Approved
No further redactions required

THE COURT OF APPEAL

CIVIL

Appeal Numbers: 2021/54, 2022/63, 2022/84

Neutral Citation [2024] IECA 95

Collins J.

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

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964

(AS AMENDED)

AND IN THE MATTER OF THE CHILDREN

AND FAMILY RELATIONSHIPS ACT, 2015

AND IN THE MATTER OF [STATED NAMES], INFANTS

BETWEEN

B

Applicant

AND

A

Respondent

JUDGMENT of Mr. Justice Maurice Collins delivered on 26 April 2024

1. I agree with the judgment of Allen J and with the orders that he proposes. I wish to add some observations of my own as to the effect of *McLaughlin v Aviva Insurance (Europe) plc* [2011] IESC 42, [2012] 1 ILRM 487. For that purpose, I gratefully adopt the clear statement of the facts and of the complicated procedural history set out by Allen J in his judgment.

2. The family law proceedings which have given rise to the dispute the subject of this appeal have been compromised by the parties and, accordingly, the issue of disclosure

is no longer a live one for the parties. Even so, I have no hesitation in agreeing with Allen J that the Court should proceed to determine the appeal. It has been fully argued. The issues raised are of continuing importance both for the Commissioner and more generally. There is a judgment of the High Court on those issues. Issues also arise in relation to costs. In these circumstances, the case for deciding the appeal is compelling: see *Blythe v Commissioner of An Garda Síochána* [2023] IECA 255, at paras 41-42, citing the earlier decision of this Court in *Kozinceva v Minister for Social Protection* [2020] IECA 7 as well as the decision of the Supreme Court in *Odum v Minister for Justice Equality and Law Reform* [2023] IESC 3, [2023] 2 ILRM 164.

3. On the Commissioner's case, *McLaughlin* is authority for the existence of an *absolute* public interest privilege from disclosure, at least for the duration of any criminal investigation undertaken by the Gardaí. This was characterised by Counsel for the Commissioner as a "*time-limited*" privilege or immunity but, as Allen J observes, a Garda investigation is not subject to any *a priori* time limit and a lengthy period – in some instances measurable in years rather than months – may elapse before a file is sent to the DPP and a prosecution decision is taken. Investigations may remain open, without a file being sent to the DPP, in the hope that further evidence will turn up. In these circumstances, the suggestion that the privilege contended for the Commissioner is "*time-limited"* is apt to mislead. In any event, I do not agree that *McLaughlin* is authority for the existence of any *absolute* public interest privilege from disclosure, time-limited or otherwise.

The Pre-McLaughlin Authorities

4. The starting point is to look at the pre-*McLaughlin* authorities. The decision of the Supreme Court in *Murphy v Dublin Corporation* [1972] IR 215 represented a significant break from prior jurisprudence and, in particular, marked the emphatic rejection of the approach in cases such as *Duncan v Cammell Laird & Co. Ltd* [1942] AC 624 where the English courts treated claims of Crown privilege as conclusive. Giving the sole judgment, Walsh J (Ó Dálaigh CJ and Budd, Fitzgerald and McLoughlin JJ agreeing) framed the issue as being whether "*in a civil action the executive organ of government may by its own judgment withhold relevant evidence from the organ of government charged with the administration of justice and engaged in the determination of the rights of the litigants*" (at 233). Having regard to the fact that under the Constitution the administration of justice was committed solely to the judiciary, Walsh J considered that it was "*impossible for the judicial power in the proper exercise of its functions to permit any other body or power to decide for it whether or not a document will be disclosed or produced. In the last resort the decision lies with the courts so long as they have seisin of the case*" (at 234). Some authority had to decide "*which course is calculated to do the least injury to the public interest*" *and it was* "*self evident that this is a matter which falls into the sphere of the judicial power for determination*" (at 235).

5. The approach taken in *Murphy* was unanimously affirmed by a full Supreme Court in *Ambiorix Ltd v Minister for the Environment (No 1*) [1992] 1 IR 277. Finlay CJ (Hederman, O' Flaherty and Egan JJ agreeing) usefully summarised the principles laid

down in *Murphy*, stressing that the power to compel the production of evidence (which include a power to compel the production of documents) was an inherent part of the judicial power and part of the "*ultimate safeguard of justice in the State*" and stating emphatically that, where there were conflicting public interests engaged by the potential production of evidence or documents, "*it is the judicial power which will decide which public interest shall prevail*" (at 283). He went on to identify certain "*practical conclusions*" that applied to claims of executive/public interest privilege, as follows:

> *"(a) The Executive cannot prevent the judicial power from examining documents which are relevant to an issue in a civil trial for the purpose of deciding whether they must be produced.*
>
> *(b) There is no obligation on the judicial power to examine any particular document before deciding that it is exempt from production, and it can and will in many instances uphold a claim of privilege in respect of a document merely on the basis of a description of its nature and contents which it (the judicial power) accepts.*
>
> *(c) There cannot, accordingly, be a generally applicable class or category of documents exempted from production by reason of the rank in the public service of the person creating them, or of the position of the individual or body intended to use them"* (at 283-284).

6. Writing separately in *Ambiorix*, McCarthy J also rejected the invitation to depart from *Murphy*. To do so, in his view, "*would be to lessen or impair judicial sovereignty in the administration of justice*." He rejected the challenge to Murphy and, in particular, rejected "*the claim that documents may be withheld from production simply because they belong to a particular class*" (at 289).

7. The continued vitality of *Murphy* and *Ambiorix* has been affirmed by the Supreme Court in *McDonald v Raidió Teilifís Éireann* [2001] 1 IR 355 and *Keating v Raidió Teilifís Éireann* [2013] IESC 22, [2013] 2 ILRM 145. In *Keating*, McKechnie J (Clarke and McMenamin JJ agreeing) observed that it could be seen from the authorities that, as a result of the constitutional position of the courts, "*which is mandated by the separation of powers and which permits of no exception, it is for the courts alone to resolve, in a justiciable setting, any conflict or tension which may arise between the public interest in the administration of justice on the one hand, and the public interest, howsoever, articulated, which is advanced as a ground for non-disclosure of documents on the other. That being so, neither the Executive nor any other person can arrogate to themselves the power to make a decision such as the one in issue in this appeal"* (at 158-159; my emphasis).

8. Of course – and unsurprisingly – courts have readily accepted that "*the public interest in the prevention and prosecution of crime must be put in the scales*" against disclosure: *Breathnach v Ireland (No 3)* [1993] 2 IR 458, per Keane J (as he then was) at 469. As Keane J noted, information supplied in confidence to the Gardaí should not in general be disclosed, at least where the innocence of an accused person is not at stake. As he

went on to observe, there may be material the disclosure of which would be of assistance to criminals by revealing methods of detection or combatting crime (*ibid*). In such cases, or where the production of documents would involve the disclosure of garda sources, the balance will usually weigh decisively against disclosure. But the decision is still one for the court to make and, in making that decision, the court may – and perhaps in most cases will – inspect the documents in dispute. That is clear from *Breathnach* itself, in which Keane J dismissed the suggestion that a court could be prevented from inspecting documents which came into being for the purpose of criminal proceedings by the making of a claim of public interest as "*wholly at odds with the constitutional position of the courts*" as laid down in *Murphy* and *Ambiorix* (at 469). In *Breathnach*, the High Court examined the documents and directed the disclosure of some, though not all, of the documents in dispute.

9. *Breathnach* was approved and applied by the Supreme Court in *McDonald v Raidió Teilifís Éireann* where the plaintiff in a defamation action sought discovery from An Garda Síochána of material relating to its investigation of a murder in which he was a suspect (he was suing RTÉ arising from a broadcast which, he alleged, indicated that he had committed the murder) as well as a file dealing with his earlier arrest on suspicion of a firearms offence. The murder investigation was still open and the Gardaí asserted public interest privilege in opposition to the non-party discovery application. The High Court and, on appeal, the Supreme Court inspected the documents at issue. Having done so, the Supreme Court directed the production of a number of documents, while noting that the murder investigation was still live and observing that "*it would be injurious to the public interest to bring some of the relevant documents into the public*

arena through the means of discovery" (per McGuinness J, Murphy and Fennelly JJ agreeing, at 376). For present purposes, the key aspect of *McDonald v Raidió Teilifís Éireann* is that the court reviewed the documents and determined whether and to what extent the disputed documents should be disclosed.

10. *Breathnach* was also cited extensively in *Livingstone v Minister for Justice* (Unreported, High Court, Roderick Murphy J, 2 April 2004). The plaintiffs sought damages arising from the manner in which the Gardaí had investigated the murder of the first plaintiff's wife, in the course of which investigation the first plaintiff had himself been arrested as a suspect. The plaintiffs sought discovery, including discovery of Garda files relating to the investigation. The investigation remained open. The High Court directed discovery of some of the categories sought but refused to direct discovery of the file sent to the DPP and communications between the Gardaí and the DPP: given that the investigation remained open, disclosure of that material could hinder the investigation or any subsequent prosecution and would be detrimental to the public interest (at 19).

The Decision in McLaughlin

11. *McLaughlin* involved a claim by an insured against his insurer challenging its refusal to indemnify him arising from a fire at a bar and restaurant owned by him in Donegal. The insurer refused indemnity on the basis that the insured was responsible for the fire and the claim was fraudulent. The insurer had obtained certain CCTV recordings from the premises and had also obtained expert forensic reports all of which it had provided

to the Gardaí. The insured sought discovery of that material from the Commissioner of An Garda Síochána and the Commissioner brought a counter-motion for an order permitting them to "*refuse consent to discovery … on the basis that disclosure of [such material] is privileged pursuant to Public Interest/Investigative Privilege*" (at page 489). The High Court (Kelly J) disallowed the claim of privilege but the Supreme Court (Hardiman J dissenting) allowed the Commissioner's appeal.

12. In her judgment, Denham CJ made it clear that the decision as to whether evidence was privileged or not is a matter for the courts and may involve different aspects of the public interest (at 492, para 11). There was a public interest in criminal investigations carried out by An Garda Síochána and she agreed with the observations of Lord Reid in *Conway v Rimmer* [1968] AC 910, at 953-954 to the effect that "*in general documents material to an ongoing criminal investigation by An Garda Síochána should not be required to be disclosed in civil proceedings*", adding that after the verdict in a criminal trial or after it was decided not to prosecute, there was no need for any privilege. The fact that such privilege applied only for a limited period was, in her view, an important part of the analysis (at 492-493, paras 12-14). In her view, the fact that the material had not been created by the Gardaí did not prevent the operation of privilege "*on the basis of public interest and investigative privilege*" as they were a material part of a criminal investigation (at 493, paras 20-21). On occasion, she continued, when considering a privileged document the court had to balance interests but "*the issue of balancing interests does not arise in this case*" (at 494, para 22). She emphasised that the case was being decided "*upon its facts and circumstances*" and that the issues arising might arise for further consideration in another case, "*where there would be*

more elaborate argument and scrutiny than was available in both the High Court and in this court in this case" (at 494, para 24).

13. The other judge in the majority, O' Donnell J (as he then was) (*McLaughlin* was heard by a panel of three) made it clear that he did not regard the case as raising any novel issue or see the decision as marking any "*departure in the law*" (at page 504, para 2). The Commissioner was not seeking a stay on the trial of the insurance claim, he merely sought to maintain a public interest immunity; which it was arguably his duty to assert. That immunity was limited in time and as a result the parties had a choice whether to proceed without the material or to wait until the public issue immunity fell away either by the disclosure of the material in the criminal proceedings or by a decision not to prosecute (at 505-506, para 5). Significantly, O' Donnell J went on to observe that he did not consider the privilege claim as a claim for class privilege. The claim was, he said, made in respect of material of "*particular significance … to an ongoing investigation*", adding that the court was free to inspect the items if it considered it appropriate or necessary to do so and was not bound to accept the Commissioner's claim (at 506, para 6).

14. Hardiman J dissented. He emphasised that the onus rested on the Commissioner (at 501). His substantial objection was one of priority and timing. In Hardiman J's view, there was no rule of law whereby a civil case must yield in priority even to a pending criminal case, less still any rule to the effect that a pending civil case must yield to a "*purely hypothetical criminal case*" that might not ever come to pass, citing in that context *Dillon v Dunnes Stores* [1966] IR 397 (at 501-502). He attached particular

importance to the fact that the material in dispute had not been generated by An Garda Síochána in the course of a criminal investigation undertaken by it but had been provided voluntarily to it by one of the parties (at 502-503). He also gave weight to the fact that the civil proceedings were at an advanced stage and that no criminal proceedings had even been initiated and no estimate had been given as to when a decision whether or not to initiate such proceedings might be taken (at 504).

15. If, as the Commissioner contends, the effect of *McLaughlin* is that an absolute (though supposedly "*time-limited*") "*investigative privilege*" applies to material relating to ongoing criminal investigations by An Garda Síochána, such that a court is not entitled to inspect such material, that would represent a very significant, indeed radical, departure from *Murphy* and *Ambiorix*. Both of those decisions were decisions of a full Supreme Court and it is inherently improbable that a (divided) panel of three intended to recast the law in this area. But, in fact, O' Donnell J makes it clear in his judgment that he did not regard the judgment of Denham CJ as marking any departure in the law. He also made it clear that the court was free to inspect the documents and reach its own view on the claim of privilege (which, he emphasised, was *not* a claim for class privilege) which is wholly at odds with the Commissioner's theory of the effect of *McLaughlin*.

16. In her judgment, Denham CJ emphasised that the appeal was being decided on its particular facts and circumstances. It is evident that, on those facts, the majority considered that the claim of privilege was so strong that no real question of balancing interest actually arose. On the one hand, the material was of "*particular significance*"

to an ongoing criminal investigation and, on the other, the prejudice that the plaintiff would suffer in the event that the claim of privilege was upheld was limited. That, in my view, was the rationale of the decision in *McLaughlin* and it is not authority for any broader proposition such as that advanced before us by the Commissioner.

The Post-McLaughlin Decisions

17. The post-*McLaughlin* decisions, such as *Keating v RTÉ, Nic Gibb v Minister for Justice* [2013] IEHC 238, *AP v Minister for Justice* [2014] IEHC 17, *McGuinness v Commissioner of An Garda Síochána* [2016] IEHC 549, [2016] IEHC 591 (upheld by this Court in [2017] IECA 330) and *AP v Minister for Justice* [2019] IESC 47, [2019] 3 IR 317, are consistent, and consistent only, with the proposition that, where a claim of public interest privilege is made, the claim falls for determination by the court, that the court may inspect the material for that purpose and that it is a matter for the court to balance the conflicting interests for and against disclosure. As Clarke CJ observed in *AP v Minister for Justice*:

> *"The position is, therefore, well settled. The ultimate decision in Ireland on whether legitimate State interests outweigh the requirement to produce documents in the context of court proceedings is one which must be made by a court rather than by the State authority itself. Furthermore, it is clear from the case law, as per Walsh J. in Murphy at pp. 234-235 which was approved by Finlay C.J. in Ambiorix at pp. 283-284 and more recently restated by McKechnie J. in Keating v. Radio Telefís Éireann and Ors. [2013] IESC 22 at*

para 36, that, if it is considered necessary, the court may itself look at the documents concerned to enable the Court to make an appropriate assessment" (at 331, para 34).

18. I therefore join with Allen J in rejecting the core contention advanced by the Commissioner in this appeal, namely that the High Court was required to accept the claim of public interest privilege here and was not entitled to inspect the disputed recordings in order to assess and determine firstly whether they were privileged, and secondly, if they were, whether they should nonetheless be disclosed. As the authorities make clear, there may be cases where a court can properly determine a claim of privilege and any consequent issue as to whether material should be disclosed based only on a description of the material and without inspecting it: see eg per Finlay CJ in *Ambiorix* at 284. Clearly, however, the High Court Judge did not consider this to be such a case and, in those circumstances, he was entirely within his rights to listen to the recordings.

The High Court Judge's Assessment of the Material

19. As the authorities also consistently emphasise, it is not the case that there is *"any priority or preference for the production of evidence over other public interests"*: *Ambiorix*, at 283. In a case such as this, the court is required to balance the public interest in the proper administration of justice against the public interest in the prevention and prosecution of crime and it is only where the first public interest

outweighs the second that disclosure should be ordered: per Keane J in *Breathnach*, at 469.

20. That assessment is necessarily highly fact-sensitive. The more important the material appears to be to the proper determination of the civil proceedings, the greater the case for disclosure (and *vice versa*): see *Breathnach* at 469. as well as *Gormley v Ireland* [1993] 2 IR 75, at 78 & 80 (where the fact that documents might be "*of some value*" in the conduct of the plaintiff's case but were not "*fundamental to it*" was a significant factor in the decision of the High Court (Murphy J) not to direct disclosure of "*highly confidential material*" the disclosure of which would be "*significantly detrimental to the public interest*"). It may not be enough to show only that the material at issue is "*relevant*" in the expansive *Peruvian Guano* sense.[1] The nature of the civil proceedings and the interests at stake will clearly be relevant also. That was a very significant aspect of the proceedings here, involving as they did important issues concerning the safety and welfare of minor children.

21. Conversely, the prejudice likely to arise from the disclosure of certain types of information – such as the identity of confidential Garda sources, confidential intelligence, information that would reveal methods of investigation and so on – is such that the balance will almost always weigh against disclosure (though it may be possible to direct the disclosure of redacted material or, as was discussed by the Supreme Court

[1] If that is so where *private* interests such as confidentiality/privacy are relied on as a basis for objecting to production/inspection of documents on discovery – as to which see *AB v CHI* [2022] IECA 211, at para 41 and following – the position must be *a fortiori* where there is a tangible *public* interest weighing against disclosure.

in *AP*, it may be possible for the "*gist*" of the privileged material to be communicated in a way which does not undermine the privilege). But, as this appeal illustrates, not all applications for discovery of investigative material necessarily involve sensitive material of that kind.

22. In deciding whether or not the balance was in favour of the disclosure of the recordings, the High Court Judge was correct to give significant weight to the fact that the proceedings involved the interests of minor children and, in that context, to have regard to section 3 of the Guardianship of Infants Act 1964 (as amended). Whether in the context of litigation between parents that is governed by the 1964 Act, or public law proceedings between the State and a parent or parents, such as care proceedings under the Child Care Act 1991 (as amended) (section 24 of which requires that, in proceedings under it, the court shall regard the best interests of the child as the paramount consideration), our justice system attaches a very high value to the expeditious and informed determination of issues regarding the safety and welfare of minor children. That is underpinned by Article 42A.4 of the Constitution. The Judge rightly characterised that as a "*key public interest*" weighing in favour of disclosure. Proceedings involving issues of child welfare differ significantly from the commercial proceedings in *McLaughlin*, important as those proceedings no doubt were to the parties involved.

23. The Judge accepted that the public interest in the investigation of crime was in principle a "*key public interest*" also. But the Judge was entitled to conclude that, in the circumstances here, that interest must yield to the interest in ensuring that, in making

potentially far-reaching decisions affecting the safety, welfare and care of the minor children involved, the High Court (and the section 32 assessor) should have access to all relevant material. That is particularly so in light of the limited and somewhat speculative nature of the Commissioner's objection to disclosure which, at its height, was that it would or might deprive the Gardaí of a potential forensic advantage in the event that Mr A was prosecuted.[2] No question of the disclosure of confidential Garda intelligence or confidential information relating to methods of crime detection or investigation arose here.

Concluding Observations

24. The Commissioner's central contention – namely that *McLaughlin* gives rise to an absolute (if supposedly "*time-limited*") investigative privilege that precludes a court from directing disclosure of, or even inspecting, materials relating to an ongoing Garda investigation – is not well-founded. The law undoubtedly recognises an important public interest in the effective investigation and prosecution of crime. But a claim of public interest privilege made on that basis is assessed in the same way as any other such claim: it falls for determination by the court, the court may inspect the material in dispute for that purpose and it is a matter for the court to balance the conflicting interests for and against disclosure. The invocation of so-called "*investigative privilege*" does not have the effect of foreclosing that constitutionally mandated process or dictating its outcome.

[2] Affidavit of Brian Farrell, at para 13.

25. The Commissioner is not to be criticised for asserting public interest privilege where that appears to be appropriate. But this appeal, as well as the appeal in *Child and Family Agency v AP* which was heard on the same day and in which the Court also gives judgment today ([2024] IECA 94), suggests that the approach that has been taken by An Garda Síochána to the issue of privilege is founded on a misunderstanding of the law and needs to be reconsidered. As I have said, our justice system attaches a very high value to the expeditious and informed determination of issues regarding the safety and welfare of minor children. That is true of guardianship, custody and/or access disputes in the High Court (or in the Circuit Family Court) as it is true of care proceedings brought in the District Court pursuant to the 1991 Act. Decisions in such proceedings are enormously consequential, for the children involved and for their parents, guardians and other family members. Quite apart from the *private* interests of those involved in and/or affected by such proceedings, the *public* interest is also profoundly engaged. It is an unfortunate fact that the same circumstances that give rise to contested applications under the 1964 Act and/or contested care proceedings under the 1991 Act also frequently give rise to complaints of criminal conduct and subsequent Garda investigations. That is illustrated by this appeal and by the appeal in *Child and Family Agency v AP* (arising from care proceedings in the District Court). As these appeals also illustrate, applications for the production/disclosure of material in the hands of An Garda Síochána are often made in such proceedings.

26. Where, as here, the application is opposed and/or where a decision to direct disclosure is appealed, the parties – and the court – are left facing an unattractive dilemma. They can elect to proceed without the disputed material, which may result in an important

decision being made in the absence of significant information. Of course, courts often have to proceed to make decisions based on imperfect and/or incomplete information. Witnesses die or are unavailable. Documentary records may be lost. But the position appears to be rather different where the information is available but where, because of an unresolved dispute as to whether it should be disclosed, the parties or the court are driven to proceed without it. On the other hand, the court and the parties may decide to await the conclusion of the Garda investigation. But, as Allen J observes, that may involve a significant delay, delay that is fundamentally inconsistent with the imperative to resolve disputes relating to the care of children expeditiously. The delayed resolution of such proceedings is certainly not in the best interests of the children involved.

27. Of course, there may be instances in which the Commissioner reasonably considers that disclosure would *materially* prejudice an ongoing Garda investigation, such that a claim of privilege must be made. But I hope that I will be forgiven for suggesting that the Commissioner might consider taking a more pragmatic approach going forward than the rather doctrinaire approach adopted here, one that avoids reflexive or routine claims of privilege, that distinguishes appropriately between the different categories of material that the Gardaí hold as part of a criminal investigation and that recognises the significant interest favouring disclosure in proceedings involving the safety and welfare of children. It is also important in this context to recall that courts have a number of tools available to them to regulate and control disclosure, such as by permitting the redaction of material and imposing restrictions on the circulation and copying of disclosed material. Courts for their part must be careful not to indulge speculative applications for discovery/disclosure by litigants and seek to ensure that only material

of real importance to the resolution of child care proceedings should be directed to be disclosed by agencies such as An Garda Síochána. In that way, it may be possible to avoid, or least reduce the incidence of, disputes such as that before the Court here.

28. For these reasons, and for the further reasons set out in the judgment of Allen J, I would dismiss the Commissioner's appeals.

Whelan J and Allen J have indicated their agreement with this judgment.