Neutral Citation Number: [2010] IEHC 525

THE HIGH COURT

2008 6170 P

BETWEEN

VEHICLE TECH LIMITED

PLAINTIFF

AND

ALLIED IRISH BANKS PLC, COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 4th day of October, 2010.

1. Factual background in outline

1.1 The plaintiff is a limited company which prior to the events which gave rise to these proceedings was involved in the business of the repair and sale of commercial motor vehicles. It maintained two accounts in the Ashbourne branch of the first defendant (the Bank), which I understand were current accounts. At any rate, one of them, account No. 19108261, was a current account. The accounts had been opened in 2001 and the position of the Bank is that, up to the events of July 2008 which gave rise to these proceedings, they were operated in a satisfactory manner.

1.2 On 10th July, 2008 a direction (the July 2008 Direction) was issued to the Bank by the Garda Bureau of Fraud Investigation (the Bureau) under s. 31(8) of the Criminal Justice Act 1994 (the Act of 1994), as substituted by s. 21 of the Criminal Justice (Theft and Fraud) Act 2001. It was signed by Detective Garda Seamus Padden and was addressed to the Bank's Anti-Money Laundering Unit. It was in letter form and the two accounts in the name of the plaintiff in the Ashbourne branch, account No. 19108261 and account No. 19108188, were referred to in it. It was stated that the purpose of the letter was to inform the Bank that the Bureau was "conducting an investigation into suspected criminal activities, including money laundering" by the plaintiff and to issue a direction in relation to the accounts in question. The letter then stated:

> "It is my preliminary view that the accounts of [the plaintiff] mentioned above constitutes (*sic*) property captured by s. 31 …. I want to draw your attention to s. 31(8) …."

Section 31(8) was then transcribed. That was followed by the following statement:

> "There is protection under this provision if the person in possession acts in accordance with directions from An Garda Síochána."

The directive part of the letter then followed. It stated as follows:

> "For the purposes of s. 31(8), I hereby direct that you do not deal in any way with the accounts listed above without my specific consent until further notice. If this direction should result in your institution refusing to comply with instructions from [the plaintiff] or any other person who has power to give instructions in relation to the account, I confirm that in those circumstances I agree to you informing [the plaintiff] or such other person of the existence and content of this letter."

The final paragraph in the letter stated that it confirmed an oral direction which had been given on 10th July, 2008 at 4.20pm to the Anti-Money Laundering Unit. The written form of the July 2008 Direction, apparently, was transmitted by fax at 17.15pm on the same day.

1.3 The investigation being carried out by the Bureau had been instigated as a result of a mutual assistance request which had been received in February 2008 from the Belgian authorities in relation to trucks which were stolen in Belgium, transported to this jurisdiction, sold here and, it was suspected, the proceeds of sale of which were laundered here. As a result of the investigation, the Bureau identified an account to which the proceeds of sale of some of the trucks had been lodged, which, in turn, led the Bureau to the accounts of the plaintiff to which the July 2008 Direction related. On the morning of 10th July, 2008 searches had been carried out by the Bureau at the plaintiff's premises and the homes of its directors and certain items had been seized.

1.4 The Bank obeyed the July 2008 Direction. The plaintiff and its officers were not notified by the Bank that it had been received. The only officer of the plaintiff to give evidence, Mr. Louis Monaghan, testified that he first became aware that it had been made some days after the 10th July, 2010 when a direct debit on one of the accounts was not processed by the Bank. As a result of a telephone call to the Bank, he was told that there was a problem with the account. He acknowledged that he understood that the account had been frozen.

1.5 In response to a letter from the plaintiff's solicitors, the Bureau, by letter dated 23rd July, 2008 from Detective Superintendent Eugene Gallagher to the plaintiff's solicitors, stated that account No. 19108261 was under investigation and that rescinding the July 2008 Direction under s. 31(8) would not be considered until such time as the investigation, which was ongoing, was concluded. The Bureau refused to furnish a copy of the July 2008 Direction on the basis that there was "no statutory requirement to inform the customer orally or in writing of the making of such direction". The investigation was still ongoing when the action was heard.

1.6 Both accounts were in credit on 10th July, 2008, one in the amount of €21,292.50 and the other in the amount of €130,990.83.

1.7 Before considering the case as pleaded, I propose outlining the provisions of s. 31.

2. Section 31 of the Act of 1994

2.1 The Act of 1994, as its long title states, is an Act to make provision for the recovery of the proceeds of drug trafficking and other

offences, to create an offence of money laundering, to make provision for international co-operation in respect of certain criminal law enforcement procedures and for forfeiture of property used in the commission of crime and to provide for related matters. The offence of money laundering is dealt with in Part IV. Section 31 creates and sets out the ingredients of the offence of money laundering.

2.2 Sub-section (1) of s. 31 provides as follows:

> "A person is guilty of money laundering if, knowing or believing that property is or represents the proceeds of criminal conduct or being reckless as to whether it is or represents such proceeds, the person without lawful authority or excuse (the proof of which shall lie on him or her) –
>
> (a) converts, transfers or handles the property, or removes it from the State, with intention of – …
>
> (b) conceals or disguises its true nature, source, location, disposition, movement or ownership or any rights with respect to it, or
>
> (c) acquires, possesses or uses the property."

As regards the Bank, the activity which could have given rise to the offence of money laundering, assuming the monies in the two accounts in the Ashbourne branch constituted "the proceeds of criminal conduct", subject to the Bank having the necessary *mens rea*, was the activity stipulated in paragraph (c), that is to say, acquiring, possessing or using the monies.

2.3 Sub-section (7) of s. 31 is a definition provision and sub-paragraph (v) of paragraph (a) thereof, on which counsel for the second to fourth defendants (the State parties) laid emphasis, provides –

> "references to any property representing the proceeds of criminal conduct include references to the property representing those proceeds in whole or in part directly or indirectly, and cognate references shall be construed accordingly."

That definition envisages tracing the proceeds of criminal conduct to property into which it has been converted.

2.4 Sub-section (8) provides:

> "Where –
>
> (a) a report is made by a person or body to the Garda Síochána under s. 57 of this Act in relation to property referred to in this section, or
>
> (b) a person or body (other than a person or body suspected of committing an offence under this section) is informed by the Garda Síochána that property in the possession of the person or body is property referred to in the section,
>
> the person or body shall not commit an offence under this section or s. 58 of this Act if and for as long as the person or body complies with the directions of the Garda Síochána in relation to the property."

The July 2008 Direction given on 10th July, 2010 was given in the circumstances outlined in paragraph (b). In other words, this is not a case in which a report had been received by An Garda Síochána from the Bank.

3. The plaintiff's case and the defendants' defences as pleaded

3.1 These proceedings were initiated by a plenary summons which issued on 28th July, 2008. The statement of claim was delivered on 31st July, 2008. The reliefs claimed in it are as follows:

> (a) a declaration that s. 31(8) "should not enjoy the presumption of Constitutionality/of Convention compatibility and is repugnant to the Constitution and incompatible with the European Convention on Human Rights, in particular the guarantees of fair procedures, equality and property rights, and the separation of powers";
>
> (b) a declaration that both the July 2008 Direction and the refusal of the Bank to comply with the plaintiff's demand for payment from its current account were unlawful; and
>
> (c) damages, including, as against the State parties, "aggravated and/or exemplary damages".

3.2 The basis on which the plaintiff pleaded its entitlement to those reliefs was as follows:

> (a) At no stage prior to the commencement of the proceedings did the defendants notify the plaintiff that the July 2008 Direction had been given, let alone the basis for doing so.
>
> (b) After the direction was given, the plaintiff's accounts were effectively frozen. The Bank had –
>
> (i) refused to honour demands for payment out of the accounts,
>
> (ii) dishonoured at least one cheque made out to a valued customer of the plaintiff, and
>
> (iii) refused to accept lodgments to the accounts.
>
> Accordingly, the Bank was in breach of contract and had unlawfully converted the funds lodged to the accounts. In consequence the plaintiff's business had been gravely damaged, if not irreparably destroyed.
>
> (c) From its inception the July 2008 Direction was and remained unlawful, unconstitutional and in contravention of the European Convention on Human Rights (the Convention) for the reasons set out, which reasons were premised on banks in

this jurisdiction treating directions under s. 31(8) "as legally obliging them not to pay funds on a lawful demand", which premise was supported by the evidence before the Court. The reasons set out were that the impugned provision, s. 31(8), gives each and every member of the Garda Síochána, regardless of rank or function, a power, unrestricted in any manner to issue the near equivalent of a Mareva injunction, with none of the safeguards required in court such as –

(i) sworn evidence,

(ii) an opportunity to refute such evidence,

(iii) an undertaking as to or protection for damages,

(iv) an impartial arbiter as to whether the direction should be given and its duration, and

(v) other terms and conditions, which were not particularised.

(d) It was pleaded that a direction under s. 31(8) does not give the Bank a defence in proceedings by a customer for the Bank's refusal to honour a lawful demand for payment of funds in the customer's current account. At most, it affords the Bank immunity from prosecution on a charge of possessing the proceeds of crime.

3.3 The foregoing are the only pleas in the statement of claim which, in my view, are pertinent to the reliefs claimed. There are other allegations in the statement of claim in relation to the conduct of the officers of An Garda Síochána who conducted the search of the premises of the plaintiff and its directors on 10th July, 2008. However, no cause of action is pleaded arising from those allegations. It is also pleaded that members of An Garda Síochána in recent years have extensively and unlawfully abused such authority as s. 31(8) "purports to give them" and three cases were cited, two which were pending in the High Court when this matter came on for hearing, the third being *Burns v. Bank of Ireland* [2008] 1 I.R. 762, to which I will refer later. No cause of action at the suit of the plaintiff arising from that allegation is disclosed in the statement of claim.

3.4 By way of general observation, in my view, the manner in which the plaintiff's case was pleaded in the statement of claim is most unsatisfactory. While the Bank sought to explore the basis of the plaintiff's claim by raising a notice for particulars, particulars were not raised on the part of the State parties. Apart from dealing with factual matters and particularising the nature of the plaintiff's claim for damages, the replies dated 26th January, 2009 furnished by the plaintiff's solicitors to the Bank's notice for particulars did not elaborate on the basis of the plaintiff's claim. On an analysis of the statement of claim, the wrongdoing alleged by the plaintiff –

(a) as against the Bank is breach of contract and the tort of conversion;

and

(b) as against the State parties is that the s. 31(8) is invalid having regard to the provisions of the Constitution and incompatible with the Convention and that the July 2008 Direction was unlawful.

3.5 In relation to the wrongdoing alleged against the State, a number of comments are apposite. First, the plaintiff's claim as pleaded, as I have outlined above, is that the July 2008 Direction was unlawful, unconstitutional and in contravention of the Convention. However, among the reliefs sought is a declaration that the impugned statutory provision is unlawful. Issue was taken at the hearing by counsel for the State parties with the fact that the nature of the unlawfulness was not pleaded and that it was not alleged that the Bureau had acted *ultra vires* its powers. In the light of the submissions made on behalf of the plaintiff there are two possible bases for the alleged unlawfulness of the July 2008 Direction. One is that it is unlawful arising from the fact that the plaintiff contends that the empowering provision is invalid. In other words, if s. 31(8) falls, the July 2008 Direction falls with it. The other is that, if, as was submitted on behalf of the plaintiff at the hearing, s. 31(8) is capable of a construction which is consistent with the Constitution, it was not complied with by the Bureau. Secondly, the plaintiff did not identify the provisions of the Constitution or the provisions of the Convention which it is contended that s. 31(8) infringes, and was not asked to do so in the course of the pleading process. However, having regard to the manner in which the declaration as to repugnancy to the Constitution and incompatibility with the Convention is formulated, it is implicit that the case being made by the plaintiff is that the member of the Bureau who issued the July 2008 Direction was purporting to exercise judicial power and that issuing the direction infringed the plaintiff's right to fair procedures and its property rights protected by the Constitution and the Convention. In the course of the hearing, counsel for the plaintiff identified Articles 34 and 37 of the Constitution as the provisions relevant to the "separation of powers" argument, Article 40.3 as being relevant to the lack of fair procedures argument and Articles 40.3 and Article 43 as being relevant to the property rights argument.

3.6 The essence of the defence of the Bank, as pleaded, was that it was required to comply with immediate effect with the July 2008 Direction, failing which it would have been exposed to a criminal sanction. It denied that what it did constituted conversion or breach of contract. Its contention was that what it did was in lawful compliance with the July 2008 Direction received by it under s. 31(8) and that it did not do anything unlawful. Alternatively, it pleaded that its contract with the plaintiff "has been frustrated and/or suspended by operation of law" by virtue of the service of the July 2008 Direction.

3.7 The State parties in their defence denied that, as a matter of law, any refusal on the part of the Bank to permit the plaintiff to withdraw monies from the accounts in issue following the issue of the July 2008 Direction was unlawful. They asserted that thereafter payment of the monies by the Bank to the plaintiff would be capable of constituting the criminal offence of money laundering contrary to s. 31, so that any contract under which the plaintiff should seek to compel the Bank to pay the monies to it was unlawful and its enforcement contrary to public policy. The State parties further asserted that there is a clear need and public interest in respect of the existence of the power to give a direction pursuant to s. 31(8). They denied that the July 2008 Direction was unlawful, unconstitutional or contravened the Convention. It was also denied that s. 31(8) is unconstitutional, but, if it is, it was denied that it gave rise to any liability on the part of the State parties. Various grounds were asserted for the contention of the State parties that, even if the plaintiff incurred losses as a result of the July 2008 Direction, such losses should not be recoverable from the State parties, which grounds were based on public policy and founded on the contention that the monies in the accounts were the proceeds of crime and that the plaintiff was engaged in money laundering.

3.8 All of the defendants denied that the plaintiff has incurred any loss or damage recoverable in these proceedings. In broad terms, the Bank pleaded that the plaintiff has not pleaded, and by inference, has not suffered any loss or damage and further it pleaded that it would rely on failure to mitigate. The State parties also denied that the plaintiff has suffered or sustained or incurred any loss or

damage and they have raised the issue of causation. It is not necessary to explore those matters in detail at this juncture, because, when the case was being opened, the Court was informed that the parties had agreed that the Court should only determine the question of "liability". What that meant was the subject of controversy, which, on reading the transcript, I am not sure was satisfactorily resolved. Nonetheless, the position I am taking as to the outcome of the controversy and what the Court's task is, is that it is to determine whether the plaintiff has established an entitlement to the declaratory relief it seeks. If it has, the Court has to decide, if it is possible to do so, whether the contention of the State parties that, on the ground of public policy, the plaintiff does not have a claim in damages against either the Bank or the State parties is correct. The Court was informed that the Bank has served a notice for contribution or indemnity on the State parties.

3.9 Unfortunately, the state of the pleadings when the matter came on for hearing left considerable ground for controversy and point scoring, which is regrettable, particularly, as the challenge to the constitutionality of s. 31(8) raised very fundamental issues. Because of that, I have found it difficult to identify and to decide on the appropriate course to take in considering the issues. However, I think it is useful at the outset to consider the decision of the High Court (Gilligan J.) in Burns v. Bank of Ireland, which addressed many of the issues raised in this case.

4. *Burns v. Bank of Ireland*.
4.1 There is considerable similarity between *Burns v. Bank of Ireland* and this case. The direction under s. 31(8) in issue there was issued by the same member of the Bureau as issued the July 2008 Direction. The direction was in similar terms, insofar as it directed Bank of Ireland not to deal with the plaintiff's account without the member's specific consent until further notice. The arguments made on behalf of the plaintiff in that case on the issue of the constitutionality of s. 31(8) were similar to the matters pleaded in the statement of claim in this case, as is clear from paras. 29 and 30 of the judgment of Gilligan J.

4.2 The underlying facts of the *Burns* case differ in certain respects from this case. In the *Burns* case the direction under s. 31(8) had been preceded by a report by Bank of Ireland under s. 57. However, I consider that difference to be of no materiality. What is material is that, while the direction was issued to the Bank of Ireland on 22nd August, 2005, as Gilligan J. recorded (at para. 52), the member of the Bureau who issued it was aware himself by the end of August 2005 that there was not going to be a prosecution against the plaintiff for money laundering and, but for the institution of the proceedings, the direction would have been withdrawn. Having regard to that fact, Gilligan J. held that, although s. 31(8) did not impose a time limit in respect of the duration of an order made pursuant to that section, members of An Garda Síochána operating the section had a duty to act in accordance with the principles of constitutional fairness in making a direction to a financial institution thereunder. Therefore, a member of An Garda Síochána who issued such a direction was under a duty to withdraw such direction once it became apparent that no criminal proceedings in respect of the funds, which were the subject matter of the direction, were going to follow. On that basis, Gilligan J. made a declaration that the Commissioner of An Garda Síochána, who, as in this case, was the second defendant in the proceedings, had acted *ultra vires* the provisions of s. 31(8).

4.3 As Gilligan J. recorded (at para. 50), the plaintiff in that case accepted that the Garda authorities were authorised under s. 31 to issue the direction. The difficulty which arose there was that the section did not expressly provide for a reasonable time limit within which the direction would remain operative. However, Gilligan J. held that such omission did not authorise the making of an open ended direction, applying what has become known as the "double construction" rule of interpretation derived from the decision of the Supreme Court in *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317, where Walsh J. stated (at p. 341):

> "[A]n Act of the Oireachtas, or any provision thereof, will not be declared to be invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means an interpretation favouring the validity of an Act should be given in cases of doubt."

By applying that dictum, Gilligan J. found (at para. 52) that, on the facts of the case before him, it was not necessary to decide whether the impugned section was constitutional.

4.4 An important aspect of the decision in the *Burns* case for present purposes is the manner in which the position of Bank of Ireland was dealt with. In this case, the overarching position adopted by counsel for the Bank was that the effect of the July 2008 Direction is governed by the decision in the *Burns* case. In consequence, it was argued, that, as the July 2008 Direction was regular on its face, the Bank was bound to obey it and it was lawful for the Bank to obey it. Therefore, the Bank could not pay out the money in the accounts to the plaintiff and had not committed any wrong in not doing so. Apropos of the position of Bank of Ireland, Gilligan J. stated (at p. 59):

> "The first defendant, having been issued with this direction, given the mandatory nature of the terminology used therein, clearly believed that it had no alternative but to comply. . . . It received the direction from the detective garda and found itself in the position where refusal to comply with the direction, as issued, could leave it open to potential criminal liability. For that reason, it is hard to see how any liability can attach to the first defendant in these circumstances where it complied with a lawfully issued direction by a member of An Garda Síochána. The first defendant cannot be held liable for the effects of the duration of the direction, since only the detective garda could withdraw it, in the absence of a court order of *mandamus*."

Gilligan J. also pointed out that the plaintiff could have made an application to court for leave to have the direction judicially reviewed. The extent of the duty of Bank of Ireland in relation to the nature of the funds was to make the report under s. 57. The duty to investigate the contents and substance of the report lay on the Gardaí. On that basis he found that no liability attached to Bank of Ireland. That finding was, of course, predicated on the direction having been lawfully issued, which the plaintiff in that case had conceded was the case.

4.5 No such concession is made by the plaintiff in this case. As I have already outlined, the plaintiff seeks a declaration that both the direction and the refusal by the Bank to comply with the plaintiff's demand for payment were unlawful, although the primary relief it seeks is a declaration as to the invalidity of s. 31(8). Understandably, the Bank in this case relies on the presumption of constitutionality of s. 31(8), which is a provision of a post-1937 statute, and the scope of that presumption, as explained in the *East Donegal* case by Walsh J. in the following passage, which was also quoted by Gilligan J. in the *Burns* case (at para. 52):

> "[T]he presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that the proceedings, procedures, discretions and adjudications which are permitted, provided for or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those

principles would be restrained and corrected by the Courts."

4.6 It will be necessary later to address the inconsistent submissions in relation to the presumption of constitutionality made on behalf of the plaintiff. However, viewing the matter from the Bank's perspective, it had received a direction which was expressed to be made pursuant to s. 31(8), which carried the presumption of constitutionality, and, in my view, it cannot be criticised for complying with the direction and obeying the law. The reality is that insofar as the July 2008 Direction is unlawful, whether on the basis that s. 31(8) is invalid having regard to the provisions of the Constitution or otherwise, the plaintiff's complaint is against the State parties. When these proceedings were initiated, the plaintiff was aware of the position which the Bureau was adopting, as set out in the letter of 23rd July, 2008. I would make the same point as was made by Gilligan J. in the *Burns* case: it was open to the plaintiff to seek leave to have the July 2008 Directive quashed in judicial review proceedings against the second defendant or, alternatively, to pursue a plenary action challenging the constitutionality of s. 31(8) against the State parties, without involving the Bank.

4.7 In support of his proposition that the Bank is liable in contract and in tort to the plaintiff, counsel for the plaintiff relied in particular on the decision of the Court of Appeal in England and Wales in *Bank of Scotland v. A Ltd.* [2001] 1 WLR 751. However, in my view, reliance on that authority does not advance the plaintiff's case against the Bank. In that case, *A Ltd*. opened accounts with Bank of Scotland to which considerable sums of the money were transferred, which gave rise to concerns on the part of the bank. As a result, the bank made inquiries and was told by the police that money laundering investigations were being conducted into activities closely associated with *A Ltd.* The police, invoking a statutory provision which makes tipping-off in the context of a money laundering investigation an offence, told the bank not to reveal the information, as they did not want *A Ltd.* to be tipped off about the investigation. The bank was then faced with a dilemma, which was succinctly summarised by Lord Woolf C.J. (at para. 9): if it paid out the monies held in the account, it considered it could be liable to third parties as a constructive trustee; if it did not pay out the monies it held, an action could be brought and the bank would not be able to defend itself because the police had invoked the prohibition on tipping-off. What the bank did to resolve the dilemma, which resulted in the bank incurring costs of all of the defendants in the proceedings at first instance, a decision which was upheld on appeal, is not of any relevance in the context of these proceedings.

4.8 What is of some relevance, having regard to the arguments advanced on behalf of the plaintiff, is how Lord Woolf considered the bank should have resolved the dilemma. He stated (at para. 40) that it was reasonable for the bank to try to anticipate the proceedings which could be expected if it refused to honour the instructions of A Ltd. as to the monies which stood to its credit in its accounts. However, the appropriate defendant to any application for directions was not A Ltd. but the Serious Fraud Office (SFO). The question of the information which could properly be disclosed should have been capable of being resolved between the SFO and the bank, but, if they could not reach agreement, then the court would have to resolve the dispute. The hearing could be held in private, A Ltd. would not be a party, and, if necessary, an interim declaration could be made setting out what information it would be proper for the bank to disclose. After that, the bank could decide what course it wished to adopt. Its primary concern being that it was in danger of being held to be a constructive trustee, if it chose not to honour the instructions of A Ltd., then the only course open was to commence proceedings against A Ltd.

4.9 Counsel for the plaintiff laid particular emphasis on the observations of Lord Woolf in para. 46, in which he stated:

> "The 'tipping-off' legislation which was the source of the problem with which this appeal deals, gave extensive powers to the police. Properly used they were beneficial. Misused they could create unintended consequences. It is of the greatest importance that use of those powers is confined to situations where it is appropriate. Institutions such as banks need to be able to ensure that they are not affected adversely unnecessarily because of the existence of the police's powers. The ability of the courts to grant interim advisory declarations achieves this purpose. The fact that the courts now have these powers, must not, however, be regarded as a substitute for financial institutions taking the decisions which should be their commercial responsibility. The courts' powers are discretionary and only to be used where there is a real dilemma which requires their intervention."

Obviously, in that passage Lord Woolf was referring to specific relief which is provided for in England and Wales under the Civil Procedure Rules. Whether this Court would have jurisdiction to grant the type of relief envisaged by Lord Woolf is not a matter which arises in these proceedings. As I understand it, the importance which counsel for the plaintiff attached to the decision is the emphasis on financial institutions not shirking their commercial responsibility. However, that must be seen against the background that Lord Woolf identified the issue, in the first instance, as being between the bank and the SFO. However, apart from that, in this case, on 10th July, 2008 the Bank was faced with a different dilemma. It was in receipt of a direction which on its face was properly made on foot of a statutory provision which carried the presumption of constitutionality and non-compliance with which would *prima facie* constitute an offence under s. 31.

4.10 Accordingly, the primary focus of this judgment will be on the plaintiff's claim against the State parties and their response to it.

5. The evidence

5.1 The aspect of the evidence which I propose to summarise is the evidence as to the monies in the accounts with the Bank being "the proceeds of criminal conduct".

5.2 The evidence tendered on behalf of the plaintiff, the evidence of Mr. Monaghan, the secretary and the director of the company, was sparse. Mr. Monaghan acknowledged that, from the time of the Garda search at his house on the morning of 10th July, 2008, he was aware that the crime in respect of which the money laundering of the proceeds was suspected was the purchase and sale of stolen trucks. He also acknowledged that part of the business of the plaintiff was the sale of commercial vehicles and it was suggested to him in cross-examination that there was an obvious link between the crime that was being investigated and the nature of the business being carried on by the plaintiff company. He made no response to that suggestion, but he did not need to because that was a fact. Understandably, no question was put to Mr. Monaghan in cross-examination which would put him in a position of incriminating himself or the plaintiff company, of which he is an officer. However, counsel for the State parties was critical of the fact that, when he was asked in examination in chief what his reaction was to a suggestion that the money was the proceeds of crime, without confirming or denying, he responded: "what crime?".

5.3 The only witness called on behalf of the State parties was Detective Superintendent Gallagher, the author of the letter of the 23rd July, 2008. His evidence was that the Bureau was satisfied, on the basis of information in its possession, that the funds in the plaintiff's accounts in issue contained proceeds from the sale of stolen trucks, which had been sold in this jurisdiction to unsuspecting persons. He was satisfied that the funds in question came within s. 31. Under cross-examination by counsel for the plaintiff as to the provenance of specific lodgements to the accounts in May, June and July of 2008, he stated that he was satisfied, on the basis of information which was available to him at the time, and which he believed to be correct, that the funds in the accounts were the proceeds of crime. Detective Superintendent Gallagher confirmed that the Bureau's investigation was continuing and that the plaintiff

was under investigation. During cross-examination, he confirmed that, on the basis of his knowledge of the case, the credit balance in the accounts represented the proceeds of crime but, if he was going to have to prove that, he would have to go into the specifics of the investigation. The Court ruled against the plaintiff on a request by its counsel to see the relevant documentation on the basis of public interest privilege.

6. The plaintiff's submissions

6.1 A difficulty which I have encountered in determining the issues in this case is that the plaintiff's case as argued at the hearing differed from the case as pleaded, which I have outlined in some detail earlier. Not only that, but the oral submissions made on behalf of the plaintiff differed from the written submissions. Counsel for the plaintiff accepted that, in accordance with the principle of judicial restraint, the Court should only consider the constitutional issues if the case could not be resolved on other grounds. This raised the issue as to whether and to what extent s. 31(8) was capable of a constitutional construction. Counsel for the plaintiff addressed this issue in dealing with the interpretation of s. 31(8).

6.2 In relation to the interpretation of the provision, it was submitted on behalf of the plaintiff that, while s. 31 may provide immunity to the Bank in any criminal proceedings against it, the section does not provide it with a defence to civil proceedings arising from a breach of contract as between the Bank and its client, the plaintiff. In this regard, counsel for the plaintiff pointed to other statutory schemes of a cognate nature. Section 14 of the Proceeds of Crime Act 1996 (the Act of 1996), which grants universal immunity, was instanced. Counsel for the plaintiff contended that s. 31(8) is capable of a construction which is consistent with the Constitution provided it is understood to refer to property which is, in fact, the proceeds of crime. It was accepted that, if the funds in the accounts of the plaintiff are shown to be the proceeds of crime, then the Bank has a defence to the plaintiff's claim for breach of contract.

6.3 Counsel for the plaintiff highlighted a number of other matters, aside from the absence of a provision that compliance with a direction would constitute a defence to a civil action by a client against a bank which obeys it, which are not to be found in s. 31(8).

6.4 First, it is not provided that a direction may be based on a "preliminary view" as the July 2008 Direction was expressed to be. Even if the preliminary view or belief of the member of the Bureau is based on reasonable grounds, that is not sufficient, it was submitted, to satisfy the Court that the property in issue, i.e. the funds in the account, are the proceeds of crime. Counsel relied on two authorities in support of this proposition: the decision of the Court of Criminal Appeal in *DPP v. McHugh* [2002] 1 I.R. 352 and the decision of the House of Lords in *R. v. Montila* [2004] 1 WLR 3141. Both decisions related to prosecutions for the offence of money laundering. The *McHugh* case related to a prosecution under s. 31 in its original form. As a matter of construction of that provision, the Court of Criminal Appeal held that it was an essential ingredient of the offence of handling property the proceeds of drug trafficking pursuant to that provision that the property be shown, by admissible evidence, to be or to represent another person's proceeds of drug trafficking. The House of Lords decision, which related to criminal charges that the accused had concealed, disguised, converted or transferred property knowing, or having reason to suspect, that it represented another person's proceeds of criminal conduct or drug trafficking was, broadly speaking, to the same effect, namely, that the fact that the property in question had its origins in criminal conduct or drug trafficking was an essential part of the *actus reus* of the offences in question. On the basis of those authorities, counsel for the plaintiff contended that the July 2008 Direction was invalid because it was merely based on a "preliminary view" of the member of the Bureau who issued it and it had not been proved as a fact that the property was in fact the proceeds of crime. As a result, it was submitted, the direction was unlawful.

6.5 Secondly, another matter which s. 31(8) does not provide for is that the account holder is afforded a reasonable and early opportunity to demonstrate that the money is not the proceeds of crime. In other words, it does not expressly mandate that the principle *audi alteram partem* be complied with. In this connection, counsel for the plaintiff relied on the decision of the House of Lords in *R. (Wright) v. Health Secretary* [2009] 2 WLR 267 and the decision of the Supreme Court in *D.K. v. Crowley* [2002] 2 I.R. 744.

6.6 Counsel for the plaintiff also relied on the decision of the Court of First Instance of the European Communities (7th Chamber) in *People's Mojahedin Organisation of Iran v. Council of the European Union* [2009] 1 CMLR 44, in which it was held that the freezing of the applicant's funds by the decision contested before the Court was the result of a procedure during which the applicant's rights of defence were not respected and, accordingly, the contested decision had to be annulled. The Court also followed the judgment of the Grand Chamber of the European Court of Justice of 3rd September, 2008 in *Kadi v. Council of the European Union* [2008] 3 CMLR 41, holding that judicial review of the lawfulness of a decision to seize funds extended to the assessment of the facts and circumstances relied on as justifying it, and the evidence on which that assessment was made, and to the Court ensuring that the right to a fair hearing was observed. Counsel for the plaintiff in his replying submissions also referred obliquely to a decision of the Court of First Instance made on 11th June, 2009. I assume the judgment he was referring to was *Othman v. Council of the European Union and the Commission* (Case T – 318/01). While I have read the European authorities cited by counsel for the plaintiff, I am at a loss to understand how they have any relevance. They were concerned with the review by the European Union Courts of European Union law (i.e. Council Regulations imposing restrictive measures against certain persons and entities associated with Usama bin Laden, the Al-Queda network and the Taliban). The plaintiff in this case is not invoking European Union law. This case is concerned with the application of Irish law to an Act of the Oireachtas.

6.7 On the basis of the necessity to comply with the principle of *audi alteram partem*, counsel for the plaintiff submitted that, in order to construe s. 31(8) in a manner which is consistent with the Constitution in accordance with *East Donegal* principles, it must be construed as requiring that any discretion or power it vests in An Garda Síochána must be exercised in accordance with the principles of constitutional justice, for instance, by giving notice of the direction to the account holder, such as the plaintiff, by providing the opportunity of a fair hearing to the plaintiff and by laying down a timeframe during which it is in force. None of those procedures was afforded to the plaintiff, it was submitted, and, therefore, the July 2008 Direction was unlawful. Accordingly, both the Bureau and the Bank acted unlawfully. What is more, it was the contention of counsel for the plaintiff that the plaintiff's case as pleaded encompassed those submissions.

6.8 To summarise the submissions of counsel for the plaintiff on the issue of the interpretation of s. 31(8), it is that certain matters which are not expressly provided for in the sub-section can be read into it, for instance, the requirement that the principles of constitutional justice be complied with, including *audi alteram partem*. However, other matters cannot be read into s. 31(8). For instance, it cannot be read into it that compliance by a bank, which receives a direction expressed to be made under the sub-section, with that direction constitutes a defence to a claim for breach of contract by the customer, such as is provided in s. 14 of the Act of 1996, because such an interpolation would be unconstitutional, there being no provision for compensating the customer in the event that he is damaged by compliance with the direction. Therefore, for compliance with a direction to constitute a defence to an action for breach of contract against a bank, the bank would have to be in a position to show that the monies in the account constituted the proceeds of crime because, under ordinary principles of common law, a court will not enforce an illegal contract. If that reasoning is correct, and if the plaintiff's construction of s. 31(8) is correct, it would leave a bank recipient of a direction under

the sub-section in a very vulnerable situation, which can hardly have been the intention of the Oireachtas. If it was, it would justify the bank contending that its constitutional rights were infringed.

6.9 Counsel for the plaintiff represented the plaintiff's challenge to the constitutionality of s. 31(8) as a "fall-back" position, on the basis that it was open to the Court to put a construction on that provision which is consistent with the Constitution, but it would have to find that the July 2008 Direction did not comply with the constitutionally permissible manner of issuing a direction. As I have outlined by reference to the statement of claim, the plaintiff advanced two bases on which it is contended that s. 31(8) is repugnant to the Constitution. First, it was said to be an unconstitutional exercise of the judicial power in breach of the separation of powers provided for in the Constitution and, in particular, in Article 37, the power conferred being characterised as being akin to granting an executive Mareva-type injunction for an unlimited period. The authorities on which counsel for the plaintiff relied in support of that contention were: *Re Solicitors Act 1954* [1960] I.R. 239; *Cowan v. Attorney General* [1961] I.R. 411; and *O'Mahony v. Melia* [1989] I.R. 335. Secondly, it was said to be an unconstitutional infringement of the plaintiff's constitutional rights, in particular, the right to fair procedures guaranteed by Article 40.3 and the right to property guaranteed under Article 40.3 and 43. In relation to the right to fair procedures, counsel for the plaintiff emphasised that there is no requirement contained in the provision to notify the party affected by the direction, no timeframe is laid down for its remaining in force and there is no element of *audi alteram partem*, again relying on the *Mojahedin* case, the Wright case and *D.K. v. Crowley*. Counsel laid particular emphasis on the interaction of the right to fair procedures with property rights, citing *Orange v. Revenue Commissioners* [1995] 1 I.R. 517; North Georgia Finishing Inc. v. Di-Chem Inc. (1975) 419 US 601, which was a decision of the US Supreme Court, and *Air Canada v. A.G. of Canada* 222 DLR 4385, which was a decision of the Quebec Court of Appeal.

7. The submissions of the State parties

7.1 In outline, the position of the State parties was that the July 2008 Direction was lawfully given in the context of a criminal investigation into suspected criminal activities, including money laundering, and in circumstances where the Bureau had reasonable grounds for believing that the plaintiff had engaged in money laundering. This case is distinguishable from the *Burns* case in that this case concerned an ongoing criminal investigation in which a preliminary file has been sent to the Director of Public Prosecutions. Section 31(8) confers immunity from prosecution on a body corporate and persons in the position of the Bank and its staff either where such body has complied with its obligation to make disclosure under s. 57, or where it is informed by An Garda Síochána that it is in possession of property which is, or represents, the proceeds of crime. Although the section provides for immunity from prosecution, it was submitted that the July 2008 Direction was not a mandatory direction which could be enforced against the Bank. However, it was acknowledged that its effect in practice was to prevent the body served with such a direction from dealing with the property affected by the direction. Indeed, under cross-examination, Detective Superintendent Gallagher testified that, when the Bank was served with order, he would have expected that there would be no further movement on the accounts.

7.2 Counsel for the State parties skilfully sought to exploit the manner in which the plaintiff's case was pleaded, what was contended to be an insufficient evidential basis to support the claim, and, in particular, the position adopted by counsel for the plaintiff in conceding that s. 31(8) is capable of a construction which is consistent with the requirements of the Constitution. Two facets of the presumption of constitutionality were explored. The first was the onus on the plaintiff to adduce evidence to establish the factual basis on which the plaintiff grounds his legal arguments that the section is unconstitutional. It was submitted that the plaintiff had not discharged the heavy onus on a plaintiff in a constitutional action arising from the fact that the impugned provision enjoys the presumption of constitutionality. The second was the principle established in the *East Donegal* case that the Oireachtas intended that discretions conferred by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. On that point, counsel for the State parties contended that, once counsel for the plaintiff had conceded that s. 31(8) was capable of being construed in a manner consistent with the requirements of the Constitution, he could not simultaneously contend that the provision is *per se* unconstitutional. Further, counsel for the State parties pointed out that the case made on behalf of the plaintiff on the pleadings was not that the authority conferred by s. 31(8) is valid but was improperly exercised by the Bureau in issuing the July 2008 Direction, which would have mirrored the approach adopted in the Burns case. On the contrary, the case pleaded is that the authority conferred by s. 31(8) is unlawful.

7.3 Counsel for the State parties urged the Court to adhere to the doctrine of judicial restraint in considering s. 31(8) and submitted that, having regard to the double construction rule, if the matter can be determined without the necessity of determining the constitutionality of the provision, it should be so determined. Arising out of the second facet of the presumption of constitutionality outlined in the preceding paragraph, it was submitted that, the concession having been made on behalf of the plaintiff that s. 31(8) is capable of being given a Constitution consistent interpretation, that must be regarded as the end of the constitutional challenge.

7.4 Aside from urging that the Court should adopt the principle of judicial restraint having regard to the manner in which the plaintiff's case had been presented, counsel for the State parties urged that the Court adopt the principle of judicial restraint in relation to the constitutional challenge to the validity of s. 31(8) having regard to the circumstances which prevailed after the issue of the July 2008 Direction and, in particular, the position of the Bank. It was in this context that the Court was informed that the Bank has served notice for contribution or indemnity on the State parties. The State parties' argument was premised on the proposition, referred to earlier, that although the July 2008 Direction was not mandatory, as a matter of practice and as a logical consequence of the legal basis upon which it was issued, the Bank was going to comply with it. The purpose for which it was issued was to confer immunity because, the Bank having been told that the monies in the account constituted the proceeds of crime, the Bank would have committed a criminal offence under s. 31 if it dealt with the monies in the account by, for instance, acceding to the plaintiff's instructions to operate the account. Moreover, as the monies in the account constituted the proceeds of crime, as between the plaintiff and the Bank, a court would not have enforced the performance of the contract between those parties in accordance with the well established principles that the courts will not enforce contracts which are contrary to public policy or the performance of which involves the commission of a criminal offence, as, insofar as the Court would be enforcing performance of the contract between the Bank and the plaintiff, in effect, it would be requiring the Bank to commit an unlawful act. The Court should not proceed to determine the constitutional issue, on the basis that it would not be prepared to order enforcement of a contract to commit an unlawful act which the Bank had no wish or intention to commit.

7.5 To illustrate what was described as a long-standing common law principle that the courts will not enforce an unlawful contract, as to do so would be contrary to public policy, counsel for the State parties referred to a number of authorities: *Hortensius Ltd. v. Bishop* [1989] ILRM 294; *McIlvenna v. Ferris* [1955] I.R. 318; *Whitecross Potatoes v. Coyle* [1978] IRLM 31; and *Namlooze Venootschap de Faam v. Dorset Manufacturing* [1949] I.R. 203. Counsel for the State parties emphasised that, regardless of the service of the July 2008 Direction, on the basis of the evidence before the Court, the contract between the Bank and the plaintiff, being tainted with illegality, would not be enforceable by a court in any event.

7.6 If, contrary to what was urged on behalf of the State parties, the Court considers that the challenge to the constitutionality of s. 31(8) should be considered, it was the position of the State parties that the provision was not unconstitutional. As regards the argument advanced by the plaintiff that the provision constituted an unconstitutional vesting of judicial power in An Garda Síochána,

it was submitted that the stage at which the direction operated was during the investigation of a suspected offence under the Act of 1994. It was neither final nor punitive in nature. It did not determine liability. It did not determine guilt or innocence. There was no expropriation, the funds remaining in the ownership of the customer of the Bank, in this case the plaintiff. The affected customer could in an appropriate case protect his interest through the Court by seeking leave to apply for judicial review of the direction. The essence of the State parties' case was that the issuing of the July 2008 Direction was not a judicial act, but rather was a criminal investigative tool. Even if it was regarded as a quasi-judicial power, it came within the scope of, and was permissible under, Article 37.

7.7 While it was acknowledged that a direction given by An Garda Síochána under s. 31(8) is capable of constituting a limitation on the property rights of a bank customer, such as the plaintiff, it was submitted that the interference with the plaintiff's property rights under the Constitution, which are not absolute, was permissible in the light of the objectives which it served. The interference with the plaintiff's constitutional rights in this case was limited, just and proportionate.

7.8 It was submitted that the ownership of, as distinct from access to, the money in the account was not affected by the July 2008 Direction and it was open to the plaintiff to seek payment out of the money, presumably by applying to Court, which the State defendants did not oppose in principle. In relation to this point, an issue which arose at the hearing was the fact that, although the plaintiff had initiated an application for an interlocutory injunction for an order directing payment out of the monies in the accounts the salaries and expenses of the officers of the company and other outstanding liabilities of the company, that motion was not proceeded with. The evidence of Mr. Declan Fahy, the plaintiff's solicitor, was that the decision not to proceed with the interlocutory application was strategic. I feel constrained to comment that, if the State parties did not object to an order for payment out being made, why did they persist in sums aggregating just over €150,000 being effectively frozen during the currency of these proceedings. In the overall context of the case, it does not make sense. I would make the same comment in relation to the contention of the State parties that the plaintiff could have opened another Bank account to replace the accounts which were frozen. I attach no weight to those arguments on the issue of the constitutionality of s. 31(8). The State parties have throughout, since the July 2008 Direction was issued, relied on its validity and on the validity of the statutory authority conferred by s. 31(8). From as early as the letter of 23rd July, 2008, the position of the Bureau was that the Bank would be bound by the July 2008 Direction until the criminal investigation was concluded. If the Bureau was prepared to depart from that position, why did it not convey that information to the Bank and to the plaintiff? Why should the plaintiff have to institute proceedings and why should the Bank be exposed to proceedings at the suit of the plaintiff?

7.9 In any event, the essence of the response of the State parties to the contention of the plaintiff that his rights to property under the Constitution were infringed by the issue of the July 2008 Direction was that the investigation of serious crimes, such as money laundering, was a pressing social purpose which permitted limitations on individuals' property rights in the interests of the common good. The July 2008 Direction, the means by which the plaintiff's rights were restricted, was rationally connected to this objective. In the circumstances while the section interfered with the plaintiff's rights, it was nonetheless a proportionate restriction of those rights.

8. Consideration of constitutional issues

8.1 There is no doubt, as I have already indicated, that the plaintiff has adopted an inconsistent approach in this matter in seeking a declaration that s. 31(8) "should not enjoy the presumption of Constitutionality", while at the same time submitting that the provision is susceptible of a construction which is consistent with the Constitution. Moreover, notwithstanding that concession and the fact that the State parties have advocated that the Court should exercise the restraint normally exercised by the Court in relation to considering the constitutional validity of a statute, it is the plaintiff's case that the Court, if it is not satisfied that the impugned provision is capable of a construction consistent with the Constitution, should go on to consider the constitutional challenge. Having regard to those matters, I think it is important to emphasise that the case was not made on behalf of the plaintiff that the presumption of constitutionality does not operate in this case because the unconstitutional nature of the provision in issue is patent, in the sense in which patent unconstituonality has arisen in the cases referred to in *J.M. Kelly: The Irish Constitution* (4th Ed.) at para. 6.2.207 *et seq*.). Indeed, in view of the concession, it would not be open to the plaintiff to make that case. Therefore, the starting point of the Court's consideration of the issues in this case must be that the presumption of constitutionality applies to s. 31(8).

8.2 Although it was submitted on behalf of the State parties that the plaintiff was not in a position to maintain a challenge to the constitutionality of s. 31(8), the basis of that contention was not that the plaintiff did not have *locus standi*, but rather that the plaintiff did not establish the evidential foundation for such a challenge. While I think I am correct in stating that, over the four days of the hearing, the concept of *locus standi* was not mentioned by any of the parties, I think it is important to emphasise that the plaintiff does have *locus standi* to challenge s. 31(8). In this connection, one of the authorities relied on by counsel for the plaintiff in relation to the separation of powers argument, *O'Mahony v. Melia* [1989] I.R. 335 is apposite.

8.3 The facts in *O'Mahony v. Melia* were that the applicants had been arrested by a member of An Garda Síochána and brought before the first respondent, who was a Peace Commissioner, charged with certain offences. When the arresting Garda stated his opposition to the granting of bail, the first respondent remanded the applicants in custody to the next day's sitting of the District Court. On the following day the applicants were admitted to bail by the District Court and released. The applicants challenged, by way of judicial review, the order of the Peace Commissioner remanding them in custody overnight and they also challenged the constitutionality of the statutory provision which empowered a Peace Commissioner to remand a person in custody. It was contended on behalf of the applicants that they had standing to challenge the constitutionality of the provision because, if it was unconstitutional, their detention overnight was unlawful and any statements they might have made while in unlawful custody would be inadmissible at their trial which was to take place in the Circuit Court. On the *locus standi* argument, Keane J. stated as follows (at p. 340):

> "It would be clearly wrong, in these circumstances, to deny the applicants the *locus standi* to challenge the relevant legislation. If the first respondent had no power to make the orders which he did remanding the applicants in custody it would be unjust, in my opinion, to preclude them from relying on that lack of jurisdiction in their impending trial.
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> In this context, it is as well to recall the principles on which the court must act when such questions of standing arise. In Cahill v. Sutton [1980] I.R. 269, O'Higgins C.J. said at page 276:-
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> > 'This court's jurisdiction, and that of the High Court, to decide questions concerning the validity of laws passed by the Oireachtas is essential to the preservation and proper functioning of the Constitution itself. Without the exercise of such a jurisdiction, the checks and balances of the Constitution would cease to operate and those rights and liberties which are both the heritage and the mark of free men would be endangered. However, the jurisdiction should be exercised for the purpose for which it was conferred — in protection of the Constitution and of the rights and liberties thereby conferred. *Where the person who questions the validity of a law can point to no*

> *right of his which has been broken, endangered or threatened by reason of the alleged invalidity, then, if nothing more can be advanced, the courts should not entertain a question so raised*. To do so would be to make of the courts the happy hunting ground of the busy body and the crank. Worse still, it would result in a jurisdiction which ought to be prized as the citizen's shield and protection becoming debased and devalued.' (Emphasis added).
>
> It is beyond argument in the present case that the applicants were detained in purported pursuance of the legislation the validity of which is now challenged. It could not conceivably be suggested in these circumstances that no rights of theirs were 'broken, endangered or threatened' if the legislation is in truth invalid. What the consequences may be of any such infringement of the rights in question can only be determined in criminal proceedings yet to be heard. I accordingly conclude that the applicants have the necessary *locus standi* to challenge the relevant legislation."

8.4 On the facts of this case, the plaintiff had sums aggregating in excess of €150,000 in the accounts in issue, which were used for the purposes of its business. The Bureau issued a direction under s. 31(8), which was inevitably going to result in the monies in the accounts being frozen and beyond the reach of the plaintiff for the purposes of running its business or any purpose. As was the case in *O'Mahony v. Melia*, it could not conceivably be suggested that, having regard to those facts, no rights of the plaintiff were "broken, endangered or threatened", if s. 31(8) is invalid. Therefore, the plaintiff clearly has *locus standi* to challenge the validity of that provision.

8.5 As I understand it, the evidential deficit which the State parties tried to lay at the door of the plaintiff is that the plaintiff had not called evidence to prove that the monies in the accounts were not the proceeds of crime, pointing out, as was the case, that Mr. Monaghan did not even make a bald assertion that the monies were not the proceeds of crime. No more than the applicants in *O'Mahony v. Melia* were not required to establish their innocence on the charges they were facing in the Circuit Court, in my view, it was open to the plaintiff to challenge the constitutionality of s. 31(8) without establishing that monies in the accounts were not the proceeds of crime.

8.6 Another matter which was not addressed at the hearing was the sequence in which the Court should deal with the issue of the constitutionality of s. 31(8) and its incompatibility with the Convention. In accordance with the decision of the Supreme Court in *Carmody v. The Minister for Justice* [2010] 1 ILRM 157, the issue of constitutionality must be decided first.

8.7 In analysing s. 31(8) to determine whether it is capable of a construction which is consistent with the requirements of the Constitution, counsel for the plaintiff compared that provision to other cognate provisions with a view to highlighting the shortcomings in s. 31(8). That, in my view, was a useful exercise. I now propose considering the relevant provisions of the Act of 1996 and the relevant provisions of the Criminal Justice (Terrorist Offences) Act 2005 (the Act of 2005).

9. The Act of 1996

9.1 As the long title indicates, the Act of 1996 was enacted "to enable the High Court, as respects the proceeds of crime, to make orders for the preservation and, where appropriate, the disposal of the property concerned and to provide for related matters". It established the regime whereby the Criminal Assets Bureau (CAB), which was established under the Criminal Assets Bureau Act 1996, may get an interim order, an interlocutory order and, ultimately, a disposal order in relation to property which is the proceeds of crime.

9.2 An application for an interim order prohibiting persons from disposing of, dealing with or diminishing the value of property that is the proceeds of crime is made *ex parte* by a member or authorised officer of CAB to the High Court. The order, if made, endures for a period of twenty one days only from its making. The Court may insert such provisions, conditions or restrictions as it considers necessary and expedient. It provides for notice of it to be given to the respondent unless the Court is satisfied that it is not reasonably possible to ascertain that person's whereabouts. The order includes provision for variation and discharge of the order. It further provides that the order shall lapse after twenty one days unless the interlocutory application has been made.

9.3 An interlocutory order is an application on notice to the respondent. It is made by a member or authorised officer of CAB. The Court has similar scope to insert provisions, conditions or restrictions as it considers necessary and expedient as it has in the case of an interim order. The duration of the interlocutory order is until the final determination of an application for a disposal order.

9.4 The disposal order is the final step in the process and is made where an interlocutory order has been in place for not less than seven years. The effect of such an order is to direct that the whole or, if appropriate, a specified part of the property be transferred, subject to such terms and conditions as the Court may specify, to the Minister for Finance or such other person as the Court may determine. In effect, such an order transfers ownership of the property affected. The application is made by a member or an authorised officer of CAB and it is on notice to the respondent and such other persons as the Court may direct.

9.5 There are additional safeguards provided for in the Act of 1996. In the definition section, an "authorised officer" is defined as meaning an officer of the Revenue Commissioners authorised in writing by the Revenue Commissioners to perform the functions conferred by the Act of 1996 on authorised officers. The expression "member" is defined as meaning a member of An Garda Síochána not below the rank of Chief Superintendent. Section 6 provides that, in a case where an interim or an interlocutory order is in place, the Court, on the application of the respondent, may make such orders as it considers appropriate if it considers it is essential for the discharge of the reasonable living and other necessary expenses, including legal expenses, to be incurred by the respondent and his or her dependents and for the carrying on of business, trade or suchlike to which the property relates. Significantly, section 14, to which I have already referred, expressly grants immunity from any action or proceedings of any kind to a financial institution in respect of any act or omission done in compliance with an order under the Act. Also, as has been mentioned previously, s. 16 empowers the Court, where interim and interlocutory orders are discharged, varied or lapsed, on the application of a person who shows to the satisfaction of the Court that it is the lawful owner of the property and the property is not the proceeds of crime, to award such compensation to that person as the Court considers just.

10. The Act of 2005

10.1 This legislation was enacted, *inter alia*, to give effect to the State's international obligations in relation to a series of terrorism-related offences. Section 6 provides for a general definition of terrorist offences which fall within scope of the Act. Part 4 deals with a specific aspect of this, namely, financing terrorism. The offence of financing terrorism is defined in s. 13. Subsequent sections make provision, in a manner analogous to the Act of 1996, for granting interim, interlocutory and disposal orders. Those provisions mirror the corresponding provisions of the Act of 1996, particularly in relation to interlocutory and disposal orders. In relation to interim orders there are some differences, but an application *ex parte* to the High Court is required, there is provision for the Court including in the order such provisions, conditions and restrictions as it considers necessary and expedient, for notice to be given to the respondent and for applications to vary or discharge. It is provided that an interim order continues in force until the end of the period specified by the Court and then lapses, unless an application for an interlocutory order in respect of any of the funds concerned is brought during

that period. An interim order may be made for a maximum period not exceeding forty days. The nature of the order is specified as an order prohibiting the person from disposing or otherwise dealing with, or where appropriate, a specified part of, the funds or diminishing the value of the funds during the relevant period.

10.2 The Act of 2005 contains provision for the payment of compensation in a similar manner to s. 16 of the Act of 1996. Further, s. 20 applies some of the other provisions of the Act of 1996 to orders made under the Act of 2005, subject to modification, thus indicating that the Oireachtas saw fit in recent years to use the Act of 1996 as a model.

11. The interpretation of s. 31(8): conclusions

11.1 All of the sub-sections of s. 31 which precede subs. (8) focus on the creation and definition of an offence of money laundering, including defining the ingredients of the offence both in relation to *actus reus* and *mens rea* and stipulating an exception in respect of anything done by a person in connection with the enforcement of any law (subs. (5)), and on the imposition and the delimiting of the punishment for it. It has to be said that there is very little connection between subs. (8) and the preceding sections.

11.2 When one comes to subs. (8), viewing it from the perspective of a financial institution which comes within para. (b), such as the Bank in this case, the link with the previous provisions of s. 31 is that financial institution is informed by An Garda Síochána that property in its possession "is property referred to in this section". That links subs. (8) back to subs. (1), which creates the offence of money laundering in relation to "property [which is] or represents the proceeds of criminal conduct". Sub-section (7)(a)(v) provides that "property representing" the proceeds of crime includes "those proceeds in whole or in part directly or indirectly", envisaging the tracing element referred to earlier. Clearly that provision is intended to encompass Bank accounts which comprise a mixed fund of legitimate and illegitimate monies and also a running account where there is movement in and out. What constitutes "property referred to in this section" within the meaning of subs. (8) in a particular case, in my view, falls to be determined in accordance with the application of the provisions of s. 31 as a whole. I do not accept as correct the submission made on behalf of the plaintiff that, in determining whether money in an account "is property referred to in this section", the appropriate course is to apply the equitable principle known as the rule in Clayton's Case which, historically, has been applied to an active bank account to resolve competing claims of beneficiaries and innocent volunteers, whose funds are in a mixed fund in the account, on the basis of "first in, first out". The only evidence the Court has in relation to the monies in the two accounts in issue in this case is that, although he was not able to identify the provenance of various lodgments, Detective Superintendent Gallagher believed that the monies represented the proceeds of crime. For the purpose of the exercise on which I am now embarking, I am taking that evidence at face value.

11.3 When compared with the provisions of the Act of 1996 and the Act of 2005, subs. (8) of s. 31, which, on the evidence, was invoked in this case on the expectation that it would operate in the same manner as a freezing order obtained under those Acts, is silent as to its objective, vague as to its implementation and lacking in safeguards as regards the owner or person with rights over the property to which it relates to an extraordinary degree. It is also lacking in safeguards for the financial institution to which a direction is issued, in failing to afford it universal immunity from suit.

In simple terms, the expected outcome of An Garda Síochána conveying information to a financial institution in accordance with subs. (8) in relation to a particular account is that the account will be frozen indefinitely until the Bank is told otherwise by An Garda Síochána. That outcome, and the manner in which it is achieved, differs from provisions which govern the making of interim or interlocutory freezing orders under the Act of 1996 or the Act of 2005 in the following respects:

> (a) An application to court is not necessary. Therefore, there is no provision for an independent adjudicator to assess whether it is appropriate that the account should be frozen or not. There is no requirement to support the case for freezing the account by sworn testimony or indeed by any evidence.
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> (b) As regards the process embodied in para. (b) of subs. (8), which is involved in this case, all that is required is that An Garda Síochána inform the financial institution that the money in the account "is property referred to in this section". It is not required that a decision to initiate a process which freezes an account is only made at an appropriate rank in the force. It is not even stipulated that the information be conveyed in writing.
>
> (c) It is left to the recipient of the direction to determine what action must or must not be taken in relation to the account, although I would accept that it is implicit that a financial institution must not take action of the type referred to in paras. (a), (b) and (c) of subs. (1) quoted earlier. Neither is the objective in conveying the information to the financial institution which will give rise to the expected outcome clarified. For instance, it is not made clear that the objective is to facilitate the investigation of criminal activity, although again, it would be reasonable to infer that such is the case.
>
> (d) There is no requirement that the owner of the money in the account, the person who is going to be adversely affected by the outcome expected from the financial institution, be informed of the intention to freeze the account or that he be given any opportunity to answer the contention that the money in the account is property referred to in the section. Given that, having regard to the presumption of constitutionality, one must construe the provision on the basis that the Oireachtas intended the discretion thereby conferred to be conducted in accordance with the principles of constitutional justice, including the principle *audi alteram partem*, one is entitled to ask a number of questions. Who is responsible for giving the owner an opportunity to be heard? Is it the An Garda Síochána or is it the Bank? How and in what forum is the owner to be heard? Who is to determine whether he has made a case that operating the account does not constitute money laundering? How can it be ensured that he can get a fair hearing?
>
> (e) In other words, there is no prescribed framework within which the owner, if he is, or becomes, entitled to have the freezing of the account lifted, may obtain the equivalent of a variation or a discharging order.
>
> (f) There is no prescribed framework within which, if justice requires that the owner should be paid living or other expenses, that can be achieved. What is provided for on the face of the provision is an outcome which is expected to continue until it is reversed by a communication from An Garda Síochána. However, as Gilligan J. held in the Burns case, when construed with regard to principles of constitutional justice, the making of an open ended direction is not authorised.
>
> (g) If the owner suffers loss or damage in consequence of a direction which was improperly given, there is no provision for compensation. While expropriation of the monies in the account does not flow from the operation of subs. (8), it is not inconceivable that a person deprived of the money in the account for a certain period may suffer substantial damage. In this case, it is contended that the plaintiff's business collapsed as a result of the issuing of the July 2008 Direction.
>
> (h) While the financial institution is immune from criminal liability under s. 31, if it complies with a direction under subs.

(8), there is no provision that it is immune from civil action or proceeding at the suit of an owner who suffers loss and damage as a result of the effective freezing of the account.

11.4 The effect of the service of the July 2008 Direction to the Bank was that, in accordance with the expected outcome, the plaintiff's accounts were frozen and the plaintiff was prevented from accessing the monies in those accounts for the duration of the ongoing criminal investigation without being given any opportunity at the instigation of An Garda Síochána to challenge that outcome or to seek to alleviate its effect before an independent adjudicator. I have no doubt that what has happened constitutes a breach of the plaintiff's entitlement to constitutional justice. The question is whether that is attributable to the Bureau failing to exercise its power under s. 31(8) in accordance with the Act of 1994 as properly interpreted in a Constitution consistent manner or, alternatively, whether s. 31(8) is invalid having regard to the provisions of the Constitution.

12. Breach of the Act of 1994 or Act of 1994 constitutionally invalid?

12.1 Of the authorities to which the Court was referred on the issue of the constitutionality or otherwise of s. 31(8), in my view, the most pertinent to the facts of this case is the decision of the Supreme Court in D.K. v. Crowley. In that case, the Supreme Court held that s. 4(3) of the Domestic Violence Act 1996 was invalid having regard to the provisions of the Constitution in that the procedures prescribed, in failing to prescribe a fixed period of relatively short duration during which an interim barring order made *ex parte* was to continue in force, deprived the respondents to such applications of the protection of the principle of *audi alteram partem* in a manner and to an extent which was disproportionate, unreasonable and unnecessary. In delivering the judgment of the Supreme Court, Keane C.J. noted that the impugned provisions enjoyed the benefit of the presumption of constitutionality and that the onus was on the applicant to establish that they were constitutionally invalid. He also noted the double construction rule and the requirement that the Court give effect to the principle stated in the *East Donegal* case, that it is to be presumed that the Oireachtas intended the discretion provided for in an enactment to be exercised in accordance with the principles of constitutional justice. He also referred to the fact that, while the Oireachtas in upholding certain constitutional rights, in that case the rights of spouses and dependent children to be protected against physical violence, is entitled to abridge the constitutional right to due process of other persons, it can only do so to a proportionate extent, i.e. no more than is reasonably required in order to secure that the constitutional right in question is protected and vindicated, citing *Heaney v. Ireland* [1996] 1 I.R. 580. He emphasised that, in reaching a decision as to whether that constitutional balance had been achieved in the legislation under consideration, it was of paramount importance to bear in mind the consequences of the order made in the District Court, which he outlined. He continued (at p. 758):

> "The applicant, accordingly, is unarguably deprived of the protection of one of the two central maxims of natural justice – *audi alteram partem* – in proceedings which may have profoundly serious consequences for him in his personal and family life. The issue in this case is not as to whether the Oireachtas was entitled to abridge, even in a relatively drastic fashion, the right of the applicant to be heard, in order to protect spouses and dependent children from domestic violence. That the legislature was entitled to effect such abridgement of the rights of individual citizens in order to deal with the social evil of domestic violence is beyond dispute. The question for resolution in this case is as to whether the manner in which the abridgment of the right to be heard has been affected is proportionate in the sense already indicated."

12.2 In considering that question, Keane C.J. stated (at p. 760) that it was not the existence of a jurisdiction to grant interim barring orders on an *ex parte* basis which created a serious constitutional difficulty. It was the manner in which the legislation had provided for the granting of such orders. He pointed out that, if a model were needed, it was readily to be found in s. 17 of the Childcare Act 1991, which enabled the District Court on the application of a Health Board to make a care order in respect of a child without notice to the parent where this was required in the interests of justice or the welfare of the child. However, such an order, unless the Health Board and the parent having custody consent, must not be for a period exceeding eight days.

12.3 A distinctive feature of D.K. v. Crowley was that the Supreme Court held that it could not construe the impugned provision in accordance with the *East Donegal* principle on the basis that it must be presumed that the District Court, in dealing with such applications, would ensure that the requirements of constitutional justice would be observed. In that case, the statute conferring jurisdiction on the District Court expressly provided that the interim order was to continue until the determination by the Court of the application for a barring order, so that the District Court had no jurisdiction to impose a shorter time limit at the expiration of which the interim order was to expire. In that respect, s. 31(8) is, to some extent, distinguishable, in that Gilligan J. construed s. 31(8) in the *Burns* case on the basis that the issuing member of the Bureau was statutorily bound to reverse the direction made thereunder once the criminal investigation ended. However, a criminal investigation by its nature is indefinite in duration, with the consequence that, as happened in this case, where a direction under s. 31(8) is issued, the account to which it relates will be frozen for an indefinite period during which the account holder will be without redress unless he has the wherewithal to embark on judicial review proceedings or plenary proceedings seeking interlocutory relief in this Court.

12.4 The absence of a limitation on the apparent indefinite duration of a direction under s. 31(8) is one only of a range of protections of the constitutional rights of the owner of an account in respect of which what is effectively a freezing order is made where such a direction is given, which are to be found in what might be regarded as the model for the process by which a direction which operates as a freezing order is given without infringing constitutional rights – the process provided for in the Act of 1996 outlined earlier – but which are not to be found in s. 31(8). Counsel for the plaintiff submitted that this case is on all fours with *D.K. v. Crowley*, save that the context here is running a business, rather than running a home. While I do not accept that as a true analogy, I do believe that the basis on which the Supreme Court held that the impugned provision in the *D.K.* case was invalid having regard to the provisions of the Constitution indicates that the appropriate course for the Court to take in this case is to find that s. 31(8) is invalid having regard to the provisions of the Constitution, rather than to find that it is capable of a Constitution consistent construction. In my view, to read into s. 31(8) the existence of a procedural structure and of the safeguards which are necessary to ensure that, where a bank account is effectively frozen in aid of a criminal investigation into money laundering, the rights not only of the owner of the account but the rights of the financial institution, which has contractual obligations to the owner of the account, are constitutionally protected and vindicated would involve the Court actually legislating. That is because, while the Act of 1996 is available as a model, it may well be that the procedural structure provided for and all of the safeguards contained therein are not necessary in the context of the desired constitutionally permissible objective and the resulting outcome of the giving of the type of direction provided for in s. 31(8) in the context of a money laundering criminal investigation. It is for the legislature to determine those matters.

12.5 Accordingly, I conclude that s. 31(8) of the Act of 1994 is invalid having regard to the provisions of the Constitution because it infringes the plaintiff's right to fair procedures under Article 40.3 and its property rights under Article 40.3 and Article 43 of the Constitution.

12.6 That conclusion is largely redundant because since this case was heard, s. 31 in its entirety has been repealed by s. 4 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, which came into operation on 15th July, 2010 and introduced new legislative provisions in relation to directions, orders and authorisations relating to investigations. On the authority of the decision

of the Supreme Court in *Blehein v. Minister for Health* [2009] 1 I.R. 275, even though the issue is now historic, it remains relevant.

13. The remedies to which the plaintiff is entitled

13.1 The plaintiff, whom I have found has *locus standi* to challenge the validity of s. 31(8) having regard to the provisions of the Constitution, is entitled to a declaration that s. 31(8) is invalid. It is also entitled to a declaration that the July 2008 Direction is invalid because the Bureau had not statutory authority to make it.

13.2 In reaching those conclusions I have not taken account of the submission made on behalf of the State parties, which counsel for the plaintiff accepted was correct, that a Court will not enforce an unlawful contract, which I accept is a correct statement of the law. In *Hortensius Ltd. v. Bishop* [1989] ILRM 294 Costello J. stated (at p. 300):

> "At common law the enforcement of certain contracts was regarded as being against public policy and such contracts were termed 'illegal'. Illegal contracts included those which tend to injure the public service, or pervert the course of justice, or abuse the legal process, or are contrary to good morals, or restrain trade. Also included are those whose objects are clearly illegal, so that the contract cannot be performed without a breach of the criminal law is unenforceable at common law."

If the monies in the accounts in the Ashbourne branch of the Bank in the name of the plaintiff are, or represent, the proceeds of criminal conduct, then it would have been an offence on the part of the Bank under s. 31(1) of the Act of 1994 to operate the account after it had become aware that the monies were the proceeds of criminal conduct, irrespective of the existence of the July 2008 Direction. It seems to me that the significance of that is that, if it is the case that the monies are, or represent, the proceeds of criminal conduct, then the plaintiff cannot establish any loss or damage as a result of the existence of the direction. Therefore, if such is the case, the plaintiff cannot establish any entitlement to an award of damages. That is so irrespective of whether it would be appropriate to make an award of damages on the basis that s. 31(8) has been found to be unconstitutional if it were otherwise and the plaintiff could establish loss. However, it is important to emphasise that that issue was not addressed in any depth by the parties, although in the plaintiff's written submissions there is a reference to those who suffer discrete losses on account of the application of unconstitutional legislation being entitled to be compensated, citing *Blascaod Mór Teo v. Commissioners of Public Works in Ireland (No. 4)* [2000] 3 I.R. 565.

13.3 However, the basis on which counsel for the State parties submitted that, irrespective of s. 31(8) and the existence of the July 2008 Direction, the plaintiff had not established any loss or damage on account of the actions of the Bank was that the Court must find that the monies in the accounts in issue are the proceeds of crime on the basis of the evidence of Detective Superintendent Gallagher, which was not contradicted by Mr. Monaghan, or even asserted to be untrue. The problem with that argument, as I see it, is that these plenary proceedings have been necessitated by the fact that, under a statutory provision which I have found to be unconstitutional, the plaintiff's accounts were effectively frozen for the duration of a criminal investigation, in circumstances in which the plaintiff had no alternative course of action, in order to protect its rights, to prosecuting these plenary proceedings. When the proceedings were heard, the criminal investigation was ongoing and it was in that context that Mr. Monaghan did not address the issue of whether the monies in the accounts were the proceeds of crime. As I have recorded, very properly the matter was not put to him in cross-examination on the basis that he could claim that he was not obliged to incriminate the plaintiff or himself, as an officer of the plaintiff. It seems to me that it would be entirely unjust to form a view as to whether the plaintiff could have succeeded in an action against the Bank or against the State parties for the loss it incurred by reason of it being unable to access the monies in the accounts on the ground that those monies constitute, or represent, the proceeds of crime while the criminal investigation is ongoing. Therefore, I consider that it is not possible at this juncture to determine whether the contention of the State parties that, on the ground of public policy, the plaintiff does not have a claim in damages is correct.

13.4 Subject to hearing further submissions, it may be that the appropriate course is to adjourn the issue of damages until the criminal investigation and any criminal proceedings which arise therefrom have been finalised. In the meantime, the declarations referred to in paragraph 13.1 will be made.