APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Numbers: 2021 54

2022 63, 2022 84

Collins J. **Neutral Citation Number [2024] IECA 95**

Whelan J.

Allen J.

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT, 1989

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

BETWEEN

A

APPLICANT

AND

B

RESPONDENT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

NON-PARTY

IN THE MATTER OF THE GUARDIANSHIP OF ONFANTS ACT, 1964, AS AMENDED

AND IN THE MATTER OF THE CHILDREN AND FAMILY RELATIONSHIPS ACT, 2015

AND IN THE MATTER OF [STATED NAMES], INFANTS

BETWEEN

B

APPLICANT

AND

A

RESPONDENT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

NON-PARTY

JUDGMENT of Mr. Justice Allen delivered on the 26th day of April, 2024

Introduction

1. This is a judgment on three related appeals by the Commissioner of An Garda Síochána *("the Commissioner")* against orders made by the High Court for the disclosure by the Commissioner to the parties to family law proceedings in relation to the custody of and access to children, of material which came into the possession of the Gardaí in the course of a criminal investigation.

2. The Commissioner's central proposition is that the public interest in the detection, investigation and prosecution of suspected criminal offences requires that he may not be required by a court to disclose such material until such time as a decision is made as to whether there should be a prosecution and in that event until the book of evidence has been served. In effect, the proposition is that material so gathered by the Gardaí is, until such time, immune from an order for production.

Chronology

3. The underlying facts are fairly involved and the procedural history is unusual but it is sufficient for present purposes to give a brief overview.

4. The parties to the proceedings are the parents of young children. The breakdown of their relationship in 2020 gave rise to acrimonious litigation in relation to the custody of and access to the children.

5. On 3rd November, 2020 on *ex parte* application on behalf of the mother, the District Court made an interim barring order against the father. An audio recording was played to the court which was said to evidence abusive behaviour by the father towards her. The recording was again played to the District Court on 10th November, 2020 on the hearing of the contested *inter partes* application when a barring order was imposed on the father for twelve months. On 18th November, 2020 the father appealed to the Circuit Court where, eventually, his appeal was allowed.

6. In the meantime, on 2nd December, 2020 the mother issued High Court proceedings under the Guardianship of Infants Act, 1964 and the Children and Family Relationships Act, 2015 in relation to the custody of and access to the children.

7. On 9th December, 2020 the father issued judicial separation proceedings in the High Court by which he also sought orders in relation to the custody of and access to the children and on 10th December, 2020 issued a notice of motion seeking interim access.

8. On 11th December, 2020 the mother presented herself at a Garda station saying that she had audio recordings which showed abusive behaviour by the father towards her. The Gardaí copied the recordings from the mother's phone onto a USB stick and returned the phone to her.

9. On 15th December, 2020 the mother filed a replying affidavit in response to the father's interim access application. Part of the mother's case was that the father had behaved

in a way which imperilled the safety and welfare of the children and she deposed to having recordings – plural – which evidenced her allegations. On 5th January, 2021 the father served a notice to produce the recordings but the mother failed to do so. By order of the High Court made on 19th January, 2021 the mother was directed to produce the recordings for inspection by close of business on 22nd January, 2021 but did not do so.

10. On 20th January, 2021 the mother went back to the Garda station. She informed the Gardaí that the father had requested a copy of the recordings but made no mention of the High Court order. The mobile phone containing the recordings was seized by the Gardaí.

11. The father's motion came back into the list on 22nd January, 2021. The father then indicated his intention to make an application for non-party discovery of the recordings and the High Court made an order giving liberty to the Commissioner to make submissions to the court regarding the holding of the mobile device(s) belonging to the mother which contained recordings and on 2nd February, 2021 counsel for the Commissioner appeared to say that the Gardaí were conducting a criminal investigation which had a bearing on the family law proceedings.

12. By notice of motion issued on 4th February, 2021 the father applied to the High Court for an order pursuant to O. 31, r. 29 of the Rules of the Superior Courts directing the Garda Commissioner to make discovery of the recordings and to make provision for the inspection of the device or devices on which they were held.

13. On 8th February, 2021 a replying affidavit was sworn on behalf of the Commissioner which disclosed that he had in his possession 29 audio and video recordings within the category of discovery sought, in respect of which public interest privilege was claimed on basis of the public interest in the detection, investigation and prosecution of suspected criminal offences. Although filed in reply to the non-party discovery application and entitled replying affidavit, it was in substance an affidavit of discovery – more or less in the form

prescribed by the Rules of the Superior Courts – listing and briefly describing the recordings and claiming public interest privilege in respect all of the material sought.

14. On 9th February, 2021 Barrett J. heard argument on the question of the privilege asserted by the Commissioner. On the same day, a notice of motion was issued on behalf of the mother claiming, in form, a direction that the recordings be provided to the expert who had been appointed by the High Court under s. 32 of the Act of 1964 – to determine and convey the views of the children – and under s. 47 of the Family Law Act, 2015 – to prepare a social report . That motion was treated by the High Court judge as being, in substance, an application by the mother for an order for discovery by the Garda Commissioner of the recordings.

The High Court orders

15. On 12th February, 2021, for the reasons set out in a detailed written judgment ([2021] IEHC 96) it was ordered that the identified recordings be provided to the court so that it could make an assessment of what had been identified as the competing public interests in the privilege claimed by the Commissioner and the public interest in the administration of justice. The judge was duly provided with a copy of the recordings which he viewed and listened to.

16. On 23rd February, 2021, Barrett J. delivered a second written judgment ([2021] IEHC 119) in which he concluded that the public interest in the administration of justice in a case concerning the safety and welfare of the children outweighed the public interest in maintaining investigative privilege and said that he would make an order for *"discovery"* of the material by the Garda Commissioner to each of the father and mother.

17. On 11th May, 2021 for the reasons given in a third written judgment ([2021] IEHC 352) Barrett J. made an order for the payment by the father – as to 75% – and the mother – as to 25% – of the Commissioner's costs. By then, the substantive proceedings had been settled

and on the application of the father and mother, an order was made vacating all orders in relation to disclosure and non-party discovery.

The appeals

18. By notice of appeal filed on 15th March, 2021 (2021 54) the Commissioner appealed against the judgment and order of 12th February, 2021. For some reason the orders of 23rd February, 2021 and 11th May, 2021 were not perfected until 11th February, 2022. By separate notices of appeal filed on 11th March, 2022 (2022 63 and 2022 84) the Commissioner appealed against the judgment of 23rd February, 2021 and consequent orders made in favour of each the father and the mother; and against so much of the order of 11th May, 2021 as vacated the disclosure and discovery orders previously made.

19. The appeals were said to raise overlapping grounds but in truth the order of 23rd February, 2021 was consequential on that of 12th February, 2021 and the appeal against the order of 11th May, 2021 appears to have been prompted by an apprehension that the vacating of the previous orders might have rendered the other appeals moot – or more moot than they already were following the disposal of the substantive proceedings.

20. The Garda Commissioner's core contention was that the High Court was precluded by his claim of privilege from even considering whether the material should be disclosed to the parties.

21. The appeals were opposed by the father, as *legitimus contradictor.*

The High Court judgments

22. In his judgment of 12th February, 2021 the Barrett J. set out in detail the orders sought by each of the father and the mother and the background to the applications, and then quoted extensively from the affidavit of the father's solicitor on which his motion was grounded and from the replying affidavit filed on behalf of the Commissioner. For the purposes of the appeals, it is necessary to say no more than that there were two applications – one each by the

father and the mother – for orders directing the Garda Commissioner to disclose material which had been gathered in the course of an ongoing criminal investigation.

23. As I have said, the replying affidavit filed on behalf of the Commissioner listed and briefly described 29 audio and video recordings on the mother's mobile device. That affidavit was filed in response to the father's motion but was taken by the High Court judge as also setting out the Commissioner's claim for privilege in relation to the mother's application. At paras. 12 to 16, the High Court judge set out the text of the claim of privilege in full:-

> *"12. I can confirm that a criminal investigation into [the father] is ongoing in respect of alleged assault against his children and coercive control as against [the mother]. It is my opinion and the opinion of the investigating team which I am a part of, that these mobile phone devices and the audio recordings contained thereon form a material part of this criminal investigation.*
>
> *13. Furthermore, it is my opinion and the opinion of the investigating team which I am part of, that the mobile telephone devices in possession of An Garda Síochána and the audio recordings contained thereon or any copies of same should not be disclosed/produced to [the father] at this juncture as to do so would impede the criminal investigation into [the father] which is currently ongoing. Specifically, if a prosecution was to be brought against [the father] and these audio recordings were disclosed to [the father] prior to any arrest, it would affect the spontaneous response made by [the father] during interview.*
>
> *14. Therefore, the Commissioner of An Garda Síochána objects to the production/disclosure of the documents set out in the Second Part of the First Schedule upon the grounds that said documents attract public interest/investigative*

privilege on the basis of the public interest in the detection, investigation and prosecution of suspected criminal offences.

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

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

24. The judge first looked at public interest privilege in general. He noted that in *Leen v. President of the Executive Council* [1926] I.R. 456 the Supreme Court of Saorstát Éireann found firstly, that the Executive Council was entitled to the privilege which formerly had been enjoyed by the Crown, and secondly, that the application of the grounds on which privilege was claimed was a matter to be left to the judgment and word of the executive. He identified *O'Leary v. Minister for Industry and Commerce* [1966] I.R. 676 as an example of the application of the then applicable principle that once a claim of privilege was made, it had to be accepted by the courts without further enquiry.

25. The judge then came to the seminal judgment of the full Supreme Court in *Murphy v. Dublin Corporation* [1972] I.R. 215 in which Walsh J., for the court, said, at pp. 234 to 235:-

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

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

26. The judge next looked at *Ambiorix v. Minister for the Environment (No. 1)* [1992] I.R. 277 in which the Supreme Court – again a full court – declined to resile from its decision in *Murphy.* In *Ambiorix,* at p. 283 of the report, Finlay C.J. restated by way of summary what he said were the clear principles laid down in the judgment of Walsh J., which were, he said:-

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

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

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

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

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

27. Barrett J. identified as notable in that summary that the court is the sole decision maker when a claim of public interest privilege was asserted, a principle which had since been confirmed in *Keating v. RTÉ* [2013] 2 I.L.R.M. 145. He also noted that in *A.P. v. Minister for Justice* [2014] IEHC 17, McDermott J. had described the principles laid down in *Murphy* as *"well settled."*

28. The judge then, under the heading *"Public Interest Privilege in Overlapping Proceedings"*, carefully examined the judgments of the Supreme Court in *McLaughlin v. Aviva Assurance (Europe) plc* [2012] 1 I.L.R.M. 487. Barrett J., at para. 16, was inclined to wonder whether the majority judgments in *McLaughlin* represented *"something of a conservative, even counter-evolutionary lurch by the Supreme Court ... to the traditional position in which but to assert public interest privilege was to yield [to] such privilege ..."*. If not in so many words, that is the substance of Garda Commissioner's argument.

29. Later in his judgment, at para. 24, the judge suggested there was something of a divergence between the majority judgments in *McLaughlin* and the judgment of the Supreme Court in *Dillon v. Dunnes Stores* [1966] I.R. 397– or at least that they were not readily reconcilable – but found that because the parties were agreed that it was the law as stated in *McLaughlin* which fell to be applied, it was not necessary to reconcile what he described as the *"McLaughlin-Dillon quandary"*.

30. At para. 26 of his judgment the High Court judge noted the observation of Denham C.J. at para. 22 of her judgment in *McLaughlin* that *"On occasions when considering a privileged document, the court may have to balance interests."* Seizing on this, the judge found that the impact of s. 3 of the Act of 1964 was such that there was, in the case at hand, a need to balance competing interests. He found that although the motions under consideration were not directly concerned with guardianship, custody or access they had the potential to impact on those questions. The motions, he said, arose in proceedings in which custody and access were in question.

31. Having compared the case in hand with the circumstances underlying the decisions in *Breathnach v. Ireland (No. 3)* [1993] 2 I.R. 458 and *Gormley v. Ireland* [1993] 2 I.R. 75 the judge decided that he needed a copy of the recordings in order to undertake a weighing exercise of the competing interests.

32. In his second judgment of 23rd February, 2021, the High Court judge, having listened to and viewed the recordings, expressed himself as satisfied that they comprised evidence of the relationship between the father and the mother, between the parents and one or more of the children, and between the family as a whole, and so that they were relevant to the High Court proceedings and that the discovery sought was necessary to allow a fair disposal of the proceedings. He said that he was mindful of the potential difficulties that his conclusion might present for the Gardaí in their investigative work but because s. 3 of the Act of 1964 was engaged, could not see that he could safely come to any conclusion other than that the public interest in the proper administration of justice outweighed the public interest in maintaining investigative privilege. The judge also permitted the material to be used by the father for the purpose of his Circuit Court appeal against the barring order.

33. The third judgment of 11th May, 2021 was confined to the allocation of the Commissioner's costs, against which there is no appeal.

The grounds of appeal

34. The Commissioner appealed against the judgment and order of 12th February, 2021 on two numbered grounds, to each of which there were a number of sub-grounds.

35. The first ground of appeal was that the High Court erred in concluding that there was a need to engage in balancing exercise.

36. Under this heading, it was said that the High Court erred:-

(a) In determining that it was necessary to conduct a balancing exercise between the public interest in the proper administration of justice in a case concerning the safety and welfare of children and the public interest in maintaining the investigative privilege associated with the Gardaí investigating an alleged criminal offence;

(b) In its interpretation and application of *McLaughlin* and *Dillon* when making the determination that a balancing exercise needed to be conducted; and

(c) In failing to give adequate consideration to the temporal limit of the privilege claimed by the Commissioner when considering whether a balancing exercise was necessary.

37. It was also said under this first general ground that the High Court erred in failing to consider properly the relevance and necessity of the recordings to the father's and the mother's various family law proceedings; failed to adequately consider the specific context of a non-party discovery motion; and failed to place appropriate weight on the alternative evidence available to the father and the mother. Each of these further asserted failings was said to go to the issue of whether a balancing exercise was *"necessary"* but in my firm view, they did not.

38. There was no issue as to the relevance of the recordings. The Commissioner was not party to the family law proceedings or privy to the issues which had been put before the court

by the parties. Unusually, the Commissioner effectively made the discovery sought before he had been ordered to make it. The dispute, in truth, was not about discovery but about disclosure. The *"specific context of [the] non-party discovery motion"* was that the recordings were relevant to the family law proceedings. The Commissioner was not privy to the question of what alternative evidence might or might not have been available to the father or the mother: and in any event, that would have gone to the making of an order for discovery and not to the question of inspection.

39. The second general ground of appeal against the first order was that the High Court erred in its interpretation and application of s. 3 of the Guardianship of Infants Act, 1964:-

(a) in finding that the matters under consideration *"[came] within the protective scope of section 3"*;

(b) in finding that *"the impact of s. 3 of the Guardianship of Infants Act 1964 is such that the court considers that this case does present with a need to balance certain competing interests"*; and

(c) in its interpretation of *P v. Q* and *G v An Bord Uchtála* as it applied to these motions.

40. It was also said that the High Court erred in finding that the motions for non-party discovery and inspection constituted a *"proceeding"* for the purposes of s. 3 of the Act of 1964, which – to get this suggestion out of the way – he plainly did not.

41. The Garda Commissioner appealed against the judgment and order of 23rd February, 2021 on five grounds:-

1. The court erred in conflating discovery with disclosure/inspection.
2. The court failed to properly consider the difference between non-party discovery and *inter partes* discovery.

3. The court erred in its finding that the provisions of s. 3 of the Guardianship of Infants Act, 1964 applied to consideration of the relief sought in the motions.
4. The court erred in its application of a balancing test in the matter.
5. The court erred in directing that the recordings be furnished to the s. 32 / s. 47 assessor.

42. This appeal can usefully be whittled down at this stage. As I have already observed, the procedural evolution of the case was unusual. When the Garda Commissioner was first notified of the suggestion that the father might apply for disclosure of the recordings, he put front and centre his objection in principle to the disclosure of anything on the investigation file. For the avoidance of doubt, he is not in the least to be criticised for that. There was, it has to be said, some looseness in the language of the judgments in failing to distinguish precisely between discovery and disclosure – or as the distinction is sometimes identified, between disclosure and inspection – but it seems to me that that can be traced back to the fact that the Commissioner, purportedly in answer to the application for an order for discovery, effectively made the discovery sought – listing and briefly describing the material sought and asserting his claim for privilege. Similarly, the language of the High Court judgment may not have precisely distinguished between non-party discovery and *inter partes* discovery: but that was not what the case was about. Whether, if the recordings were made available to the parties, they would then be made available to the court appointed assessor was, quite frankly, of no concern to the Commissioner. The proposition that the judge erred in finding that the motions for non-party discovery and inspection constituted a *"proceeding"* for the purposes of s. 3 of the Act of 1964 does not get off the ground. He did not so find. Strikingly absent from the appeal is any suggestion that the judge erred in his conclusion that the recordings were material to the question of the safety and welfare of the children.

43. The order sought by the Commissioner in the event that the second appeal were to be successful is an order to the effect that the public interest/investigative privilege applied to the recordings in the possession of An Garda Síochána until such time as a decision was made not to prosecute the father or a decision was made to prosecute him and a book of evidence served on him. Here is more confusion. As I will come to, it is well and clearly established that the recordings attracted public interest/investigative privilege and that such privilege endures until a decision is made to prosecute or not. The issue in the High Court and on the appeal is not whether the recordings attracted privilege but whether they are absolutely immune from disclosure. Thus, the meat of the second appeal is not whether the High Court erred in his application of the balancing test but whether he ought to have embarked on the exercise at all.

44. The grounds of appeal against the order consequent on the judgment of 11th May, 2021 are that the judge erred in determining that the Garda Commissioner requested that the previous orders be vacated – which the judge did not – and that the High Court judge was by then *functus office* as the Court of Appeal had seisin of the first appeal. The third appeal was directed to ensuring that the Commissioner's appeal against the first order and his right of appeal against the second order were preserved. In the event, the father – as *legitimus contradictor* – supported the Commissioner's position that the issues raised by the first and second appeals were of sufficient general importance that it was in the public interest that they should be determined.

The Garda Commissioner's submissions

45. While the issue raised by the Garda Commissioner before the High Court and which is the subject of the appeals was rendered moot by the final disposal of the family law proceedings between the father and the mother, I am persuaded – as is submitted on behalf of the Commissioner with the support of the father – that it is an issue which, while no longer

live for the particular applicants, remains a very live issue for the Commissioner. The appeals therefore fall squarely within the first of the three broad circumstances identified in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 in which it is appropriate to entertain a moot appeal.

46. The Commissioner, however, appears to ask that the court should go much further than simply determine the appeals. The court is invited to:-

> *"(i) clarify the procedure which the Commissioner should utilise when applying public interest/investigative privilege over documents which form part of a criminal investigation where those documents are sought in the course of civil proceedings;*
>
> *(ii) provide guidance to the lower courts and the Commissioner as to when it is appropriate for the courts to conduct a balancing/weighing test between the public interest in the proper administration of justice in a case concerning the welfare of children and the public interest in maintaining the investigative privilege associated with Gardaí investigating an alleged criminal offence; and*
>
> *(iii) provide guidance to lower courts and the Commissioner as to what factors should be considered in the event that a court applies a balancing/weighing test."*

47. If this is to be understood as a request for general guidance, that is not permissible. However, I will endeavour to explain as clearly as I can the nature of the privilege claimed and the limitations to it.

48. The Commissioner acknowledges that the principles laid down in *Murphy* and confirmed in *Ambiorix, Keating* and *A.P.* are well settled. However, he submits that while those principles are informative, those cases did not concern the disclosure of documents or

evidence pertaining to an active criminal investigation. It is acknowledged that the court may, but is not obliged to, inspect documents in order to verify a claim of privilege and that the court may, in certain circumstances, carry out a weighing/balancing exercise but it is submitted that *McLaughlin* is authority for the proposition that there is a general rule against requiring disclosure of documents in civil proceedings where those documents form a material part of a criminal investigation.

49. The Commissioner emphasises the statement of Denham C.J. at para. 12, in which she cited with approval the *dictum* of Lord Reid in *Conway v. Rimmer* [1968] A.C. 910, 953 that:-

> *"... it would generally be wrong to require disclosure in a civil case of anything which might be material in a pending prosecution."*

50. The Commissioner submits that the High Court judge erred in his finding that *Dillon* was not obviously reconcilable with *McLaughlin*. *Dillon,* it was said, was not a disclosure case; in *Dillon* the criminal trial had already commenced; the applicant for the stay of the civil proceedings was merely a witness; and no considerations of public policy/public interest were present.

51. *Breathnach (No. 3)* it was said, was distinguishable on the ground that the disclosure application post-dated the conviction.

52. It was urged on behalf of the Commissioner that a crucial factor to be considered was the temporal limit on the privilege claimed, *"and how that factored into an assessment as to whether a balancing test requires to be conducted."*

Discussion and decision

53. I am bound to say that the submissions on behalf of the Commissioner were not consistently clear and focussed. There was confusion between the power of the court to inspect documents or evidence and an asserted obligation to do so. There was confusion as to

the purpose for which such an inspection might be made. There was confusion between the Commissioner's statutory duties under the Garda Síochána Act, 2005 and the public interest the confidentiality of a criminal investigation. There was confusion between disclosure to suspects in criminal proceedings and disclosure to suspects the subject of criminal investigations. In the submissions on the appeal – as there was in the High Court – there was confusion between discovery and disclosure (or between disclosure and inspection) and between the existence and the nature of the privilege claimed. Significantly, the submission misidentified the public interest in the administration of justice as a personal right of the litigant.

54. While my hand is in it, the respondent's submissions were not altogether clear and consistent either. It was suggested that the High Court judge *"rejected [the] assertion of privilege on the basis that the public interest for the paramount welfare of the children outweighed the public interest in the investigation of the alleged criminal activity"*: which he did not. The judge accepted the Commissioner's claim of public interest privilege and acknowledged the potential impact of the disclosure of the recordings on the criminal investigation and put that in the balance. Later, it was suggested that the Commissioner was seeking to intervene in family law proceedings – which he plainly was not – and that *"if the rationale of the Commissioner were to prevail in this appeal, it would require the Commissioner to intervene in all such proceedings, seize the evidence, initiate a criminal investigation and assert investigative privilege"*: which I found to be decidedly unhelpful. Later again it was suggested that the deployment by the wife of the recordings in the barring order applications and her reference to them in her answer to the father's Guardianship of Infants Act application amounted to *"a waiver of privilege on her part at least"*. This makes no sense. The public interest privilege at issue is just that, a public interest privilege. It is not a privilege that could have been invoked by the wife, and it could not possibly have been

waived by her. The last part of the respondent's written submissions seems to be an obscure attempt to cavil with the order for costs made in favour of the Commissioner but there was no cross-appeal against the costs order. That said, I acknowledge the difficulty for the respondent's lawyers in unravelling the Commissioner's submissions sufficiently to be in a position to address them.

Immunity from production

55. Doing the best I can, the Commissioner's principled objection is to the inspection of the material by the High Court judge with a view to deciding whether – balancing the public interest in the investigation and prosecution of crime and the public interest in the administration of justice – the material ought to be disclosed to the litigants. The fundamental premise of this objection is the proposition that the judge did not have jurisdiction to do so. In the written submissions filed on behalf of the Commissioner – under the ambiguous heading *"The High Court erred in its application of the balancing/weighing exercise in this matter"* – the proposition is put thus:-

> *"60. ... There is a public duty to prosecute crime and execution of the duty to prosecute crime lies with the Commissioner in detecting and investigating crime and with the DPP who independently decides whether to prosecute or not. It is submitted that a court does not have the discretion to weigh the right to administer justice in a case concerning the safety and welfare of children against the public duty to prosecute and allow the duty to prosecute be prejudiced.*
>
> *61. ... It is not within the remit of the courts to conflate what the Murphy/Ambiorix/Keating authorities have held in terms of when a balancing test is required with a risk that a court had the discretion to prejudice a criminal investigation."*

56. It is useful to recall that what was said by the Supreme Court in *Murphy v. Dublin Corporation* in relation to executive privilege was strictly speaking *obiter.* In that case the Minister for Local Government had claimed executive privilege in respect of the report of a public inquiry into objections to a compulsory purchase order made pursuant to the Housing Act, 1966. The role of the Minister under the Act of 1966 was as adjudicator between the housing authority and the owner of the lands, which was not an exercise by the Minister of the executive power of the State. Accordingly, the Minister's claim to executive privilege was mistaken.

57. The consideration by the Supreme Court of executive privilege was directed to the resolution, in principle, of a conflict which might arise between the interest of the State in regard to the exercise of the executive power and the interest of the State in the administration of justice. While the Commissioner accepts that the principle established by *Murphy* is *"informative"* and does not suggest that the principle should be revisited, what his argument boils down to is that Garda investigation files are somehow an exception. That, it seems to me, need only to be articulated to be seen to be wrong.

58. The Commissioner's submission traverses a large number of cases but borrows heavily from the language of, and in the end appears to me to be to be based on, the majority judgments in *McLaughlin*, in particular the judgment of Denham C.J. Repeatedly it is said that the High Court failed to give adequate consideration to the temporal limit of the privilege claimed by the Commissioner.

59. *McLaughlin* was an action for indemnity under an insurance policy in respect of fire damage to the plaintiff's premises. The defendant insurance company had refused to pay on the ground that it believed that the plaintiff had been responsible for the fire. In the aftermath of the fire, the insurance company took possession of a CCTV surveillance system and video footage, which it later handed over to the Gardaí. On a motion by the plaintiff for non-party

discovery by the Garda Commissioner, the High Court disallowed a claim for privilege on the ground that the material the subject of the application – a recording machine and two reports – had not been generated by the Gardaí but had been given to them by the insurance company.

60. The Garda Commissioner's appeal to the Supreme Court was allowed by a majority of two to one. The headnote – correctly reflecting the grounds of appeal set out by Denham C.J. at para. 7 and her summary of the Commissioner's submissions at para. 10 – shows that the issue argued before the Supreme Court was whether public interest privilege applied to the material.

61. Incidentally, the issue appears to have been brought before the High Court on a motion by the Commissioner for an order permitting him *"to refuse to consent to discovery"* material which he had listed *"on the basis that disclosure of same is privileged pursuant to public interest/investigative privilege."* [My emphasis.]

62. Denham C.J. took *Murphy* as the starting point of her consideration of the law. *"There is",* she said, *"a public interest which arises in some cases whereby certain matters may be privileged and may not be produced in evidence. The decision as to whether evidence is privileged or not is a matter for the courts: Murphy v. Dublin Corporation [1971] I.R.215."*

63. *"There may",* she said, *"be different aspects of the public interest. Walsh J. noted in Murphy v. Dublin Corporation at p. 233:*

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

64. Citing *Conway v. Rimmer*, Denham C.J. found that there was a public interest in criminal investigations carried out by An Garda Síochána. She said that she agreed with the analysis in that case that in general documents material to an ongoing criminal investigation should not be required to be disclosed in criminal proceedings but that after the verdict in a criminal trial or after it has been decided not to prosecute, there is no need for the privilege. At para. 13 she said:-

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

65. The premise of the plaintiff's application for disclosure was obviously that the video footage and reports were necessary for the fair disposal of the action and that the action could not be fairly tried without it and that appears to have been uncontested.

66. Hardiman J., in a strong dissenting judgment, was of the view that the case turned up an entirely new point, which (at the end of p. 494 of the report) he identified as being:-

> *"Can public interest privilege be used to withhold from a citizen discovery of film footage and equipment which is the citizen's own property, which he voluntarily gave to investigators on the basis that it is now in the possession of the gardaí and that there may or may not be a prosecution to which it is relevant at some future time?"*

67. Hardiman J. saw the Commissioner's substantial objection to making the discovery as one of priority and timing. Citing *Dillon v. Dunnes Stores* [1966] I.R. 397, he said that there was no rule of law whereby a civil case which is ready to proceed must yield in priority to a criminal case actually in being, still less to a hypothetical criminal case which might or might not actually come into being. Hardiman J. would have upheld the conclusion of the High

Court that the Commissioner had failed to establish any element of privilege in circumstances in which he had obtained the documents voluntarily from one party to the proceedings.

68. O'Donnell J. (as he then was) delivered a short judgment agreeing with the judgment of the Chief Justice and in order to explain why he differed from Hardiman J. both as to the outcome of the case and as to its significance. He saw the case as raising a general issue as to the entitlement of the Gardaí to withhold from disclosure in civil proceedings documentation which was *bona fide* required for the purposes of an ongoing criminal investigation which might result in a criminal prosecution and not as raising any issue as to priority between civil and criminal proceedings. The Commissioner, he said, was merely seeking to maintain a public interest immunity which it was arguably his duty to assert. While O'Donnell J. more than once used the word *"immunity"*, what had been claimed by the Commissioner was privilege and the reference at para. 6 (on p. 506) to *"immunity or privilege"* conveys that O'Donnell J. was using those words interchangeably.

69. I do not understand *McLaughlin* to be authority for the proposition that a claim for public interest privilege in respect of documents gathered or generated in the course of a Garda investigation is to be regarded as being any different in principle to any other claim of public interest privilege: not least because it does not say so. The issue in *McLaughlin* was whether, in principle, public interest privilege attached to documents gathered in the course of a criminal investigation – specifically to material the property of the subject of the investigation – for the duration of the investigation. The observation of Denham C.J. that such documents should not *"in general"* be required to be disclosed, necessarily recognises the jurisdiction in some cases to order disclosure. Denham C.J. emphasised, at para. 24, that the case was decided upon its facts and circumstances and that the issues raised might arise for further consideration in another case, where there would be more elaborate argument and scrutiny than was available in that case. She had already said, at para. 22, that:-

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

70. This, it seems to me, is entirely consistent with the principles approach established by *Murphy* and repeatedly affirmed thereafter, not least in *Ambiorix, Keating* and *A.P.*

71. It is common case – and, indeed, it cannot be gainsaid – that, as Denham C.J. said in *McLaughlin*:-

> *"16. There is a public interest privilege in documents which are a material part of a criminal investigation. There is a public interest privilege in documents created, sought, or obtained for, and relevant to, a criminal prosecution by a prosecutor.*
>
> *17. The fact that the documents and/or items were not originally created by a prosecutor does not exclude them from privilege as there is a public interest privilege in documents and/or items which are a material part of a criminal investigation.*
>
> *18. The onus to establish that privilege lies upon the person seeking the privilege. In this case, the Commissioner carries the onus.*
>
> *19. I am satisfied that it is established that the documents and items sought … are privileged. This privilege exists until the decision is made not to prosecute or until the decision is made to prosecute, when the matters will be disclosed in the book of evidence.*
>
> *20. The fact that these documents and/or items were not originally created by An Garda Síochána does not prevent them attracting privilege. They are now material documents and items in a criminal investigation by An Garda*

Síochána and they attract privilege on the basis of public interest and investigative privilege.

72. In this case there was no issue as to whether the recordings were privileged. Nor, having regard to the fact that the recordings were being held by the Gardaí as part of a criminal investigation in respect of alleged assault by the father of the children and alleged coercive control by the father of the mother, was there any issue as to the relevance of the recordings to the civil proceedings concerning the safety, health and welfare of the children. Rather, the issue was whether the public interest in the ongoing criminal investigation which was acknowledged by the parties and accepted by the High Court judge outweighed the public interest in the administration of justice. The alleged error on the part of the High Court in determining that it was necessary to conduct a balancing exercise between those competing interests is not premised on the absence of either interest but on the asserted absolute immunity from disclosure of the documents for the duration of the criminal investigation. For the reasons already given, that argument is based on a misunderstanding of the law in relation to public interest privilege and of the role of the courts in balancing competing interests.

73. The High Court judge in his judgment of 12th February, 2021 properly emphasised the nature of the substantive proceedings and the seriousness of the issues which had been raised as to the safety, health and welfare of the children. Those factors all weighed heavily in the balance in his assessment of the weight to be attached to the public interest in the administration of justice and to the potential impact on the lives of the young children and the father of the decision he was required to make in relation to custody and access. However, I would emphasise that while the nature of the civil proceedings and the potential impact of either delay in the determination of the proceedings or the danger of embarking on a

consideration of the dispute without the full facts undoubtedly go to the balancing exercise, they do not go to the principled approach to be taken.

74. *McLaughlin* was a claim for monies said to be due and owing on foot of an insurance policy. The plaintiff was anxious to get to trial. I am bound to say that it is not immediately obvious to me why the majority concluded that it was a case in which the issue of balancing interests did not arise. I can see that a delay in the trial of a money claim – which could be mitigated by an award of interest – might carry less weight than the risk of injustice to young children and a parent by a delay in the determination of a claim to custody and access, but I should have thought that it must have counted for something. Moreover, I should have thought that the issue raised by the insurance company in *McLaughlin* was one which the plaintiff was entitled to have determined with expedition. However, as the judgments make clear, the focus of the dispute and decision was not on the weight to be attached to the privilege claimed by the Commissioner but whether it existed at all.

75. I should say, also, that I believe that the Commissioner may be reading too much into the observation by Denham C.J. and O'Donnell J. that the privilege which he established in *McLaughlin* was time limited. That was an action commenced by plenary summons issued on 24th January, 2010 arising out of an insurance claim made on 2nd February, 2009 in respect of a fire which had occurred on the previous day, which had been declined by notice dated 22nd January, 2010. It is not clear from the judgments when the Garda investigation began or when it was expected to be concluded. The observation by Hardiman J. at p. 497 that *"while the fire has been investigated by the Garda Síochána no charged have been directed by the Director of Public Prosecutions"* tends, to my mind, to convey that the Garda investigation had been completed a file submitted to the DPP on which a decision was awaited. It seems to me that in principle the time limit of a criminal investigation is the same as the length of a piece of string. Many criminal investigations may go on for years. Or they may remain open

without any immediate expectation that they can be advanced but, in the hope – sometimes realised – that they later may be. The authorities are quite clear that the public interest privilege applies to the evidence gathered until the decision to prosecute or not but it seems to me that the weight to be attached to it may vary. That is not to say, for the avoidance of doubt, that the public interest will wain with time but only that the balance of competing public interests may not be fixed.

Summary and conclusions

76. The written and oral submissions of the parties ranged far and wide but in the end the appeal raised a net issue of law as to whether *McLaughlin v. Aviva Insurance (Europe) plc* carved out material gathered in the course of a Garda criminal investigation from the principles established by *Murphy v. Dublin Corporation* as to the jurisdiction of the courts to resolve conflicting claims of public interest privilege. In my firm view it did not. For the reasons which I have endeavoured to explain, *McLaughlin* is entirely consistent with *Murphy.*

77. If, in the heat of a hotly contested and evolving custody and access application in respect of young children there was some technical irregularity in the procedure and looseness in the language, I am quite satisfied that the High Court judge was correct in the approach he took to the recordings.

78. I would dismiss the appeal in 2021 54.

79. The issue which the Commissioner sought to canvas on the appeal as to the distinction between discovery and disclosure – which in *Murphy* was identified as the distinction between disclosure and inspection – was illusory.

80. Similarly, the issue apparently raised by the notice of appeal against the second judgment and order as to whether the High Court judge erred in his application of the balancing test in the circumstances of the particular case was not, in truth, a real issue. If it was, the ground was not laid for any such argument. If it had been, any such issue would

have been entirely fact specific and would have been rendered entirely moot by the final disposal of the substantive proceedings.

81. I would dismiss the appeal in 2022 63.

82. On its face, the order of 11th May, 2021 vacating the orders previously made was not – as the notice of appeal suggested – made on the application of the Commissioner. The intention of the appeal against that order appears to have been to preserve the first appeal by preventing the legal issue subtending the first order from becoming moot but whether the order was ever complied with or not, the issue was already moot.

83. I would dismiss the appeal in 2022 84.

84. In circumstances in which the father opposed the appeals as *legitimus contradictor* I think it likely that there is an agreement in relation to his costs. In any event, it seems to me that having been entirely successful on the appeals, the father is presumptively entitled to an order for costs. If there is any issue as to costs or the precise form of order, the parties may notify the office within ten days of the delivery of this judgment, in which case the panel will reconvene.

85. Absent such notice, there will be an order dismissing each of the appeals with an order for the respondent's costs.

86. As this judgment is being delivered electronically, Collins and Whelan JJ. have authorised me to say that they agree with it and with the orders proposed.