of one's employer's confidential client list or confidential manufacturing processes, which did not become the person's information simply by virtue of being on their phone. Thus, he said, insofar as there may be photographs on the appellant's phone of garda stations or of garda documents and entries on the PULSE system on the phone, the Commissioner would be entitled to object to the return of those items. He went on to discuss the possible deletion of the items from the phone and its return and the practicalities of this, but said that was ultimately a matter for a Police Property Act application in the District Court. The judge said that he would confine himself to holding that insofar as any material on the phone is Garda documentation or data which the appellant is not authorised to have on his phone, he would not be entitled to the return of it.

40. Barr J. did not accept that the Commissioner needed to keep the mobile phone as being the best evidence at any hearing before a Board of Inquiry. Once the criminal investigation had ended, *prima facie* the applicant was entitled to the return of his property and the respondent did not enjoy any power of seizure or compulsion at the preliminary investigation stage. Once the material was found on the phone, even if the phone was returned to the appellant, evidence could be given of what was found on the phone and this would be admissible before any Board of Inquiry.

41. He did not accept there was any breach of privacy because insofar as there was any invasion of that right it was authorised on foot of the search warrant. He was also not satisfied

that any of the data in question was *"personal data"* within the meaning of the 1988 Act or the 2018 Act.

42. Barr J. noted that the appellant's main reason for wanting the return of his phone was to enable him to conduct his own technical examination of the phone in order to prepare his defence for the disciplinary hearing. He said that even if the phone is retained by the Gardaí, due to the impossibility of removing material from the phone, the appellant should still be afforded inspection facilities whereby he, his legal advisors, and such technical experts as may be retained by him can be given the opportunity to carry out non-invasive tests on the material under the supervision of the Gardaí.

43. The High Court could see no basis on which to prevent any evidence being given in relation to the finding of the bottle of methadone in the appellant's locker. In the absence of any assertion of ownership by the appellant, there appeared to be no basis for its return to him.

44. The trial judge concluded by agreeing to make the following orders:

- A declaration that the respondent is entitled to use the material found by the Gardaí as a result of the execution of the search warrants issued on 14th May, 2019 in any disciplinary investigations that may be brought into the conduct of the applicant;
- A declaration that the respondent is not entitled to retain property seized during a search conducted as part of a criminal investigation, after the conclusion of that investigation, on the grounds that such material would be of relevance to an ongoing disciplinary investigation against the Garda who owns the property;

- A declaration that, in general, a person is entitled to return of their property once criminal proceedings have been concluded, subject to the proviso that where material is on a computer or a mobile phone, the applicant must be in a position to establish ownership or at the least, a right to possession, of all the material on the computer, or phone, prior to it being returned to them; any application for return of property seized in this case can be made to the District Court in the ordinary way pursuant to s. 1 of the Police Property Act 1897 (as amended);
- Other than the above, the court refused all other reliefs sought in the notice of motion;
- The court lifted the stay on the disciplinary investigations on foot of the notices of investigation of 30th August 2019 and 27th July 2020.

Notice of Appeal and Submissions on Appeal

45. The Notice of Appeal contains the following grounds:

(1) The Trial Judge erred in holding that non-criminal material recovered from the Appellant's mobile phone seized and examined on foot of a warrant issued pursuant to the Child Trafficking and Pornography Act 1998 for the investigation of offences contrary to the Act could be used in non-criminal internal Garda disciplinary proceedings;

(2) The Trial Judge erred in holding that there was no difference between a subsequent criminal prosecution on different charges based on material found in the course of a lawful search and a subsequent disciplinary charge arising out of material found in the course of a lawful search.

(3) The Trial Judge erred in law in holding that the use of material obtained following a search performed pursuant to warrant for a purpose other than a criminal prosecution did not amount to a breach of the Appellant's right to privacy.

(4) The Trial Judge erred in holding that the material found on the Appellant's mobile phone was not his personal data.

(5) The Trial Judge erred in finding that the searches were performed at a time prior to the notice given to the Appellant that he would not be prosecuted for any offences.

(6) The Trial Judge erred in finding that it was necessary to search every aspect of the Appellant's electronic devices in order to discover material covered by the warrant.

The Appellant's submissions

46. In relation to the facts, the appellant submits that there is no evidence to support the High Court's finding that the material was identified on his phone during the criminal phase of the investigation and not after it had concluded. He submits that insofar as this forms part of the decision, it is an error.

47. He also submits, however, that even if the material was located or identified during the criminal investigation, the Commissioner is not entitled to use the material for any purpose other than that for which the warrant was granted. It may be noted that the appellant characterises all of the information found on the mobile phone as his property.

48. The appellant relies on various dicta in *CRH plc v. Competition and Consumer Protection Commission* [2018] 1 I.R. 521, *Simple Imports v. Revenue Commissioners* [2000] 2 I.R. 243 and *Entick v. Carrington* (1765) 19 St. Tr. 1030, (1765) 95 E.R. 807 as to the purpose of criminal search warrants generally, and for the principle that their use is subject to limits. He relies upon *Marcel v. Commissioner of Police of Metropolis* [1992] 2 WLR 50 and *Morris v. Director of the Serious Fraud Office* [1993] 3 WLR 1, [1993] 1 All ER 788, both of which I will return to later in some detail.

49. The appellant refers to s. 9 of the Criminal Law Act, 1976 which permits material found in the course of a search to be seized and retained and used as evidence in a prosecution in respect of any offence or suspected offence or in prison disciplinary proceedings. He submits that this by implication excludes the use of the material in any other disciplinary proceedings.

50. The appellant refers to a number of overseas authorities in which issues relating to the search of mobile phones were discussed. The first is an Australian case, *Flori v. Commissioner of Police* [2014] QFC 284, where the Supreme Court of Queensland decided the precise issue which has arisen in the present case in the negative i.e. holding that material seized pursuant to warrant in a criminal investigation could not be used in a subsequent police disciplinary procedure.

51. Another overseas decision referred to by the appellant is a decision of the Canadian Supreme Court in *R v. Fearon* [2014] SCC 77. The precise issue in the case was a different one, namely the validity of a search (without warrant) of a mobile phone which was carried out when the phone was located during a *"pat-down"* search incidental to an arrest. The appellant relies on general observations in the judgments about modern developments in mobile communications and computing technology which have led to digital devices becoming *"windows to our inner private lives"*, necessitating a careful balancing of interests in order to ensure adequate protection for privacy interests.

52. The appellant also refers to a number of American authorities. One is a decision of the United States Supreme Court in which observations were made by Roberts C.J. about the vast scope of what may be contained on, or accessed via, a person's mobile phone: *Riley v. California* 573 US 373 (2014), although again the context in which the remarks were made was that of search (without warrant) of a cell phone incident to an arrest of a suspect. Another is *In Re iPhone 4* 27 F. Supp. 3d 74 (DDC 2014), in which the United States District Court, District of Columbia refused applications for warrants to search devices which had been seized from a hotel room on various grounds, including the use of *"boilerplate"* language in the applications and the failure to specify precisely what would happen to data falling outside of the warrant. The appellant also refers to *U.S. v. Comprehensive Drug Testing Inc.* 579 F. 3d 989 [2010] from which it appears that certain courts have mandated that the initial searches of electronic devices be performed by investigative teams not connected with the main investigation. The judgment talks about data being segregated, redacted if necessary, and limited examination of the remaining material. It talks about remaining copies being destroyed or returned along with the physical medium from which they were seized to the

individual, *"so long as they may be lawfully possessed by the party from whom they received."*

53. The appellant submits that the position as set out in all of those authorities is utterly incompatible with the trial judge's view that once material came into the possession of the Commissioner which suggested a possible breach of a discipline regulation, he was under an obligation to act on it.

54. Concerning the constitutional right to privacy, the appellant relies on *Norris v. The Attorney General* [1984] I.R. 36 and *Kennedy v. Ireland* [1987] I.R. 587. He cites Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union and refers to a number of CJEU judgments such as Case C-131/12 *Google Spain* ECLI:EU:C:2014:317 (concerning the so-called *"right to be forgotten"* in the context of web search engines). He also refers to Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* ECLI:EU:C:2014:238, including para. 54 of the judgment where it was said that E.U. legislation must lay down *"clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data has been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data"*. Indeed it might be added that the recent decision of the Grand Chamber of the European Court of Human Rights in *Hurbain v. Belgium* (App. No. 57292/16) considers in detail the balancing of freedom of expression and protection of privacy in the digital context (again a *"right to be forgotten"* case).

55. The appellant refers to *CRH* as an example of a case where concerns about indiscriminate access to and retention of material arose and draws attention to the fact that Laffoy J. in her judgment referred to the CJEU decision in *Nexans v. Commission* [2013] 4 CMLR 195. This was a decision in which it was made clear that when the E.U. Commission carries out an inspection it is required to restrict its searches to the activities of the undertaking relating to the sectors indicated in the order for inspection; and therefore if a document does not relate to those activities, it must refrain from using that document or item of information for investigation. It was said that if it were not subject to that restriction, in practice, every time it had indicia suggesting that an undertaking had infringed the competition rules in a specified field of its activities, it would be able to carry out an inspection covering all of its activities with the aim of detecting any infringements of those rules that might have been committed. This was deemed *"incompatible with the protection of the sphere of private activity of legal persons, guaranteed as a fundamental right in a democratic society"*. In the *CRH* decision itself, Laffoy J. held that allowing the CCPC to examine the full e-mail server would amount to a breach of the Article 8 rights of the plaintiff.

56. In relation to the Data Protection Acts and the EU data protection regime, the appellant contends that the material is capable of being his personal data, contrary to the view taken by the High Court judge. He refers to s. 41 of the Data Protection Act, 2018 and submits that he does not fall within any of the exceptions set out in sub-paragraphs (a) – (c). Section 41 provides as follows:-

> *"41. Without prejudice to the processing of personal data for a purpose other than the purpose for which the data has been collected which is lawful under the Data*

Protection Regulation, the processing of personal data and special categories of personal data for a purpose ***other than the purpose for which the data has been collected shall be lawful to the extent that such processing is necessary and proportionate for the purposes*** –

(a) of preventing a threat to national security, defence or public security,

(b) of preventing, detecting, investigating or prosecuting criminal offences, or

(c) set out in paragraph (a) or (b) of section 47 ." [These are for the purpose of legal advice and legal proceedings]

57. With regard to the Commissioner's reliance on ss. 70 and 71 of the Act, the appellant points out that these sections are contained in Part 5 of the Act which refers to processing of personal data for law enforcement proceedings which are, he submits, entirely different from disciplinary matters. Section 70 of the Act provides as follows:

"70. (1) This Part applies, subject to subsection (2), to the processing of personal data by or on behalf of a controller where the processing is carried out–

(a) for the purposes of–

(i) the prevention, investigation, detection or prosecution of criminal offences, including the safeguarding against, and the prevention of, threats to public security, or

(ii) the execution of criminal penalties,

and

(b) by means that -

(i) are wholly or partly automated, or

(ii) where the personal data form part of, or are intended to form part of, a relevant filing system, are not automated."

58. The appellant also refers to the Garda Síochána Act, 2005 and the powers of the Commissioner under that legislation for the purpose of discipline. These are set out in the Garda Discipline Regulations 2007 made pursuant to s. 123 of the Act. The investigating officer under those Regulations has no power of compulsion except that the member must attend for interview and is obliged to answer questions truthfully. There is no provision for the obtaining of a warrant in respect of disciplinary matters. It is only if there is an independent Board of Enquiry that the Board may require a member to produce a document to the Board.

59. The appellant also refers to the powers granted to the Garda Síochána Ombudsman Commission under the same Act, including s. 98 in particular. He says that the provisions make it clear that only GSOC has the power to seek a warrant in respect of a member and that the exercise of the power for purely disciplinary issues is precluded. He also submits that the Act does not provide for a continuation of investigation pursuant to s. 98 in disciplinary matters but instead provides that there is to be a second distinct and *"subsequent"* investigation under section 95. He submits that taken altogether, these provisions do not evidence any intention on the part of the Oireachtas to permit the use of any material gathered pursuant to the warrant to be used in disciplinary matters where no criminal activity has been disclosed.

60. In supplementary submissions following the Supreme Court decision in *Director of Public Prosecutions v. Quirke* [2023] IESC 5, the appellant, while acknowledging that the warrants in the present case did not suffer from the same defect identified with regard to the warrants in that case, nonetheless relies upon matters referred to in the judgment of Charleton

J., including in particular a passage where he said: "*A power is granted for a purpose and is limited to reasonable use in accordance with the statutory remit and within its confines, and not for harassment or titillation or any other improper purpose".*

61. He submits that once the materials seized on foot of the warrant were found to be non-criminal, the purpose for which the power was granted ceased to apply. Further, the District Court judge was never asked to apply his or her mind to the question of using the fruits of the search for another non-criminal purpose, i.e. a disciplinary investigation. Therefore, it is said, the *"balancing"* of rights described by Charleton J. simply did not take place.

The Respondent's submissions

62. The Commissioner submits that the decision in *Morris v. Director of Serious Fraud Office* merely sets out a basic and unremarkable proposition that there are limits to certain statutory powers that impinge on the rights of individuals. The Commissioner points out that this judgment was distinguished by Kearns J. (as he then was) in *Gama v. Minister for Enterprise* [2010] 2 I.R. 85 and submits that the decision of the Supreme Court in *Gama* supports the proposition that the Commissioner was entitled to use the material in the present case. Kearns J. referred to the circulation of documents to *"relevant statutory agencies"* and *"for 'purposes reasonably incidental' to the exercise of the statutory powers in question"*. In this regard, the Commissioner stands over the trial judge's determination that he was obliged to investigate when evidence came into his possession which raised a possibility that a breach of discipline may have occurred.

63. The Commissioner also refers to the fact that the decision in *Marcel* was also addressed in the *Gama* decision. Kearns J. referred to the decision in *Desmond v. Glackin (No. 2)*

[1993] 3 I.R. 67 where O'Hanlon J. said that he did not share the view expressed in *Marcel* about the consequences of sharing information lawfully obtained across a wide spectrum of State agencies, instead he considered that *"it may be helpful for good government and the welfare of the community"*. He added:

> *"I would think that the protection of a free society must rest on surer grounds than the operation of the affairs of state in water-tight compartments."*

64. The Commissioner says that the Australian judgment in *Flori* adds little to the situation but insofar as it represents any difference of approach, then the position of the Irish Supreme Court obviously takes precedence. More generally, he submits that the American, Australian and Canadian precedents do not advance the position.

65. The Commissioner also refers to the decision of McMenamin J. in the *CRH* case in particular at para. 77 where he says *"It would not be surprising, if in the very different circumstances of a search following on serious crime, substantial extraneous and irrelevant material might be seized"*. The Commissioner also refers to the trial judge's observation, found at paras. 56 – 58 of his judgment, that the nature of a criminal investigation into child pornography did not lend itself to key word searches of the type discussed in the *CRH* judgment.

66. The Commissioner says that it was impossible to ignore the mobile phone because of what he learned during the criminal investigation, and it was therefore unremarkable that the phone was retained in the context of the disciplinary investigation. The material obtained from the phone, he submits, is legally obtained evidence and its possession by the gardaí was the outcome of a lawful process. The appellant would be unable to exclude it or its contents

from any criminal prosecution. It would be absurd if the right to privacy were interpreted so as to prevent the gardaí from having the phone available for a disciplinary enquiry. He says that the appellant is asking the Court in effect to create an exclusionary rule which prohibits lawfully obtained evidence from being considered by his employer for the purpose of ensuring the discipline of the force, and moreover an exclusionary rule which has no limit or parameters. He says that the appellant does not even place the limit that the phone was unfairly obtained evidence but merely that it is private. The Commissioner also submits that the correct time to consider the relevance of the evidence is if and when a Board of Inquiry is convened.

67. The Commissioner submits that the exclusionary rule that applies to disciplinary tribunals is less extreme than that which is proposed by the appellant, quoting from *Kennedy v. Law Society of Ireland (No. 3)* [2002] 2 I.R. 458, where it was said at p. 490 that the Court should be slow to adopt any mechanical exclusionary rule which makes it easy to prevent disciplinary tribunals from receiving and hearing relevant probative material. The Supreme Court also said that only evidence obtained with *"an element of deliberate and knowing misbehaviour"* should be considered for exclusion.

68. The Commissioner stands over the trial judge's conclusion that because the data in question was not personal data, the appellant could not rely on the data protection legislative regime or the GDPR. He also submits that if the Court has any uncertainty with regard to the GDPR or the Law Enforcement Directive, it could seek guidance from the CJEU.

69. Finally, the Commissioner submits that the use of material lawfully obtained by the gardaí for a criminal investigation can lawfully be used in a subsequent disciplinary

investigation of a member of An Garda Síochána. There is, he submits, a public interest in the maintenance of discipline within An Garda Síochána and the availability of the material to the disciplinary investigation will not undermine the administration of justice generally.

70. The Commissioner in supplemental submissions following the Supreme Court decision in *Quirke* argues that the appellant's argument does not address the fact that the respondent is the Commissioner of An Garda Síochána, and that consideration of the material was not behaviour akin to "*prurient prying*" or "*titillation*" – the potential mischief identified by Charleton J. – but instead, was driven by the very nature of the Commissioner's function and duties as head of the Irish police force. The respondent submits that the appellant ignores the High Court's finding that the Commissioner's duty obliged him to conduct an investigation once the information came into his possession.

The Court's analysis

Framing the legal Issues

71. I have previously expressed the view (see partly-dissenting judgment in *Akram v. Minister for Justice and Equality* [2022] IECA 108) that in cases involving challenges to the exercise of powers of search and seizure, it is necessary to keep in mind the fact that the generic word *"search"* encompasses a large number of individual actions, any one or more of which may be subject to legal challenge in a particular case:

(1) Entry onto premises (whether a dwelling or other premises);

(2) Search of a person;

(3) Search of an object connected with a person, such as an item of luggage or clothing;

(4) Reading paper document(s);

(5) Reading information on a smartphone or laptop which is not password protected, such as messages or e-mails;

(6) Taking possession of devices such as smartphones or laptops which are password protected;

(7) Taking possession of other forms of digital storage such as hard drives, CDROMs, USB sticks and the like;

(8) Taking copies of the entirety of the digital information on a device (such as copying a hard drive);

(9) Taking copies of individual pieces of information on a device (such as taking a screenshot of individual messages on a phone);

(10) Sorting potentially relevant material from potentially irrelevant material (by *"relevant"*, I mean relevant to the task in hand or the purpose for which the search and seizure was carried out, e.g. a fraud investigation, a drugs investigation, an immigration decision, and so on);

(11) Sorting potentially legally privileged material from non-privileged material;

(12) Retaining information/copies of information or devices thereby obtained;

(13) Destroying information;

(14) Returning information or devices.

72. The issues in this case differ from those raised in many other leading *"search"* cases, particularly because there is no challenge to the search warrant itself. Many of the leading authorities on search and seizure concerned legal challenges to the search warrants in question, frequently on the basis that the judge authorising the warrant was not given crucial information which was necessary to a proper determination as to whether a warrant should issue.

73. For example, in the recent Supreme Court decision in *Quirke*, it was held that a search warrant was invalid because the issuing District Court judge had not been told that it was proposed to seize and search digital devices. In *Corcoran v. Commissioner of An Garda Síochána* [2023] IESC 15, it was held that a search warrant was invalid because the issuing District Court judge had not been told that it was proposed to seize and search the digital devices of a journalist, in respect of whom special *"freedom of speech"* considerations arose and required consideration by the issuing judge. In *Simple Imports v Revenue Commissioners* [2000] 2 I.R. 243, warrants which carried on their face statements to the effect that they had been issued on a basis not authorised by statute were held to be invalid.

74. Needless to say, in cases where the search is held invalid because of a defective warrant, the seizure of material will be unlawful and the question will become whether the evidence is admissible in the exercise of the court's discretion in accordance with the principles in *DPP v. J.C.* [2015] IESC 31. This familiar sequence of reasoning is not directly applicable in the present case because there is no challenge to the warrant itself. Insofar as the question arises as to whether any intrusion on the appellant's privacy right falls to be justified, the intrusion arises not at the point of the seizure of the phone (because the seizure itself is not under challenge) but (if anywhere) potentially at the later point of using the information from the phone in non-criminal proceedings.

75. It seems to me that nonetheless the judicial observations in *Quirke, Corcoran* and other leading cases including *CRH* concerning the potentially far-reaching nature of searches of digital devices are still relevant in a more general way to this case. In *Corcoran,* Hogan J. observed that "*it is important to recall that this is technology which enables the person*

having access to learn almost everything about the owner, ranging from one's personal life, medical and financial records, personal interests, political views to knowledge about friends, acquaintances and other contacts". Charleton J. in *Quirke,* contrasting the search of a virtual space with that of a physical space, pointed to the nature of computer devices as "*a portal through which something other than physical space, often located outside the actual device seized, and instead accessed on remote servers or on the cloud*" and described searches of such devices as a *"significantly different intrusion into the rights of the person searched"* (para. 73). At paragraphs 74 – 84, he analysed authorities from other jurisdictions on this point, including *R v Vu* 2013 SCC 60, [2013] 3 RCS 657 and *R v Fearon* 2014 SCC 77, [2014] 3 SCR 621 (decisions of the Supreme Court of Canada), *Riley v California* 573 US 373 (2014) (Supreme Court of the United States) and *Dotcom, Batato, Ortmann and van der Kolk v R* [2014] NZSC 199 (Supreme Court of New Zealand). Given the importance of the privacy right and the emphasis in those cases on the deeply intrusive nature of searches of personal smartphones, I do not think it can necessarily said *in limine* that any privacy rights of the appellant are no longer relevant simply because there is no challenge to the seizure of the phone itself, as the High Court judge appeared to say.

76. Noting, therefore, that this case does not involve a challenge to the warrant but does involve issues relating to the search of a digital device, I would frame the key issues arising as two-fold:

(1) Whether the material found on the phone which led to the second set of disciplinary charges was obtained unlawfully because it was found on foot of a search of a phone conducted *after* the criminal investigation had concluded; and

77. Whether, even if it was lawfully obtained, the Commissioner is entitled to *use* it for a purpose other than a criminal prosecution, namely in disciplinary proceedings. ioner is

already in possession of the material by virtue of his dual role in respect of criminal investigations and Garda discipline, the case does not raise the question of *sharing* the information with private third parties or public bodies other than the Garda Commissioner (such as a separate regulatory or professional disciplinary body). Hence the emphasis on the word *"use"* in the second question posed above.

I pause also to observe that the disciplinary charge relating to possession of a bottle of methadone in a Garda locker is not relevant to this discussion and did not feature in the arguments of the parties. We are concerned with the material found on the phone which, according to the disciplinary charges brought, consist of (a) images *"which appear to be racist, misogynistic, anti-homosexual, antisemitic, supporters of Nazi ideology or 'rape culture'* and (b) *"images which appear to be CCTV images relating to garda investigations and practices; images which appear to be garda computers, including images of suspects, PULSE incidents and Command and Control incidents; images showing garda documents, garda members and of garda station interiors".* The Court did not have the benefit of seeing any of the material in question and has no more information than what is contained in the charges as so described.

(1) ***Was the material unlawfully obtained?***

78. Turning to the first of the questions identified above, the appellant argued that the material was obtained by a search of the phone on a date after the criminal investigation had concluded, and therefore was unlawfully obtained. Here, we immediately encounter a factual problem. There is a significant evidential lacuna in these proceedings as to *when* the material leading to the second set of disciplinary charges was found on the phone. Was it found during a search of the phone carried out as part of the criminal investigation? Or was it found in a

separate search of the phone carried out *after* the criminal investigation had concluded? This is a simple question of dates but those dates are not contained within the evidence before the Court.

79. Obviously the only party with information about this factual issue is the Commissioner. Unfortunately, the affidavits sworn on behalf of the Commissioner are silent as to when precisely the material was found on the appellant's phone, a most unfortunate omission from the pool of evidence before the Court because it leaves us in an evidential vacuum on a key factual issue which is relevant to at least some of the legal argument put forward by the appellant

80. The appellant invites the Court to fill the gap by making an inference. He argues that having regard to the date of the second notice of investigation served on him (27th July 2020) it follows – or is to be inferred – that the search which led to the uncovering of the material relevant to that notice must have been conducted *after* the conclusion of the criminal investigation (5th May 2020); in other words, that there were two searches, one which led to the first charge concerning the persons engaged in a sexual act, and a second, which led to the second set of charges described above.

81. The trial judge was not persuaded by this argument and held that he was satisfied that a complete search of the content of his phone was probably carried out prior to the appellant's arrest in June 2019

82. In my view, the fact that the second notice of investigation post-dated the conclusion of the criminal investigation by a number of months does not necessarily lead, as a matter of

logic, to the conclusion that a second search was carried out, as argued by the appellant. There may for example have been a re-evaluation of what was found, as distinct from a second search. To that extent, I disagree with the appellant's argument that the requested inference should be drawn. However, I agree that the timing of the second set of charges does raise questions about when the information leading to the second set of charges was found.

83. It is also fair to say, however, that the appellant failed to use any of the legal procedures available to him to fill this factual lacuna such as by serving any application for leave to serve notice of intention to cross-examine the relevant deponent(s). Such cross-examination might have established the simple fact of *when* the materials underpinning the second set of charges were found on the phone, and more particularly, whether they were found during or after the criminal investigation. This being a part of the appellant's argument that the material was unlawfully obtained, it is surprising that the gap in the evidence was left untouched.

84. The burden of proof in these proceedings is borne by the appellant with regard to the facts he relies upon in support of the reliefs sought. I would therefore approach the matter by holding that for the purpose of these proceedings the appellant has failed to establish on the balance of probabilities that there was a second search of his phone after the criminal investigation had concluded, and that the second set of charges was based on material found during that second search. I emphasize that in so finding, I am reaching a conclusion for the purposes of these proceedings only and by applying the burden of proof. I remain ignorant of the true factual position and can only reach the conclusion that the appellant has not

satisfied the burden of proof to prove a fact which is essential to his *"unlawfully obtained"* argument.

85. Accordingly, for the remainder of the judgment, I will proceed on the basis that the material was lawfully obtained as having been obtained *during* a criminal investigation on foot of a lawful seizure of the appellant's phone. This leads on to the second of the two questions posed earlier.

(2) *Whether, even if the material was lawfully obtained as having been found during the criminal investigation, the Commissioner is entitled to use it for a purpose other than a criminal prosecution, namely in disciplinary proceedings in respect of the appellant Garda*

86. The Commissioner makes the argument that it would be absurd if the right to privacy were interpreted so as to prevent the gardaí from having the phone available for a disciplinary enquiry in circumstances where it was *lawfully* obtained, when even if it were *unlawfully* obtained it would (as a result of *DPP v. J.C.)* be potentially admissible even in criminal proceedings. He says that the appellant is asking the Court in effect to create an absolute exclusionary rule which prohibits lawfully obtained evidence from being considered by his employer for the purpose of ensuring the discipline of the force. This argument does have some attraction, but in my view it overlooks the fact that the starting position regarding evidence seized during a criminal investigation is that it is *prima facie* admissible in a criminal prosecution, whereas in the present context, the very question begged is what the starting position is: i.e. whether evidence seized in a criminal investigation is even *prima*

facie admissible in the police disciplinary context. This is because of the general principle that materials gathered pursuant to a compulsory power conferred for one purpose must not in general be deployed for a different purpose, which will be discussed further below.

87. Further, it seems to me that the Commissioner's argument assumes that an individual's privacy right is spent or exhausted once the phone has been lawfully seized. I do not accept that an individual's privacy interest in material on his or her phone is of no continuing relevance once the device has been lawfully seized. Rather, I would take the view that there is a continuing privacy interest in how the material can be deployed thereafter, albeit that the precise balance to be struck when material has been lawfully seized may be different to that obtaining at the time of the seizure itself.

88. In *CRH,* Charleton J said:

> *"The extent of the powers available on a warrant is a matter of construction of the statute under the authority of which it is issued. Such legislative authority is to be construed from the plain words enacted, read in the light of any other relevant provision, within the statutory context as a whole".*

89. Although that was articulated in a different context, it seems to me that the first port of call in the examination of the question arising is indeed the statute under which the search warrant issued.

90. Section 7(1) of the Child Trafficking and Pornography Act 1998 provides for application to be made for a search warrant, and S.7(2) provides as follows:-

"A warrant issued under this section shall authorise a named member of the Garda Síochána, alone or accompanied by such other members of the Garda Síochána and such other persons as may be necessary—

(a) to enter, within 7 days from the date of the warrant, and if necessary by the use of reasonable force, the place named in the warrant,

(b) to search it and any persons found there, and

(c) to seize anything found there, or anything found in the possession of a person present there at the time of the search, which that member reasonably believes to be evidence of or relating to an offence under section 3 , 4 , 5 or 6."

91. Before any question can arise as to the use of material seized on foot of such a warrant it is necessary to consider what may lawfully be seized. Although qualified by the reasonable belief of the member of An Garda Síochána conducting the search, all that this provision authorizes in terms of seizure is anything that may be evidence of or related to an offence under the Act of child trafficking or child pornography. In the case of a physical search of a person or premises, the member conducting the search would not be entitled to seize, for example, racist, misogynist or antisemitic images. While the appellant's phone was lawfully seized – and with it, all of the material on it – the issue in practical terms is whether the Commissioner is entitled to use material which could not lawfully have been seized in physical form. The section does not address the issue of the use of the seized material in a forum other than a criminal investigation.

92. Section 9 of the Criminal Law Act 1976 (*"the 1976 Act"*)is also of interest, and it is important to note that it applies generally to all searches and seizures. Section 9(1) provides:-

> *"Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act."* (Emphasis added.)

93. This is a well-known and far-reaching statutory provision concerning the seizure, retention and use of materials as evidence in proceedings other than those for which the power was exercised. What is well known is that it applies across the board in criminal proceedings. What is less well known but is clear from its terms is that it applies to prison discipline proceedings as well as criminal proceedings. As we have seen, the appellant argues that the provision, by explicitly mentioning criminal and *prison discipline* proceedings, thereby implicitly *precludes* the use of the seized materials in other forms of disciplinary proceeding.

94. The judgment of Charleton J in *Quirke* contains a most useful discussion of the reasons for the introduction of s. 9 of the 1976 Act which is set out below while addressing that judgment more generally.

95. I also note that s. 7 of the Criminal Justice Act 2006 contains a similar provision, but this time without any reference to prison discipline. It provides that a Garda who is in (a) a public place or (b) any other place under a power of entry authorised by law or to which or in which he or she was expressly or impliedly invited or permitted to be, and who *"finds or comes into possession of any thing"* and has reasonable grounds for believing that it is evidence of or relating to the commission of an arrestable offence, he or she may *"seize and retain the thing for use as evidence in any criminal proceedings…."*. The power is expressed to be "*without prejudice to any other power conferred by statute or otherwise exercisable for a member of the Garda Síochána to seize and retain evidence"* relating to the commission of an offence (subsection (3)). It therefore operates in parallel to the 1976 power and does not replace it.

96. It seems that while s. 9 of the 1976 Act is primarily directed at the seizure of materials pursuant to a search power, s. 7 of the 2006 Act is primarily directed to the seizure of materials where the Garda is in a public place or lawfully on premises because of the owner's consent or having exercised some power of entry. Both provide for the use of the materials seized in any criminal proceedings, but s. 9 alone refers to prison discipline. I will return below to the impact of these provisions on my ultimate conclusion.

97. I turn now to authorities referred to by the parties as well as some additional authorities that I consider to be of some assistance.

Discussion of the scope of searches in recent Irish authorities

98. It may be noted that at paras. 34 and 35 of *CRH* – where the focus was on excessively broad searches of digital devices – MacMenamin J. set out some historical background to

common law search powers, and discussed, as Charleton J. would later do in *Quirke*, the leading decision of *Entick v. Carrington* (1765) 19 St. Tr. 1030, (1765) 95 E.R. 807.

99. In *Quirke,* Charleton J. (delivering the unanimous judgment of the Court) engaged in a detailed analysis of the common law and statutory development of search powers. In setting the scene, he said at paras. 43 – 44:

> *"Two further principles should be borne in mind. Firstly, police powers are not granted simply for individual officers to decide to annoy those they may dislike by, as can happen, arresting people repeatedly and in the absence of reasonable suspicion, or exercising powers under the Road Traffic Acts or Misuse of Drugs Acts to stop and search people. A power is granted for a purpose and is limited to reasonable use in accordance with the statutory remit and within its confines, and not for harassment or titillation or any other improper purpose. A search is for the gathering of criminal evidence or leads to assist the investigation of crime, and the power to search is not granted for the purpose of annoyance through the arbitrary invasion of the privacy of the home.*
>
> *Secondly, where articles are seized and an issue arises as to the improper seizure of irrelevant evidence, a civil application is a necessary fetter on police power whereby a judge may decide that it is no longer necessary to hold property since a suspicion justifying a search has dissipated or a belief as to connection with crime has dissolved; Ghani v Jones [1969] 3 All ER 1700, along with the other relevant authorities".* (Emphasis added.)

100. At paragraphs 60 - 62, Charleton J. explained the background to s. 9 of the Criminal Law Act 1976: -

"The early common law powers of search, limited to warrants to seek out stolen goods, limited the trawl to those goods listed in the warrant; Price v Messenger (1800) 2 Bos & P 158, (1800) 126 ER 1213. That extended to such other items as were likely to furnish evidence of the identity of the goods stolen; Crozier v Cundy (1827) 6 B & C 232. While the common law developed that principle of reasonable connection so that warrant powers enabled the seizure of items reasonably thought to provide evidence of other crimes, the limitations required specification generally; Elias v Pasmore [1934] 2 KB 164. The authorities were overthrown in favour of a wide doctrine established in Ghani v Jones and Chic Fashions (West Wales) v Jones [1968] 1 All ER 229, which enabled a constable who enters a house on foot of any statutory search warrant to seize not only the goods which they reasonably believe to be covered by the warrant, but also any other goods which they believe on reasonable grounds to have been stolen or to be evidence of any other crime.

Formerly, only goods which were reasonably thought material to the investigated crime could be seized. The common law as to specificity, which had not been bypassed in this jurisdiction through any judicial intervention approving the Ghani v Jones line of authority arguably survived. Intervention by statute was, in consequence, prudent. Any doubt as to the final position of the authorities was bypassed through the intervention of the Criminal Law Act 1976 which enabled wide stop and search powers in respect of gardaí and members of the Defence Forces. While these powers were conferred in the context of violence through subversion of State authority and in the

main related to the detection of explosives and munitions travelling by road, other interventions in clarification of the common law rules of search were also made. These include in s 8 of the Act, stopping and searching vehicles. In the interests of ensuring clarity in contra-distinction of potential common law authority, persons therein could also be searched. Section 9(1) deals with a situation where acting in good faith on a warrant in respect of a reasonable suspicion as to a particular crime, for instance theft, articles such as machine guns or timing devices or improvised explosive materials are found. At common law, the targeted search might have enabled only the seizure of the materials related to the theft under investigation, potentially requiring those searching to seek out a fresh warrant on firearms or explosives charges under specific legislation in that regard; Firearms Act 1925 s 21, as amended and the Dangerous Substances Act 1972, s 40.

Hence, and again on the basis of ensuring common law authority did not operate as a potential hindrance to an investigation, s 9(1) enables seizure within a validly searched premises subject to a warrant where there was any belief that what is found is evidence of any crime, in respect of the index crime or outside the ambit for which a power was used, which on general authority must of course be reasonable."

(Emphasis added).

101. To my mind, what is particularly interesting for present purposes in the above explanation as to the background to the introduction of s. 9 of the 1976 Act is that Charleton J. considers that the provision was necessary to displace the rather narrow the common law position which would otherwise have prevailed.

102. Other general comments about search and seizure made by Charleton J. in his judgment include:

> *"Where something is seized lawfully, it is subject to inspection and later analysis. That is why it is taken in the first place, because of the reasonable belief that it may assist in the police investigation; The People (DPP) v Hannaway & Others [2021] IESC 31."* (para. 67)

> *"Search for specific items carrying a suspicious aura may be specifically authorised by warrant and legislation has enabled a specified and definite suspicion as to a particular crime to extend into the seizure of physical items related to another crime that was outside the contemplation of the searching police officers when they applied for a search warrant on a particular basis."* (para. 68)

> *"General words, derived through drafting practice to address negative potential common law prohibitions, enable and extend a search to anything once those seizing the item reasonably believe it to be evidence, not just of the offence in contemplation, but any serious offence, thereby again addressing common law constrictions."* (para. 71)

> *"What the common law authorities cited above emphasise are: the intervention of a judicial mind; the need for a statutory power; the conformance with the parameters of such power; the need to specify what is in reality sought; and the duty to use a power only for the purpose for which it is granted by statute. Such an approach is necessary to ensure that the manner in which a warrant is obtained, authorising a*

significant but proportionate and necessary infringement on privacy rights, remains a legitimate balancing exercise carried out by the issuing judge". (para. 89)

(Emphasis added)

103. While those comments would appear to envisage the material seized being deployed only in criminal proceedings (albeit *any* criminal proceedings), it is only fair to point out that the comments were made in a context in which the question of whether they might be deployed in *non-criminal proceedings* simply did not arise. This brings us to some authorities which do deal with this point. Many of these authorities concern the *sharing* of material with non-Garda parties or bodies.

The Marcel and Morris cases: deploying material seized pursuant to search warrant in other proceedings

104. A case which is frequently taken as the starting point of the discussion in the context of *sharing* material obtained pursuant to compulsory powers during criminal investigations with other persons or bodies is *Marcel v. Commissioner of Police of Metropolis* [1992] 2 W.L.R. 50. There, the police had seized certain documents pursuant to statutory powers during a criminal investigation into a property development. Thereafter, a *subpoena duces tecum* was served on them to produce the documents in civil proceedings between private parties. An injunction was sought to prohibit the police from dealing with the documents otherwise than in the course of the criminal investigation and to set aside the writ of *subpoena*. These reliefs were granted at first instance. The Court of Appeal allowed the appeal in part, holding that while there were restrictions on the *voluntary* use to which the police could put the documents seized, the police could be required to produce those

documents pursuant to *subpoena* (with the exception of legally privileged documents). The *ratio* of the appellate judgments concerns the latter situation (production pursuant to *subpoena*), but the question of voluntary disclosure was discussed both at first instance and on appeal.

105. It may be noted that the relevant statutory power pursuant to which the materials were seized was s. 22 of the Police and Criminal Evidence Act 1984 which provided that the materials could be retained (i) for use as evidence at a trial for an offence; or (ii) for forensic examination or for investigation in connection with an offence. Thus, on its face, the provision would not appear to permit the sharing of the information with bodies other than the police nor of their deployment outside criminal proceedings. However, both at first instance and on appeal – even when considering the question of voluntary disclosure by the police (i.e. not pursuant to *subpoena*) – it was considered that there could be *some* circumstances in which sharing the materials *would* be permitted because of some important public interest at play. However, this exception did not encompass the sharing of materials with private parties for the purposes of civil proceedings, which would not be permitted absent a *subpoena*. Thus, while there is in England a general principle that material seized pursuant to warrant or compulsory power should not be used outside criminal proceedings, it also appears to have at least some element of exception in the public interest, even where the underlying statute does not appear to expressly permit of any such exception.

106. The judgment of Sir Nicolas Browne-Wilkinson V.-C., at first instance, at pp. 234 – 235, contained the following statement which states the general prohibition together with a nod towards exceptions in the public interest:-

"In my judgment, subject to any express statutory provision in other Acts, the police are authorised to seize, retain and use documents only for public purposes related to the investigation and prosecution of crime and the return of stolen property to the true owner… if communication to others is necessary for the purpose of the police investigation and prosecution, it is authorised. It may also be, though I do not decide, that there are other public authorities to which the documents can properly be disclosed, for example to City and other regulatory authorities or to the security services."

107. The above passage was approved on appeal by Dillon L.J. with the significant caveat that it was correct *"solely in relation to the voluntary use by the police of documents seized under the Act of 1984 which are the property of other persons"* but that it was not correct in so far as the production of the seized documents is sought by the process of a *subpoena*. A police officer would be amenable to produce on *subpoena* any documents in his possession, subject to the true owner having the right to challenge the *subpoena*, or the production of the documents, on any of the grounds on which a *subpoena* can be challenged.

108. Dillon L.J. referred to certain particular categories of (voluntary) sharing of information:

"Equally nothing in this judgment or, in my view, in the Vice-Chancellor's judgment, is to be treated as directed in any way towards suggesting that there is any impropriety in the present practice of the police in any of the following areas which were drawn to our attention by Mr. Gompertz as possible matters of concern, viz.: (i) the supplying by the police of information and witness statements to interested parties where there

is a possibility of civil litigation after a road accident, and in particular the supplying of the names and addresses of parties involved in the accident whom an injured person could well otherwise have difficulty tracing; (ii) conferences with and the supplying of information to the social services and welfare agencies and doctors in relation to the welfare of a minor (even if there has been a decision not to prosecute) where there has been an allegation of child abuse, whether sexual or not; and (iii) the supplying of information to the Criminal Injuries Compensation Board where a victim has claimed compensation and there has been no prosecution because the alleged criminal has died or fled the country."

109. It would appear at first sight that the police practices in the three categories referred to do not concern materials seized pursuant to compulsory powers. Witness statements, names, addresses, and information from or about a victim of sexual abuse, and information as to the fact that a person was the victim of a criminal injury are not usually materials collected on foot of compulsory powers. Yet, as we shall see below. Noland L.J. appeared to envisage a public interest exception which would include material seized pursuant to compulsory powers.

110. Nolan L.J. expressed, at p. 260, his full sympathy with the Vice-Chancellor's view that strict limits had to be placed on the use to which seized documents could properly be put by the police. He added, at p. 261:

"The statutory powers given to the police are plainly coupled with a public law duty. The precise extent of the duty is, I think, <u>difficult to define in general terms beyond saying that the powers must be exercised only in the public interest and with due regard to the rights of individuals</u>. In the context of the seizure and retention of

documents, I would hold that the public law duty is combined with a private law duty of confidentiality towards the owner of the documents. The private law duty appears to me … to be of the same character as that which formed the basis of the House of Lords decision in the Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109 . It arises from the relationship between the parties." (Emphasis added.)

111. As to the propriety of the police sharing the three categories of information listed by Dillon L.J., Nolan L.J. expressed his agreement but appeared to envisage that this would include materials obtained under compulsory powers:

"The responsibilities which are by law and custom entrusted to the police are wide and varied. The powers conferred upon them must be considered against the background of those responsibilities. If the hands of the police were too strictly tied with regard to the use of documents and information acquired under compulsory powers then the public interest would suffer. In this connection, I agree with Dillon L.J. that there can be no suggestion of impropriety in the present practice of the police in the areas which he has listed in his judgment." (Emphasis added.)

112. Of interest also is the judgment of Sir Christopher Slade who stated the general prohibition and then made certain observations that would limit the degree to which the police might share materials beyond the primary *"*police purposes*"* to purposes which were *"reasonably incidental"* to those purposes:-

"In my judgment, documents seized by a public authority from a private citizen in exercise of a statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they might be used. The user for any other

purpose of documents seized in exercise of a draconian power of this nature, without the consent of the person from whom they were seized, would be an improper exercise of the power. Any such person would be entitled to expect that the authority would treat the documents and their contents as confidential, save to the extent that it might use them for purposes contemplated by the relevant legislation. These general principles, I think, explain why, for example - as has been common ground in answer to a point raised in argument on this appeal - the police in the present case would not have had an unrestricted right to supply copies of the seized documents to the Press.

As a starting point, therefore, it is necessary to consider the purposes for which Parliament contemplated that documents seized under the powers conferred by Part II of the Act of 1984 might properly be used by the police. In my judgment, those purposes must be coterminous with the purposes for which it envisaged that such documents might properly be retained by the police. ...

What then is the meaning of the phrase in section 22(1), 'so long as is necessary in all the circumstances?' In my judgment, in its context, this phrase can only mean: so long as is necessary for carrying out the purposes for which the powers given by sections 19 and 20 have been conferred. I shall not attempt a comprehensive statement of those purposes. They clearly include, inter alia, the primary purposes of investigating and prosecuting crime and the return to the true owner of property believed to have been obtained in consequence of the commission of an offence. Further, the relevant sections would, I think, authorise acts which were reasonably incidental to the pursuit of those primary purposes, thus including in appropriate circumstances the disclosure to third parties of seized documents. In my judgment, however, the Vice-Chancellor's broad description of those primary purposes as 'police purpose' (see ante, p. 234G) was a correct one."

113. In summary, while *Marcel* is usually cited as authority for the proposition that there is a prohibition on (voluntarily) sharing material obtained during a criminal investigation in proceedings with non-police persons or bodies, the prohibition is not stated in absolute terms even by *Marcel* itself. Exceptions based on the public interest are clearly envisaged, although it is less clear whether these exceptions encompass materials seized pursuant to warrant or similar compulsory power.

114. A second English authority which is also frequently cited in this context is *Morris v. Director of the Serious Fraud Office* [1993] 3 W.L.R. 1, [1993]1 All E.R. 788. The Serious Fraud Office, a body established by the Criminal Justice Act 1987, was investigating the affairs of an insolvent deposit-taking institution and had obtained documents from various sources using powers conferred by criminal legislation. The issue was whether the liquidators were entitled to an order requiring the Office to produce those documents together with other documents seized by police from third party premises. It was held that they were not.

115. The statutory context to the decision in *Morris* may be noted. Section 3 of the 1987 Act expressly addressed the issue of disclosure of information in very precise terms. Subsections (1) and (3) provided for certain specific categories of information obtained, and subsection (5) went on to list certain bodies to whom disclosure of other information could be made, saying: *"information obtained by any person in his capacity as a member of the Serious Fraud Office may be disclosed . . . (a) to any government department or Northern Ireland department or other authority or body discharging its functions on behalf of the Crown . . . (b) to any competent authority; (c) for the purposes of any prosecution in England*

and Wales, Northern Ireland or elsewhere; and (d) for the purposes of assisting any public or other authority for the time being designated for the purposes of this paragraph by an order made by the Secretary of State to discharge any functions which are specified in the order." Subsection 6 then went on to provide a list of *"competent authorities"*: several classes of persons appointed to carry out investigative functions under statutes, such as inspectors appointed under the Companies Act 1985, the Building Societies Act 1986 and the Financial Services Act 1986 , and *"any body having supervisory, regulatory or disciplinary functions in relation to any profession or any area of commercial activity"*. It was in that detailed statutory context that it was held that any wider sharing of materials was not permitted.

116. Sir Donald Nicholls V.-C. said:

> *"Since the S.F.O. is the creature of statute, its powers and functions comprise, and are confined to, the powers and functions expressly or impliedly conferred or imposed upon it by the statute. The information obtained by the S.F.O. is obtained to enable or assist it to carry out its primary functions of investigating serious fraud and instituting and conducting criminal proceedings relating to serious fraud. Section 3 authorises disclosure of that information to other persons, but liquidators and provisional liquidators and administrators and administrative receivers, conveniently referred to as 'office-holders,' are not included in the list of those to whom disclosure may be made.*
>
> *In the absence of an express power to make disclosure to office-holders, is a power to make disclosure to them to be implied? In my view it is not. Whether the list in section 3 [of the Criminal Justice Act 1987] is to be regarded as exhaustive for all purposes in respect of information obtained by the S.F.O. from all types of sources is not a*

matter I need pursue on this application. Suffice to say, I can see no justification for implying a general power for the S.F.O. to disclose information, obtained in the exercise of compulsory powers conferred by the Act, to persons not named in section 3. That, surely, is only what one would expect. The compulsory powers of investigation exist to facilitate the discharge by the S.F.O. of its statutory investigative functions. The powers conferred by section 2 are exercisable only for the purposes of an investigation under section 1. When information is obtained in exercise of those powers the S.F.O. may use the information for those purposes and purposes reasonably incidental thereto and such other purposes as may be authorised by statute, but not otherwise. Compulsory powers are not to be regarded as encroaching more upon the rights of individuals than is fairly and reasonably necessary to achieve the purpose for which the powers were created. That is to be taken as the intention of Parliament, unless the contrary is clearly apparent". (Emphasis added.)

117. While the passage emphasised above is often quoted, it is important to recognize the specific statutory context in which the judgment was delivered.

The Desmond and Gama cases: deploying materials held by one government department/agency in a different context or proceeding

118. The issue of inter-agency information-sharing was addressed in two Irish authorities heavily relied upon by the Commissioner, but it is important to note at the outset that the information in those cases was not obtained on foot of a search warrant (or similar compulsory power) issued pursuant to criminal legislation.

119. In *Desmond v. Glackin (No. 2)* [1993] 3 I.R. 67, an inspector was appointed by the Minister for Industry and Commerce pursuant to the Companies Acts to investigate the purchase and sale of certain lands. The inspector asked the Minister to obtain information concerning exchange control transactions involving one of the companies involved, and then requested the applicant to answer questions based on the information thereby obtained. The Exchange Control Act 1954 permitted the Minister for Finance to delegate statutory powers under that Act, and the Minister had in fact delegated the powers to the Central Bank. Section 16(1) of the Central Bank Act 1989 prohibited a Governor, Director, officer or servant of the Bank from disclosing any information concerning the business of a person or body which came to his knowledge by virtue of his office or employment. There were a number of exceptions to this prohibition, one of which was where the Bank was acting in the capacity of an agent. In short, the information in question travelled from the Bank to the Minister for Finance in the capacity of agent to principal, and the information was then shared with the Ministry for Industry and Commerce, who shared it with the inspector.

120. The applicant sought an order of *certiorari* quashing the appointment of the inspector and restraining him from continuing the investigation while making use of information from the Central Bank, pleading privacy and confidentiality in personal and commercial matters both on the basis of the Constitution and the common law

121. The High Court (O'Hanlon J.) held that the Central Bank as agent of the Minister for Finance under the Exchange Control Act 1954 was duty bound to divulge to the Minister information in its possession in the exercise of those functions when required by him to do so; the disclosures fell within s. 16(2)(c) of the 1989 Act and were permissible. The public interest required all the information which the inspector needed for his investigation to be

made available to him and there was no countervailing public interest of equal or near equal weight in denying the inspector access to the Central Bank information. He discussed the *Marcel* case in detail, noting among other things that in that case there had been entry and seizure pursuant to search warrant and that what was sought in *Marcel* was the use of the documents in civil proceedings between parties, as distinct from a public interest investigation, such as was in the case before him (p.101).

122. He also specifically noted the examples given in *Marcel* of existing police practice in relation to the sharing of information with certain public authorities, for example information about child abuse or criminal injuries with the relevant authorities. He said that he did not share Browne-Wilkinson V.-C.'s *"stated apprehension about the consequences of sharing information lawfully obtained across a wide spectrum of state agencies"* and instead said that such sharing of information *"may be helpful for good government and the welfare of the community"*, adding that *"the protection of a free society must rest on surer grounds than the operation of the affairs of state in water-tight compartments."* (p.102).

123. The Supreme Court (in the judgment delivered by McCarthy J. on the non-constitutional issues) approved the approach of the High Court on this point. It held that the right of the Minister for Finance to obtain information from the Central Bank was confined to information concerning activities carried out by the Bank as agent for the Minister, but in that sphere the right of the Minister to obtain the information was absolute and unconditional. It also said that if a Minister obtained information from his agent which might be of assistance to another Minister in the exercise of his duties, there was no principle which would prohibit him from providing that other Minister with the information. McCarthy J. specifically approved (p.132) the statement of the High Court that the foundation of freedom

in society had a sounder base than the possible concept of government activity carried out in watertight compartments.

124. The judgments therefore favour the exchange of information between Ministers and make general observations about the importance of such information-sharing in matters of public interest. On the other hand, it has to be kept in mind that the case did not involve the sharing or use of information obtained by the Gardaí pursuant to a search warrant or analogous power. As against this, the High Court judgment in *Desmond v. Glackin (No. 2)* specifically referred to *Marcel* insofar as it discussed examples of police practices involving the sharing of certain information with other agencies; but as we have seen, there is some ambiguity as to whether this was intended to encompass material obtained pursuant to search warrant or similar compulsory power.

125. In *Gama v. Minister for Enterprise* [2010] 2 I.R. 85, the Minister for Enterprise, Trade and Employment had directed the Labour Inspectorate of his Department to carry out an urgent investigation into allegations that a company – a major foreign based multi-national construction company which had secured substantial contracts within the jurisdiction – was exploiting its workers contrary to employment legislation. Draft reports were prepared by the Inspector and furnished to the company. The latter alleged that the investigation and report were *ultra vires* the powers of the Minister who had appointed him because it was proposed to share the report with other government departments, the Gardaí, the Director of Corporate Enforcement, the Law Society, Revenue, and other bodies. When no undertakings as to non-publication were forthcoming, Gama launched legal proceedings seeking prohibition against publication of the report and *certiorari* in respect of the report itself. It

was contended that the intended general publication of the report was an unlawful purpose which had the effect of invalidating the report in its entirety.

126. The High Court held in favour of the applicant, relying on the reasoning in *Kennedy v. Law Society (No. 3),* which concerned an investigation carried out (in part) for an improper purpose. The Supreme Court reversed. It held that the analogy of combined proper and improper purpose in terms of the scope of what was being investigated, which had found favour with the High Court, did not hold true in this case. The investigation and subsequent circulation of report were separate; the latter was a *"collateral and incidental act outside of the purposes of the investigation itself"*. Further, even if that were not so, the circulation of the report could readily be severed from the preparation of the report itself, because unlike *Kennedy,* it was not a case where *"the permissible and impermissible purposes were so interwoven as to be incapable of severance".*

127. In its discussion of *Desmond v. Glackin (No. 2)* [1993] 3 I.R. 67, the Court quoted extensively from the judgments of O'Hanlon J. and McCarthy J. and observed that that case was the:

> *"... clearest possible authority for the proposition that at least a private and limited circulation of the Inspector's report to the relevant statutory authorities was permissible. One might indeed go further to state that such circulation was both desirable and indeed necessary if effective enforcement of the relevant Employment Acts was to be assured".*

128. Kearns J. said that the decision in *Desmond v. Glackin (No. 2)* was *"on all fours with the instant case"* and *"quite distinguishable"* from *Morris v. Director of Serious Fraud*

Office. He said that *"paradoxically",* while *Morris* was cited by Gama for the proposition that general publication could not be justified, *"it may also be seen as clear authority for the proposition that a private and limited circulation of the report to the relevant statutory agencies is entirely warranted, given that such circulation may be seen as being 'for purposes reasonably incidental' to the exercise of the statutory powers in question"*.

129. As to *Marcel,* Kearns J. thought that the *"critical distinction"* had been noted by O'Hanlon in *Desmond v. Glackin (No.2)* when he noted that the purpose for which the documents were sought were civil proceedings between parties. He said that Browne-Wilkinson V.-C. was *"approaching the issue on the basis that the powers to seize the documents were conferred for the better performance of public functions by public bodies – an intention entirely different from that of making the same information available to private individuals for their private purposes"*. He quoted the *"watertight compartment"* passage from the judgment of O'Hanlon J. and concluded that none of the cases cited by Gama spoke to *"a limited and private circulation of the report to the relevant statutory agencies who have the clearest of interest in upholding the efficacy of the relevant Employment Acts"*.

130. It is worth noting that the final paragraph of the *Gama* judgment says that the list of persons and bodies entitled to have sight of the report was to be confined to State bodies with a *prosecutorial* function in relation to the matters identified in the report. The present case, of course, does not concern the deployment of material in a prosecution but in a disciplinary proceeding. Nonetheless, the strong emphasis on the public interest as a justification for sharing information with other public bodies is striking.

Some more recent English decisions: deploying materials gathered during a police investigation in separate (non-police) disciplinary investigations

131. The framework of analysis in modern English cases often appears to be one of balancing competing European Convention rights. In *Woolgar v Chief Constable of Sussex* [2000] 1 W.L.R. 25, a registered nurse sought unsuccessfully to prevent the disclosure of her police interviews to the regulatory body for the nursing profession. The Court of Appeal held that the public interest in the proper working of the relevant regulatory body may justify disclosure without the nurse's consent. The nurse had been arrested after a patient died in her care and she was interviewed by the police under caution. At the conclusion of their investigation the police informed the plaintiff and the local health authority's registration and inspection unit that there was insufficient evidence to charge the plaintiff with any criminal offence. The registration and inspection unit, which was concerned with other allegations against the plaintiff, then referred the matter to the regulatory body for nursing. The regulatory body contacted the police for relevant information. The police, in accordance with their practice, sought the plaintiff's authority to disclose a transcript of the interview to the regulatory body but she refused her consent. The judge refused to grant her an injunction to restrain disclosure.

132. The judgment of Kennedy L.J. for the Court of Appeal referred to the need for a balance between the principle that information given to the police for the purposes of criminal investigation is confidential and may not be used for a collateral purpose, on the one hand, and the countervailing public interest in protecting public health and safety, on the other. There could be exceptional cases where disclosure was legitimate, and in the

present case the regulatory authority had made a formal request for information which was relevant to its investigation of a serious matter. Kennedy L.J. said:

> *"where a regulatory body such as U.K.C.C., operating in the field of public health and safety, seeks access to confidential material in the possession of the police, being material which the police are reasonably persuaded is of some relevance to the subject matter of an inquiry being conducted by the regulatory body, then a countervailing public interest is shown to exist which, as in this case, entitles the police to release the material to the regulatory body on the basis that, save in so far as it may be used by the regulatory body for the purposes of its own inquiry, the confidentiality which already attaches to the material will be maintained…*
>
> *Putting the matter in Convention terms Lord Lester submitted, and I would accept, that disclosure is 'necessary in a democratic society in the interests of… public safety or… for the protection of health or morals, or for the protection of the rights and freedoms of others'. Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which, in their reasonable view, in the interests of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the relevant regulatory body for its consideration."*

133. The breadth of the principle as stated in the above passage may be noted. The facts of the case did not concern material obtained pursuant to a search warrant, but the principle set out was sufficiently broad in its terms to cover such material. The next case mentioned here did in fact concern information obtained pursuant to warrant.

134. In *Nakash v. Metropolitan Police Service and General Medical Council* [2014] EWHC 3810, the court was concerned with the deployment of information obtained in the course of a criminal investigation in a subsequent medical disciplinary proceeding against the claimant, who was a doctor at a London hospital. There was the extra twist that the evidence had been *unlawfully obtained* during the criminal investigation; a criminal prosecution had been initiated but the doctor was acquitted. Nonetheless it was held that the evidence could be used in the disciplinary proceeding despite it having been unlawfully obtained. One of the key pieces of evidence was a one-page Skype document found on the doctor's computer as a result of the unlawful search of his home. The court accepted this was a serious intrusion into the claimant's private communications within his own home, but nonetheless held that the passing of the information to the medical disciplinary authority was justified.

The Australian cases

135. As we have seen, counsel for the appellant sought to rely on *Flori v Commissioner of Police* [2014] Q.S.C. 284 where it was held that information obtained during a criminal investigation into a police officer could *not* be deployed in disciplinary proceedings against him. The case is certainly interesting, at least at first sight, because of the similarity of the facts in broad terms. A police officer was accused of having leaked police CCTV footage showing a struggle between an arrested person and other officers in a police station basement. In circumstances where the leaking of material would be a criminal offence, a warrant was obtained for a search of his house and seizure of his electronic devices. The search revealed evidence implicating him as operating the e-mail account used to leak the CCTV footage, but no prosecution was directed, and instead disciplinary proceedings were commenced on foot of the material obtained pursuant to the warrant. The court defined the

issue as whether evidence seized under the search warrant which was issued in order to obtain evidence of the commission of a criminal offence could be used in disciplinary proceedings against the police officer, and concluded that it could not. The court examined a number of authorities, including *Johns v. Australian Securities Commission* (1993) 178 C.L.R. 408, and *Williams v. Keelty* (2001) 111 F.C.R. 175.

136. However, as always with authorities from other jurisdictions, one must be vigilant to ascertain the precise context of the decision. The decision in *Flori* drew on prior Commonwealth authority, including *Williams v Keelty* (2001) 111 FCR 175 and *ASIC v. Rich* [2005] 220 A.L.R. 324, which concerned evidence obtained pursuant to specific *federal* legislative powers. At the time of those decisions, s. 3F(5) of the Crimes Act 1914 (Commonwealth) provided:

> *"If things are seized under a warrant, the warrant authorises the executing officer to make the things available to officers of other agencies if it is necessary to do so for the purpose of investigating or prosecuting an offence to which the things relate."* (Emphasis added.)

The Australian courts took the view that because this provision explicitly *permitted* the sharing with *some* agencies in *some contexts*, it must be construed as *impliedly excluding* the sharing of it in other contexts. The principle established in those cases was then followed by the court in *Flori.* But as the Court of Appeal of the Supreme Court of Victoria said in *McLean v Racing Victoria Ltd* [2020] V.S.C.A. 234-

> *"While cases on other legislative regimes may provide some context, articulate principle and show how other like provisions have been construed, it is important not to confuse a statement of principle with the outcome of that principle in a particular legislative context."*

This point is underscored by the decision in *McLean* itself, where the decision in *Flori* (and prior cases referred to in it) were held not to be applicable in the context of the State legislation in question. As part of a police investigation into suspected criminal offences related to horse racing, officers of Victoria Police executed a search warrant issued under s. 465 of the Crimes Act 1958 (State legislation) at the premises of the applicant, who was a racehorse trainer. During the search, the police seized six used syringes which were later shown to contain traces of equine blood and a pharmaceutical substance banned in racing.

137. It was held that s. 465 of the Victoria Act did *not* contain the implied duty of confidentiality contended for by the applicant, and the court rejected the applicant's central submission that information obtained as a result of the execution of a search warrant under s. 465 could only be used in the investigation and prosecution of a crime. The court also concluded that the judge was correct to conclude that the disclosure to Racing Victoria for the purpose of disciplinary proceedings was authorised under the Privacy Act and the applicant had no entitlement to relief.

138. At paras. 96 – 97 of its judgment, the court said:

> *"It follows from the authorities that the general principle is clearly established. A power can only be exercised for the purpose for which it is conferred and, a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which information, once obtained, can be used or disclosed. Those principles have been applied to search warrants. However, as Smethurst makes clear, it is necessary to construe the legislation in order to discern what limitations s. 465 imposes on the use of things seized under warrant.*

> *Determination of that question is a necessary starting point for the further inquiry as to limitations on information derived or obtained as a result of executing the warrant or seizing the things…*
>
> *There can be little doubt as to the purpose for which a warrant may be issued. It is to facilitate the investigation and prosecution of identified indictable offences. That conclusion follows from the long history of search warrant legislation and from the text of s 465. The more difficult question is how far that purpose carries through to limit the use of the items once seized. The answer lies in the three critical textual components of s. 465…* [The court went on to analyse s. 465 on the basis of its own terms]*"*.

Conclusions on the first ground of appeal

139. A consideration of the authorities set out above leads me to the following conclusions.

140. Firstly, there is a general principle that material obtained pursuant to a compulsory power including search warrants may only be deployed for the purpose for which the power was exercised or for purposes reasonably incidental to it.

141. Secondly, this general principle appears to admit of certain public interest exceptions which allow for the sharing of material compulsorily obtained with at least some public bodies in at least some circumstances. The judgments in *Marcel*¸ both at first instance and on appeal, hesitate to define these exceptions with precision but confirm that exceptions do exist for public interest reasons.

142. Further, some members of the Court of Appeal of England and Wales have referred with approval to certain specific examples of police information-sharing which they regarded as legitimate, but it is not entirely clear to me whether these examples included materials obtained pursuant to compulsory powers. In *Desmond v. Glackin (No.2),* O'Hanlon J specifically approved of the three categories of police information-sharing referred to in *Marcel* but again it is not clear to me whether he envisaged those as including materials obtained pursuant to search warrant.

143. Thirdly, the importance of the public interest in inter-agency sharing of material was emphasised in the judgments in *Desmond v. Glackin (No.2)* and *Gama*. However, these were not on their facts cases where materials had been procured on foot of search warrant or other compulsory power. There is therefore no Irish authority in which the point arising here is already decided, although there has certainly been strong signalling that public interest considerations are of great importance.

144. Fourthly, when considering the extent to which material obtained pursuant to a compulsory power may be shared with others or deployed for a non-primary purpose, it is important to examine the precise terms of any relevant legislation which may be relevant. So, for example, in *Morris v. Director of the Serious Fraud Office,* the fact that the legislation provided for a specific list of persons/bodies to whom the material could be given was held to exclude other persons/bodies who were not on the list. Similarly, in the Australian cases discussed above, the presence or absence of legislation specifically listing the purposes to which the information seized could be put was held to be highly relevant to whether such material could be legally used for other, non-listed, purposes.

145. The question in this case therefore ultimately seems to me to net itself down to this. Are the relevant statutory provisions to be interpreted as implicitly excluding the use of materials seized pursuant to search warrant in any proceeding other than a criminal proceeding or a prison disciplinary proceeding? Or are they to be construed as being silent on the issue, leaving the general principles to govern the situation , which would permit of a public interest exception to the general prohibition on using the material outside of a criminal prosecution?

146. I should perhaps preface the discussion by clarifying that I do not consider a Garda disciplinary proceeding to be a purpose *"reasonably incidental"* to a criminal prosecution in the sense in which that phrase was used in *Marcel* by Slade J. or by Kearns J in *Gama.* While the conduct of a Garda may be the common focus to both a prosecution and a disciplinary procedure, it seems to me that the purposes of each of these proceedings are nonetheless separate and distinct. The question of whether the material can be deployed for the different, disciplinary, purposes must be squarely confronted .

147. There is without doubt a public interest of the highest order in ensuring the integrity of the Garda Síochána, which depends as a collective body upon the integrity of its individual members. There can be no doubt that it fulfils the type of public interest criteria identified in cases such as *Desmond v. Glackin (No.2), Gama,* or in *Marcel.* Having regard to this public interest, and were it not for the relevant statutory provisions, I would have no hesitation in concluding that this public interest would justify the use of the information by the Commissioner in the Garda disciplinary proceedings and that such use would fall within the area of exceptionality the existence of which was identified in *Marcel.* However, it seems to me that the relevant legislative provisions are very significant.

148. The two relevant pieces of legislation are s.7 of the 1998 Act (the provision pursuant to which the search warrant issued) and s.9 of the 1976 Act. As noted earlier, there are two key points in relation to s.7 of the 1998 Act: (1) all that s.7 authorizes in terms of *seizure* is anything that is evidence of or related to an offence under the Act of child trafficking or child pornography and (2) the section does not authorize the *use* of the seized material in any other context.

149. As previously set out, s.9 of the 1976 Act provides that if in the course of exercising any powers under the Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence *"in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline..."* It therefore expands upon a specific power of seizure provided for under another Act (such as the 1998 Act) ; but the expansion is not unlimited. First, the s.9 power only authorises the seizure of items or materials which the Garda (or other relevant person conducting the search) believes to be "evidence of any offence or suspected offence"; it does not authorize the seizure of materials at large. Inferentially, since the appellant was not charged with any criminal offences arising out of the search of his phone, it seems unlikely that any of the material with which we are concerned can have fallen within the expanded seizure power in s.9. If that is so, then the Commissioner has them in his possession almost, as it were, by accident or happenstance, but not because they were lawfully seized pursuant to the expanded seizure power in s.9. The second important point concerning the expanded power in s.9 is that insofar as it permits the *retention and use* of materials seized on foot of the expanded power

in situations other than those for which the power was exercised in the first place (here, an investigation in respect of suspect possession of child pornographic image(s)), this is confined to retention and use in "any criminal proceedings" or "proceedings in relation to a breach of prison discipline". Just as s.9 does not authorize seizure of materials in an unlimited way, it does not authorize the retention and use of materials seized under the expanded power in an unlimited way.

150. The background to s. 9 of the 1976 Act as explained by Charleton J. in *Quirke* will be recalled. The early common law powers of search regarding warrants to seek out stolen goods limited the seizure of items to those listed in the warrant. This developed over time to include such items as were likely to furnish evidence of the identity of the goods stolen, and then later to a principle of *"reasonable connection"* (so that warrant powers enabled the seizure of items reasonably thought to provide evidence of other crimes). In England, a wider principle again was established in *Ghani v Jones and Chic Fashions (West Wales) v. Jones* [1968] 1 All E.R. 229 to include the seizure of any other items believed on reasonable grounds to have been stolen or to be evidence of any other crime. No authority having specifically adopted this wider principle in Ireland, it was thought prudent to introduce s.9 of the Criminal Law Act 1976. However, s.9 did not confine itself to clarifying that the items seized could be used in any *criminal* prosecutions; it went on to single out prison discipline as another context in which the material could be used.

151. There is considerable force in the appellant's argument that the inclusion of one particular form of disciplinary proceeding in s.9 of the 1976 Act (prison discipline) implicitly excludes other disciplinary proceedings, particularly when one considers the principle that the Oireachtas does not legislate unnecessarily. If the general position was

already clear that the public interest permitted the sharing and use of the materials seized in disciplinary contexts, it would not have been necessary to include the words *"prison discipline"*.

152. On the other hand, one might argue that the specific case of prison discipline is likely to have been to the forefront of the legislators' minds simply because the 1976 Act as a whole encompasses matters such as escape from custody, offences committed while serving a sentence, and possession of photographs, drawings and the like of the interior or exterior of a prison. It could be argued that this form of disciplinary proceeding was included in s. 9 simply because of the subject-matter of the Act rather than by reason of any intention to exclude other forms of disciplinary proceeding. Also, as we have seen, thirty years later, the Oireachtas addressed its mind again to the issue of general principle concerning seizure of materials. Section 7 of the Criminal Justice Act 2006 provides that a Garda who is in (a) a public place or (b) any other place under a power of entry authorised by law or to which or in which he or she was expressly or impliedly invited or permitted to be, and who *"finds or comes into possession of any thing"* and has reasonable grounds for believing that it is evidence of or relating to the commission of an arrestable offence, he or she may *"seize and retain the thing for use as evidence in any criminal proceedings…."*. Unlike its 1976 counterpart, it makes no reference to prison discipline. This could arguably bolster the suggestion that the Oireachtas in 1976 was merely including *"prison discipline"* out of an abundance of caution and by reason of the specific subject-matter of the 1976 Act and that it was not thereby ousting any other public interest exceptions to the general principle.

153. How, then, to interpret the legislative framework as a whole? Does it contain an implicit statutory prohibition on the use of the additional material seized pursuant to a search

under s.7 of the 1998 Act being used in a Garda disciplinary proceeding, or not? At this point in the analysis, I think it is helpful to recall again the underlying constitutional (and Convention) status of the privacy right as well as the far-reaching nature of digital searches, as described in both Irish and overseas authorities of the highest level. A search in respect of one kind of material might yield a vast store of entirely different information. The second set of charges in the present case illustrate this in some degree, with the materials found on the phone including, apparently, alleged *"racist, misogynistic, anti-homosexual, antisemitic, supporters of Nazi ideology or 'rape culture'"*. The Court has not seen the materials and has no idea of what they are, but one can imagine that searches of digital devices can reveal all sorts of information about a person's private thoughts and views. An exception to the general prohibition on the use of material obtained on foot of search warrant, without restriction or limitation of any kind, which would allow the Commissioner to use information incidentally found on a smartphone during a criminal investigation in a disciplinary proceeding would be very far-reaching in practical terms and sits rather uneasily with the privacy interests protected by the Constitution and the Convention. Among the many questions it raises is the question of whether permission for such a wide-ranging intrusion on the privacy right has been clearly articulated by law, a matter in which the European Convention on Human Rights would have a particular interest. Moreover, it is difficult to see how the exception, if recognised, could be confined as a matter of principle to Garda disciplinary proceedings. It is true that in this case the Garda Commissioner is both in charge of criminal investigations and the disciplinary regime and there is therefore no question of having to *"share"* the information with an external body. However, if the exception is recognised in the present case, it is difficult to see why the same principle should not apply to the sharing of information with other regulatory bodies which are responsible for enforcing professional standards. This may well be a good thing, but the question here is not whether it would be

desirable in the public interest that it should be so, but whether the current state of Irish law allows for such a permissive approach notwithstanding the specific and restrictive wording of s. 9 of the 1976 Act, the high value afforded to the right to privacy, especially digital privacy, under the Constitution, the European Convention on Human Rights, and the Charter of the European Union, and the vast amount of information which may be uncovered in digital searches.

154. Another point of note is that the framework for Garda disciplinary investigation does not currently confer any power for material to be produced compulsorily during the investigation stage. This again sits uneasily with the idea that a Garda disciplinary investigation could use material from a person's smartphone on the happenstance that the material was compulsorily acquired during a criminal investigation in relation to an entirely different matter.

155. In all of the circumstances and not without some hesitation by reason of the considerable public interest in maintaining the integrity of An Garda Síochána through the enforcement of the disciplinary regime, I have reached the following conclusions: that s. 9 of the 1976 Act is to be interpreted as not merely *authorising* the use of *certain* materials (i.e. those suspected at the time of seizure to be evidence of any criminal offence(s)) in certain contexts other than those in respect of which the search warrant issued in the first place, but also as *limiting the use* of any additional materials seized to the two forms of proceeding explicitly listed (criminal proceedings and prison discipline). If that is true of materials which could be lawfully seized pursuant to the expanded power in s.9, it follows *a fortiori* that where the material seized (as here) likely did not even fall within that expanded seizure power of s.9 of the 1976 Act, (because it did not constitute evidence of any offence

at all) it cannot be retained and used outside those criminal prosecutions or prison discipline proceedings. I consider that the Court is not at large to apply common law principles with their public interest exceptions, but must defer to the intention of the Oireachtas as expressed in the legislation and bearing in mind the nature of the privacy interest at stake and the far-reaching nature of digital searches of smartphones. Accordingly, the material which incidentally came into the possession of the Garda Commissioner in this case by reason of a search of the appellant's phone pursuant to a search warrant issued under s.7 of the 1998 Act (relating to child pornography) cannot be retained and used in the Garda disciplinary proceedings.

156. While the obvious public interest in proper Garda discipline may make this conclusion counter-intuitive, the remedy, if one is desired, lies in passing appropriate legislation which – if thought desirable by the Oireachtas – would enable materials seized pursuant to search warrant to be used in Garda disciplinary contexts. Alternatively, legislation might be introduced to facilitate the compulsory production of materials during the investigative phase of a Garda disciplinary procedure.

157. This judgment goes no further than to say that the material uncovered in the search of the appellant's phone cannot itself be directly used in the disciplinary investigation. It does not speak to the question of using that information in an indirect manner, such as using it to ground an application to obtain the phone from the appellant on foot of some other compulsory power if such other power existed. I express no view on that question, sometimes referred to as that of *"derivative evidence"*, which simply does not arise in the present case. Any new legislation could strike an appropriate balance between public

interests and the privacy rights at stake. The decision in this case is based on a construction of the legislation as matters currently stand.

158. In light of the above, the appellant is entitled to succeed on his first ground of appeal.

The claim based on the Data Protection regime

159. If the material constitutes personal data it would seem inevitably to follow that there has already been (and there is intended to be further) *"processing"* of the data (see *Doolin v. Data Protection Commissioner* [2022] IECA 117). It also seems to me that none of the exceptions within the data protection legislation relied upon by the Commissioner would apply. However, without expressing concluded views on these matters, there is in this case a logically prior question, namely whether the material constitutes *"personal data"* in the first place. The High Court judge dealt with this part of the case by concluding that the material in question did not constitute personal data. For my part, I would be much less certain of this conclusion.

160. The General Data Protection Regulation provides in Article 4(1) that *"'personal data' means information relating to an identified or identifiable natural person ('data subject')*; *an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".*

161. Decisions of the CJEU such as *Nowak v. Ireland ECLI:EU:C:2017:994, (2017)* provide further elaboration on what constitutes personal data. This Court's decision in

Doolin v. Data Protection Commissioner [2022] IECA 117 is also of assistance in this regard.

162. When it comes to digital devices, the question of whether information constitutes personal data can be less straightforward than might first appear, often by reason of the metadata attached to the information, such as where and when an image was taken, and whether it was searched for, or saved, when it was received, how it was responded to, and so on. So, to take a simple example, if I take a photograph of people standing at the Eiffel Tower in Paris on my smartphone, the image when later retrieved may contain personal data because it indicates that I (or at least my phone) was in Paris (location), when the photo was taken (date of my location there), and (if there are people in close proximity apparently posing for the photo) the people I was associating with while there. Thus, an image does not have to be a *"selfie"*, for example, to contain personal data.

163. It will be recalled that the material found in the search of the appellant's phone which would underpin the disciplinary charges are described in the charges themselves as:

(1) An image that was said to show what appeared to be two minors engaged in a form of sexual activity;

(2) Images which are said to appear to be racist, misogynistic, anti-homosexual, antisemitic, supporters of Nazi ideology or *"rape culture";*

(3) Images which are said to appear to be CCTV images relating to garda investigations and images showing garda documents, garda members and of garda station interiors.

164. This information is very general. Regarding category (b), for example, it is entirely unclear whether what was found consisted of images or messages or something else, and what the content was which suggested to the Commissioner that it was expressive of being *"racist, misogynistic…"* and so on. As to category (c), again the Court has not seen the images, but it seems possible if not likely that metadata concerning those images would form part of the disciplinary proceeding in order to connect the images with the appellant in some way.

165. In sum, it seems entirely possible, if not likely, that at least some of the material proposed to be used in the disciplinary proceeding consists of personal data. If it had been crucial to the Court's determination, it might have been necessary either to seek further information from the Commissioner as to what was found, or to refer the matter to the CJEU on an Article 267 reference for consideration as to whether the material constituted *"personal data"*, or both. However, neither course of action is appropriate in a situation where the Court has already decided that the appellant succeeds on the first ground of appeal.

166. Accordingly, the Court will decline to rule on the second ground of appeal while expressing reservations about the High Court's conclusion that the material did not constitute personal data.

167. In view of the Court's conclusion in favour of the appellant on the first ground of appeal, there may be ancillary matters relating to the return of the appellant's phone to be dealt with, although the issue of the disposal of the phone may well be a matter which should not be dealt with in these proceedings at all: see *Donoghue v O'Donoghue* [2018] IECA 26). *Donoghue* involved the disposal of a seized Range Rover, and the Court of

Appeal said that the High Court on judicial review *"had simply no jurisdiction to embark on a Police Property Act application"* and that the *"most that the High Court could have done was to send the matter back to the Circuit Court for reconsideration of the case in light of the interpretation of s. 1(1) of the 1897 Act that the High Court had declared to be the correct one"* (para 47). Further, there was no ground of appeal relating to this matter.

168. The question of costs also arises. As the appellant has been successful in this appeal, it would appear that he is entitled to the costs of the appeal. However, the Commissioner may wish to contend otherwise on the issue of costs.

169. In those circumstances, if the parties consider that the Court should further consider the issue of the return of the appellant's phone, or the Commissioner wishes to contend for a different costs order, they/he should apply to the Registrar on or before 1st December 2023 to seek a short hearing date on either or both of these issues.

170. As this judgment is being delivered electronically, I wish to record the agreement of my colleagues Noonan J and Allen J with it.