

THE HIGH COURT

[2005 No. 2898P]

BETWEEN

ROBERT BURNS

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND, COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Gilligan J. delivered on the 4th day of May, 2007.

1. The plaintiff in these proceedings is a citizen of the United States of America who faces charges pursuant to a grand jury indictment as handed down in the Northern District of West Virginia on 7th September 2001 relating to matters involving fraud and money laundering. Prior to the indictment being handed down the plaintiff left the United States of America in June, 2001, settling in Ireland. Subsequent to the indictment, a warrant was issued for the arrest of the plaintiff and having been tracked to Ireland, he was arrested on 14th January, 2002, pursuant to a United States extradition warrant. He was detained until December, 2004, while the extradition request was litigated before the High and Supreme Courts with the plaintiff ultimately successfully contesting the extradition warrant. Three co-defendants who remained in America were subsequently convicted on 5th February, 2003, and sentenced to terms of imprisonment. The plaintiff since the judgment of the Supreme Court has married an EU national, Marta Natonieweska, and of that union there is an Irish born child. The plaintiff now has a residency permit, is entitled to work within the State and it is accepted that there is no issue arising in relation to the plaintiff's immigration status.

2. There is agreement on certain basic background facts which are;

1. On 10th /11th July, 2005, the plaintiff and Marta Natonieweska went to the Bank of Ireland, Athlone and sought to lodge to Ms Natonieweska's account a cheque drawn by Mony Life of America in the amount of \$95,890.07 payable to the plaintiff. The Bank accepted the cheque for clearing.
2. On 5th August, the proceeds of the cheque were remitted from the US bank to a bank in the United States on behalf of the Bank of Ireland.
3. On several occasions thereafter the plaintiff was told by the Bank that the proceeds of the cheque had not been received in Athlone and on 18th August, 2005, his solicitor was similarly informed by the Bank.
4. On 19th August, Mr. Brophy, the plaintiff's solicitor threatened legal proceedings.
5. On 19th August, the proceeds of the cheque (\$95,890.07) were received in Athlone and lodged to a suspense account. On 22nd August those proceeds were transferred to the Dún Laoghaire branch of the Bank where the plaintiff had opened a current account on 15th August, 2005, and were received by Dún Laoghaire on 23rd August.
6. On 19th August Mr. Brophy was informed that the cheque had now been cleared and would be lodged to the plaintiff's current account in Dún Laoghaire on Monday, 22nd August. On 19th August, 2005, the Bank made a report to An Garda Síochána pursuant to section 57 of the Criminal Justice Act 1994. When the plaintiff went to Dún Laoghaire on 22nd August to withdraw the money the Bank refused to pay because the Bank said it had been directed by An Garda Síochána not to pay. In a letter dated 22nd August, 2005, addressed to the Bank from An Garda Síochána, (and received by the Bank on the same day and prior to the withdrawal request) Detective Garda Padden stated, inter alia, that it was his "preliminary view" that the money constituted property captured by s. 31(8) of the Criminal Justice Act, 1994 (as amended) and for the purposes of s. 31(8) of the Act of 1994 "direct[ed] that you do not deal in any way with the account ... without my specific consent until further notice." The sending and receipt of the letter are admitted.

3. Section 57 of the Criminal Justice Act 1994, provides that any person to whom or which s. 32 of the Act applies, including their direct employees and officers, (and in this case it is accepted that the section applies to the first named defendant) shall report to An Garda Síochána where they suspect that an offence under ss. 31 or 32 of the Act, in relation to the business of that person or body, has been or is being committed. Section 31 of the Act deals with money laundering, which is defined as concealing or disguising any property which, in whole or in part, directly or indirectly, represents the proceeds of drug trafficking or other criminal activity.

4. Pursuant to s. 57, the first named defendant reported to the gardaí their suspicion as regards the plaintiff's transaction in respect of the cheque for US \$95,890.07 which had been lodged into an account opened by the plaintiff in the Bank of Ireland, Dún Laoghaire, Co. Dublin branch.

5. There is no dispute in these proceedings but that the first named defendant was correct in submitting a s. 57 report to the gardaí as it was required to do because to fail to have done so could result in a person being guilty of an offence which carries a penalty of a fine and imprisonment.

6. Having received the s. 57 report, Detective Garda Padden [hereinafter referred to as The Detective Garda] of the Garda Bureau of Fraud Investigation issued a direction to the Bank of Ireland pursuant to s. 31 of the Criminal Justice Act 1994 as substituted by s. 21 of the Criminal Justice (Theft and Fraud Offences) Act 2001, specifically directing the first named defendants for the purposes of s. 31(8) not to deal in any way with the plaintiff's account without the Detective Garda's specific consent until further notice.

7. The direction from the gardaí also advised the first named defendant that there was protection under the relevant provision if the person in possession acted in accordance with the directions from An Garda Síochána.

8. It is not disputed in the circumstances of this case that the Garda authorities were entitled to issue the notice pursuant to s. 31(8) of the Criminal Justice Act 1994 as substituted by s. 21 of the Act of 2001.

9. Accordingly, in essence the plaintiff had received a cheque for US \$95,890.07 through a bank in the United States, lodged it in what were suspicious circumstances to an account in the Bank of Ireland, Dún Laoghaire, which in turn made a s. 57 report to the gardaí who in turn issued a direction pursuant to s. 38(1) to the bank not to deal in any way with the proceeds of the account and when the plaintiff sought payment out of the moneys from his account on 22nd August, 2005, the bank refused and three days later

on 25th August, 2005, the plaintiff commenced these proceedings against a background where the actual Garda directive of the 22nd August, 2005 remained in being.

10. Subsequently the United States authorities liaised with the relevant Irish authorities and on Tuesday 22nd November, 2005, the Criminal Division of the United States Department of Justice commenced proceedings pursuant to s. 46(6) of the Criminal Justice Act 1994 and in the matter of the regulations as made pursuant thereto and in the matter of the criminal proceedings pending before the courts of the United States of America against the plaintiff herein. These proceedings in effect were for the purpose of seeking a restraining order prohibiting the plaintiff and any person having notice of the making of the order from dealing with or diminishing the value of inter alia any moneys held in the plaintiff's bank account with the Bank of Ireland, Dún Laoghaire, which account contained the proceeds of the cheque in the sum of US \$95,890.07. The initial motion of counsel for the applicant being the Minister for Justice Equality and Law Reform, came before the President of the High Court on Tuesday 22nd day of November 2005, and an order was made that the plaintiff herein and any person having notice of the making of the order be restrained from disposing of or dealing with or diminishing the value of the moneys in the said bank account so that in effect, pending the hearing of the application seeking the restraining order pursuant to s. 24 of the Criminal Justice Act 1994 as inserted by s. 46(6) of the Criminal Justice Act, 1994 and regulations pursuant thereto, the relevant moneys were frozen. Separate applications were made to this Court and payment out, of reasonable expenses, has been made to the plaintiff pursuant to orders of this Court. The restraining order proceedings culminated in a judgment of this Court on 19th December 2006, where this court [Gilligan J.] declined to grant the order sought. No appeal has been taken against that decision and in those circumstances, the plaintiff's solicitors wrote on 19th December, 2006 to the Chief State Solicitor seeking in effect, the withdrawal of the direction as issued on 22nd day of August 2005 and to this letter the plaintiff's solicitors received no reply, with these proceedings coming on for hearing on the 30th and 31st January, 2007.

11. The Criminal Justice Act 1994 was amended by s. 21 of the Criminal Justice (Theft and Fraud Offences) Act 2001 by the substitution of the following section for s. 31 dealing with money laundering.

"31.—(1) 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 the intention of—

(i) concealing or disguising its true nature, source, location, disposition, movement or ownership or any rights with respect to it, or

(ii) assisting another person to avoid prosecution for the criminal conduct concerned, or

(iii) avoiding the making of a confiscation order or a confiscation co-operation order (within the meaning of section 46 of this Act) or frustrating its enforcement against that person or another person,

(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.

(2) A person guilty of money laundering is liable—

(a) on summary conviction, to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding 14 years or to both.

(3) Where a person—

(a) converts, transfers, handles or removes from the State any property which is or represents the proceeds of criminal conduct,

(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 it, in such circumstances that it is reasonable to conclude that the person—

(i) knew or believed that the property was or represented the proceeds of criminal conduct, or

(ii) was reckless as to whether it was or represented such proceeds, the person shall be taken to have so known or believed or to have been so reckless, unless the court or jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether the person so knew or believed or was so reckless.

(4) Where a person first referred to in subsection (1) of this section does an act referred to in paragraph (a) of that subsection in such circumstances that it is reasonable to conclude that the act was done with an intention specified in that paragraph, the person shall be taken to have done the act with that intention unless the court or jury, as the case may be, is satisfied having regard to all the evidence that there is a reasonable doubt as to whether the person did it with that intention.

(5) This section does not apply to a person in respect of anything done by the person in connection with the enforcement of any law.

(6) This Part shall apply whether the criminal conduct in question occurred before or after the commencement of this section and whether it was or is attributable to the person first mentioned in subsection (1) or another.

(7) (a) In this section—

(i) 'criminal conduct' means conduct which—

(I) constitutes an indictable offence, or

(II) where the conduct occurs outside the State, would constitute such an offence if it occurred within the State and also constitutes an offence under the law of the country or territorial unit in which it occurs, and includes participation in such conduct;

(ii) 'reckless' shall be construed in accordance with section 16(2) of the *Criminal Justice (Theft and Fraud Offences) Act, 2001*;

(iii) references to converting, transferring, handling or removing any property include references to the provision of any advice or assistance in relation to converting, transferring, handling or removing it;

(iv) references to believing that any property is or represents the proceeds of criminal conduct include references to thinking that the property was probably, or probably represented, such proceeds;

(v) 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.

(b) For the purposes of this section a person handles property if he or she, without a claim of right made in good faith—

(i) receives it, or

(ii) undertakes or assists in its retention, removal, disposal or realisation by or for the benefit of another person, or

(iii) arranges to do any of the things specified in subparagraph (i) or (ii).

(c) For the purposes of paragraph (a)(i)(II)—

(i) a document purporting to be signed by a lawyer practising in the state or territorial unit in which the criminal conduct concerned is alleged to have occurred and stating that such conduct is an offence under the law of that state or territorial unit, and

(ii) a document purporting to be a translation of a document mentioned in subparagraph (i) and to be certified as correct by a person appearing to be competent to so certify,

shall be admissible in any proceedings, without further proof, as evidence of the matters mentioned in those documents, unless the contrary is shown.

(8) Where—

(a) a report is made by a person or body to the Garda Síochána under section 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 this section,

the person or body shall not commit an offence under this section or section 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."

12. Further factual background information available indicates that there was reluctance by the plaintiff himself to open a bank account and against this background and the fact that the plaintiff's passport was reported to have been with the Irish authorities, the compliance officer with the Bank of Ireland took the view that it was prudent to submit a s. 57 report. It appears that the actual report itself was preceded by a phone call to the detective garda who then made enquiries of Special Agent James of the United States Internal Revenue Services in the Department of the Treasury. It was established at that point in time the plaintiff was the accused in relation to a major healthcare fraud in the United States. It was further clarified that the United States authorities had sought the extradition of the plaintiff but that his extradition proceedings had been successfully contested and the plaintiff had remained in Ireland. When speaking with Agent James, the Detective Garda was able to establish that there was a restraining order relating to the plaintiff's assets in the United States and elsewhere and following his conversation with Agent James, he had a suspicion that the funds that the plaintiff was attempting to cash in the Bank of Ireland were the proceeds of criminal conduct in the United States and in consequence of forming that view, the Detective Garda issued the direction subject to s. 31(8) of the Criminal Justice Act, to the Bank of Ireland. The Detective Garda confirmed in evidence that the purpose of the direction was for the Bank of Ireland not to transact on the account in question. During the following few days the Detective Garda became aware that these proceedings had been instituted in relation to this matter and other matters and subsequently, in November, 2005, the detective garda became aware of the application that was made by the Minister for Justice by way of a mutual assistance application in respect of the same moneys. The Detective Garda indicated that with the s. 31(8) directive in place and these High Court proceedings having been instituted, the garda authorities effectively took a step back in relation to the order itself.

13. The Detective Garda in evidence indicated that he had advised Agent James that he would be able to hold the money until the US proceedings got up and going here but also pointed out that the s. 31(8) direction was not something that could be left in place

indefinitely. The Detective Garda accepted that the ball in fact insofar as investigations were concerned, was at the feet of the United States authorities and all that Agent James could tell the Detective Garda was that the life insurance policy which had been cashed in, the proceeds of which were represented by the money in the Bank of Ireland account, was originally purchased at a time when it was suspected that the plaintiff was involved in the healthcare fraud and that Agent James had referred to the term of "co-mingling", by which he meant that he suspected that the funds were linked with legitimate funds as earned by the plaintiff.

14. On the 29th August, 2005, the US authorities issued a restraint order which included the funds in the Dún Laoghaire Bank Account. The Detective Garda accepted that the gardaí did not pursue the actual criminal activity alleged in the United States. The Detective Garda accepted that by 29th August, he was aware that the gardaí were not going to pursue a money laundering charge from the contact that had been had with Agent James in the United States and when asked by Dr. Forde, counsel for the plaintiff, why the direction of the 22nd August, 2005 was not withdrawn at that stage, the Detective Garda indicated that it was because of these High Court proceedings having been instituted. That is the only explanation that the Detective Garda adduces as to why the direction of the 22nd August, 2005 was not withdrawn around the end of August, 2005 when he knew that there was not going to be any prosecution of the plaintiff for money laundering. The Detective Garda accepted that if these High Court proceedings had not been commenced in August, 2005, the direction would have been withdrawn. The Detective Garda accepted in evidence that you could not issue a direction and leave it there forever.

15. The Detective Garda discussed the issuing of the initial directive with his superior officers and liaised with them at all times as apparently this was the first time he had ever actually used the directive. The Detective Garda was still of the view that the funds in the account the subject matter of the direction are the proceeds of criminal conduct in the United States co-mingled with legitimate funds and simply because a prosecution has never been taken in this jurisdiction, his view on this matter has not changed.

16. The plaintiff claims that if, s. 31(8) grants the authority that the Detective Garda asserted, it is both repugnant to the Constitution and incompatible with the European Convention on Human Rights on the grounds *inter alia* that it permits private property, often badly needed by the person in question, including the plaintiff in the present instance, to be frozen –

- (a) on the mere unconfirmed and/or unworn say so of any member of An Garda Síochána
- (b) without the need to obtain any prior or even subsequent sanction from a judicial officer or judge
- (c) for no brief or stipulated time scale
- (d) without making any provision for access to the funds to cover normal business living or other expenses.

17. The plaintiff also contends that *inter alia* the subsection contravenes –

- (i) the separation of powers;
- (ii) the guarantee of fair procedures in Article 40.3(i)-(ii) of the Constitution and/or Article 6(1) of the Convention;
- (iii) the guarantee of property rights in Article 40.3(i)-(ii) of the Constitution and in Article 1 of the First Protocol to the Convention.

18. Further, the plaintiff claims that he has suffered and continues to suffer, loss and damage and claims:

- 1. declarations that;
 - (a) the bank has acted unlawfully in refusing to repay him his money;
 - (b) s. 31(8) of the Criminal Justice Act 1994 as amended in 2002, confers no legal obligation on the bank to freeze the plaintiff's account;
 - (c) insofar as s. 31(8) imposes any such obligation, it is repugnant to the Constitution and/or incompatible with the European Convention on Human Rights.

19. Further, the plaintiff claims damages for negligence, breach of contract and conversion as against the first named defendant; misfeasance in public office and negligence including exemplary/punitive damages against the second named defendant, and breach of constitutional/Convention rights as against the third fourth and fifth named defendants.

20. The plaintiff claims further and other relief and costs.

21. It was agreed between the parties that any issue that may arise as to damages would be left over for separate determination.

22. It was indicated to the Court by counsel for the plaintiff that the allegation of fraud/deceit against the first named defendant had been withdrawn after discovery of documents had been obtained and during the course of the hearing before this Court, it was indicated that it was accepted that there was no substance to the claim against the State defendants for misfeasance in public office.

23. It is submitted by the plaintiff that unless the first named defendant can demonstrate that the source of moneys in the plaintiff's bank account are the proceeds of crime, the bank is obliged to meet his demand to pay him out the moneys in his account. The first named defendant maintains that it cannot pay the plaintiff on account of the direction as given to it by An Garda Síochána pursuant to s. 31(8) of the Act. It is contended by the plaintiff that the mere fact of An Garda Síochána issuing a direction pursuant to s. 31(8) does not oblige the first named defendant to, in effect, freeze the plaintiff's account, but, if in compliance with the direction, the first named defendant does so then it is only granted an immunity against criminal prosecution and not in respect of any civil action that may be taken against the first named defendant by its customer, in this case the plaintiff and that this arises because of the actual operation of s. 31(8).

24. Accordingly, it is contended that with the first named defendant complying as it has done in this case with the direction from An Garda Síochána, the effect is to create a *Mareva* injunction save that in this instance there is no access by way of an appeal or further confirmation or access to a court of law.

25. It is contended by the plaintiff that by mid September, 2005 the gardaí were clear in their own mind that they were not going to be bringing a prosecution against the plaintiff in respect of the moneys in the first named defendants' bank and further, that the Criminal Assets Bureau had no interest in the matter. The purported reason for not withdrawing the direction then or at any time thereafter was the existence of these proceedings as instituted on the 25th August, 2005. There were discussions between Detective Garda Padden and Agent James in the United States as regards the bringing of a mutual assistance application on behalf of the US authorities and the only evidence as to the criminal origin of the moneys in the account is the hearsay evidence as offered through Agent James that there was co-mingling of legitimate moneys and moneys derived from the proceeds of crime. The plaintiff contends that the only plausible explanation as to why the direction was not lifted once it was clear that there was going to be no prosecution, was to effectively prevent the moneys from being paid out prior to the mutual assistance application being processed as it was on 22nd November, 2005, when this Court granted an injunction freezing the moneys in the account. For the gardaí to say that the reason why the direction was not lifted was because of the institution of these proceedings is in the submissions of counsel on behalf of the plaintiff an explanation which makes no sense at all.

26. Counsel contends that no admissible evidence of any kind has been adduced to establish that moneys in the bank account are the proceeds of crime and even after the conclusion of the mutual assistance proceedings, which were determined on 19th December, 2006 by this Court in the plaintiff's favour, the direction has remained in place thereby giving it a lifespan of a period in excess of 500 days.

27. Counsel contends that s. 31(8) is not capable on any reasonable construction of conferring on every Garda in the country whatever his training, rank or function to direct the Bank to freeze an account. In asserting so extravagant a power and in acquiescing in that assertion the defendants were negligent. In the circumstances, it is contended by the plaintiff that the first named defendant had an obligation to pay out the moneys to the plaintiff at his request and that Garda Síochána direction gives the first named defendant no protection in respect of these proceedings as brought against it by its customer. In respect of the liability of the State defendants, counsel for the plaintiff accepts that the Detective Garda was entitled to issue the direction but only for a brief duration until a decision was taken whether to prosecute the plaintiff or to proceed against him under the Proceeds of Crime Act 1996. However, counsel contends that once it was evident that there was never going to be a prosecution against the plaintiff, the direction ought to have been withdrawn and to leave it in existence has been an abuse of power. To maintain the direction in existence until such time as the United States authorities were in a position to advance the mutual assistance application was to use the power for an egregiously impermissible motive.

28. Counsel for the plaintiff contends that the first named defendants should have applied to this Court for directions as to the appropriate course of action to be pursued in the circumstances that arose where they only had protection by way of immunity from a criminal prosecution and no protection in respect of any civil proceedings that may have been contemplated against them by reason of their not paying out the moneys in the plaintiff's account to him.

29. It is contended by the plaintiff that under the doctrine of the separation of powers, justice can only be administered by the courts pursuant to Article 34.1 of the Constitution, and power may not be given to any executive official such as a member of An Garda Síochána to issue orders that have the same effect as a *Mareva* injunction. The issuing of such orders is exclusively the function of the courts as they involve determining whether or not property represents the proceeds of crime or criminal activity. It is conceded by the plaintiff that it may be permissible to permit such orders provided they are of short duration and the matter is then brought before a court of law but legislative authority which allows the making of enduring orders, in this case a direction that has remained in force for a period in excess of 500 days without any appeal mechanism pursuant to s. 31(8), contravenes the very principle of separation of powers.

30. The plaintiff relies on the principles as enunciated in *D.K. v. Crowley* [2002] 2 I.R. 744, *Wallace v. Kennedy* [2003] N.I. 367, *R(M) v. Secretary of State* [2004] 1 W.L.R. 2298 and the decision of O'Sullivan J. in *Minister for Justice v. Devine* [2006] I.E.H.C. 216. Counsel for the plaintiff submits that in the present situation there are no safeguards to protect the plaintiff's property rights. There is no court order, no sworn undertaking, no sworn evidence, no undertaking as to damages, no provision to vary the order for reasonable living or other expenses and no appeal procedure.

31. It is contended on behalf of the first named defendant that they simply abided by the direction from the Garda authorities. In effect, the first named defendant contends that it has not taken a stance one way or the other as to whether or not the relevant moneys are the proceeds of criminal conduct. It is contended by the first named defendant that they do not form an opinion as to whether their suspicions being the basis of the s. 57 report are correct or not and that that is a matter for the gardaí. If the moneys are the product of criminal conduct, then by simply holding the moneys there is the possibility, having regard to the provisions of s. 31 of the Act, that the first named defendant is committing an offence. In these circumstances, having received the directive from the gardaí, the first named defendant cannot release the moneys because to do so would be to subject itself to a criminal prosecution or the commission of a criminal offence.

32. It is emphasised by the first named defendant that they never claimed to have any hold on the moneys and simply have held them in an account because of the direction being in place. The first named defendant will abide by any direction or order of the Court that is made in relation to the moneys.

33. Mr. O'Neill, counsel for the first named defendant submits that it would not be possible for the first named defendant simply to go to court and to seek some form of declaratory or interim relief and that this is not a procedure which is available in this jurisdiction. He refers to the possibility of going to court by way of interpleader but the difficulty is that to maintain an interpleader you need two adversaries who are claiming entitlement to the moneys and, in this instance, there is only one person claiming entitlement to the moneys and that is the plaintiff. The gardaí do not in the particular circumstances claim any entitlement to the moneys in the account.

34. It is contended by the State defendants that the direction pursuant to s. 31(8) of the Act is a direction for the purposes of conferring immunity on the first named defendant from potential criminal liability for an offence under section 31. There is no machinery in the Criminal Justice Act to allow for the enforcement of that direction and it is contended that it not per se a mandatory direction which the gardaí can enforce against the first named defendant.

35. It is further contended that the circumstances in which the direction issued indicate that the bank would be committing an offence under s. 31 and, therefore, that the direction is issued for the purposes of conferring immunity on the first named defendant and it is an immunity for the offence which the bank is unwittingly committing by even having the moneys once the banks suspects that an offence is being committed pursuant to section 31.

36. It was the bank who became suspicious of the transaction and issued the suspicious transaction report pursuant to s. 57 and

that is the starting point for the analysis that has to be made for the bank to have formed the view that an offence was being committed.

37. Ms. Butler counsel on behalf of the State defendants submits that she agrees with Dr. Forde on the plaintiff's behalf to the extent that a direction issued under s. 31(8) is not an injunction or mandatory in the sense of compelling compliance.

38. Counsel accepts that the bank did act in accordance with the direction because to do otherwise could have involved the bank committing a criminal offence.

39. Counsel contends that the very wording of s. 31(1) creates a criminal offence of merely dealing in funds which the first named defendant would suspect to have been the proceeds of crime. Ms. Butler accepts that there may be no reality to a prosecution but contends that the first named defendant faces potential criminal liability if it believes that the transaction is money laundering and deals on the account.

40. Counsel accepts the view that the Bank of Ireland did not act incorrectly in adopting the attitude that it took.

41. It is contended that to require performance of the contract between the first named defendant and the plaintiff would require the first named defendant to commit an unlawful act and this Court should go no further to consider whether the issuing of the direction is constitutional or unconstitutional because that issue should not arise and also the Court should not proceed to determine a constitutional issue on the initial basis that it would be prepared to order enforcement of a contract in circumstances where to do so would be to compel one of the parties to the contract to commit an unlawful act which it has no desire or intention to commit.

42. With regard to the constitutional issue, Ms. Butler submits that the constitutional protection of property rights is limited where in the interests of the common good the rights and exercise of the rights require limitation. In this instance there was never any objection by the State defendants to the plaintiff making application for the payment out of his reasonable living expenses from the moneys in the account and the only dispute was as to the level of the payments; the State defendants never disputed the plaintiff's entitlement to seek payments out or indeed his entitlement to any payments out. It is contended that there is no breach of the separation of powers inherent in this statutory scheme.

43. Ms. Butler submits that there is no constitutional requirement that there must be sworn evidence in order for a step to be taken which would have the effect of restricting a person's property rights. Counsel submits that it has to be borne in mind in this particular instance, that the effect of the direction to the bank for the purpose of conferring immunity on the bank, has the consequential effect of restricting the plaintiff's access to his funds not only because the direction has issued but because permitting access would necessarily entail the potential committal of a criminal offence.

44. It is emphasised that there has been no deprivation of the plaintiff's property rights and the money remains the plaintiff's and has been regularly paid to him for his reasonable living expenses pursuant to court applications and orders made. The plaintiff's property has not been forfeited, he is not being denied title to it and neither the State defendants nor the first named defendants claim any entitlement to the moneys.

45. As regards the time aspect, Ms. Butler refers to the statement of claim and to the fact that it was pleaded that the gardaí acted in misfeasance of public office and in effect the directive was issued for the purpose of making the plaintiff's life in this State untenable and for the purpose of frustrating proceedings he had before the High Court in relation to a failed refugee claim. Counsel points out that the case that is presented before this Court is materially different and that in fact what occurred was with the issue of these High Court proceedings, the gardaí took a step back and have taken no further action. She relies on the evidence of the Detective Garda that he did not indicate that it would be necessarily the intention that a direction should continue indefinitely and that he had indicated that it normally would not but in the particular circumstances that arose, the gardaí felt restrained by what was ultimately a multiplicity of High Court proceedings.

46. Ms. Butler emphasises the fact that a very strong claim was made out on the pleadings based on very serious allegations about misfeasance in public office as against the State defendants and fraud as against the first named defendant but now a considerable time later, a completely different claim is advanced and perhaps different actions may have been taken if the matter had been clarified at an earlier stage.

47. Counsel submits that at any time it was open to the plaintiff to apply by way of judicial review to have the direction reviewed but as against that it has to be borne in mind that the plaintiff has never deposed either on affidavit or in evidence that the moneys in the account are not the proceeds of criminal activity.

Conclusion

48. The plaintiff alleges that the direction given by the garda under s. 31 contravenes his constitutional and Convention rights. This assertion centres, not around the issuing of the direction itself, which the plaintiff accepts was lawfully authorised by the statute, but rather, in that the statute makes no provision for a reasonable time limit within which the direction should remain operative. The defendant argues that the section is not unconstitutional and that even if the section does not provide for such a time limit, this does not of itself render the section unconstitutional. A number of issues arise for consideration in these circumstances.

49. Every Act and Bill passed by the Oireachtas since 1937 is presumed to be constitutional. This flows from a number of Articles in the Constitution, not least of which is Article 15 which precludes the Oireachtas from passing any law that is in any way repugnant to the Constitution. This presumption remains in place unless/until the statutory provision is successfully challenged. To guard against unwarranted incursions into the realm of the legislature, the doctrine of separation of powers requires that in the adjudication of disputes between the parties, non-constitutional issues must be determined first. This means that where there are a number of issues to be determined between the parties, which issues include among their number a constitutional challenge, all other issues must be decided prior to the Court's examination of the merits of the constitutional challenge. The rationale behind this requirement is that a statute or provision thereof should ideally only be repealed or amended by the appropriate body – the legislature, and incursions into this role by the judiciary should, where possible be avoided. In the instant case, if it is possible to decide the issues between the parties without having to decide upon the constitutionality of the statutory provision, this should be done. Only when this is not possible should the Court embark upon the constitutional issue. In *East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317, Walsh J., at 341 of the judgment stated that:

'...[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’.

50. The double construction rule obliges a court, when adjudicating on the constitutionality of a statutory provision which permits of two or more interpretations, to adopt the interpretation that is in keeping with the Constitution.

51. The net issue in the instant case is as follows: The plaintiff accepts that the Garda authorities were authorised under Section 31 to issue the direction. The difficulty with the section is that it does not provide for a reasonable time limit within which the directive as given, remains operative and that consequently, by not revoking or withdrawing the directive at a time when the garda knew that no criminal proceedings were to be initiated against the plaintiff, what then becomes the status of the direction. The State defendants assert that even if the garda acted wrongfully, which they do not accept, this wrongful act does not in itself strip the provision of its constitutionality.

52. *DK v. Ireland* [2002] 2 I.R. 744, *Wallace v. Kennedy* [2000] N.I. 367 and *Orange v. Revenue Commissioners* [1995] 1 I.R. 517 are relied upon by the plaintiff in support of his assertion that, by failing to provide a time limit on the directive issued by the second named defendant, the section under which the direction is issued is unconstitutional. The purpose of the impugned section is to provide immunity to a financial institution from a criminal prosecution in circumstances where to disobey the directive would render the financial institution liable for criminal activity. Given that an investigation into the type of criminal activity involved could take a considerable amount of time, the imposition of a time limit could well irreparably hinder such investigation. This however does not absolve the second named defendant of the duty to act in accordance with principles of constitutional fairness. Discretionary powers may only be exercised within the confines of the stated objectives of the Act under which they are used and, following the *East Donegal* principles, carry with them the duty to act fairly and judicially – in other words, there is no ‘absolute or unqualified power’. In *Glover v. BLN* [1973] IR 388, Walsh J., at p. 425 stated that:

‘...[T]he dictates of constitutional justice requires that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures’.

53. On the facts of the present case, it is not necessary to decide whether the impugned section is constitutional. Both the plaintiff and the second named defendant have accepted that the Garda authorities were entitled to issue the direction. Following the issuing of the direction, the gardaí were obliged to act fairly and judicially. Clearly, the Detective Garda accepted that the direction could not last indefinitely and that much is clear in any event from the wording of the direction itself. There was considerable argument as regards part of the Detective Garda’s evidence being hearsay as it related to conversations with Agent James in the United States but I do not believe that I have to resolve any issue in this regard because the Detective Garda’s evidence can quite simply be summarised that as a result of information received from the Bank of Ireland pursuant to s. 57 of the Criminal Justice Act 1994, the Detective Garda, in consultation with his superiors, issued a direction pursuant to s. 31(a) of the Act of 1994. He 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 these proceedings, he accepts that the direction would have been withdrawn and it follows that once the direction was withdrawn, the plaintiff would have had access to his funds in the account. It may or may not have been the case that the plaintiff would have withdrawn the funds but in any event on Tuesday 22nd November, 2005, the President of this Court, in proceedings pursuant to section 46(6) of the Criminal Justice Act 1994, made an order freezing the funds in the account in the sum of US\$95,890.07. That order was vacated by this Court (Gilligan J.) pursuant to the judgment delivered in those proceedings on 19th December, 2006, but the direction, the subject matter of these proceedings has remained in place. Having directed the first named defendant not to deal in any way with the account until further specific notice from him, the Detective Garda clearly envisaged giving such further specific notice. His failure to do so in the circumstances, once he knew there was not going to be a prosecution, creates the problem. In *East Donegal* at p. 243, Walsh J. stated that:

‘...[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 retained and corrected by the courts’.

54. In a similar vein, in *The State (Lynch) v. Cooney* [1982] I.R. 337, Henchy J., at p. 380 stated that:

‘...[N]ot only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful such as by misinterpreting the law, or by misapplying it through taking into consideration irrelevant matters of fact or through ignoring relevant matters of fact or through ignoring relevant matters. Otherwise the exercise of the powers will be held to be invalid for being *ultra vires*.’

55. In my view, the extent of the Detective Garda’s authority was to issue the direction which he did in consultation with his superiors, and when he became aware that no criminal proceedings were going to follow, as he did at the end of August, 2005, he was from that point onwards under a duty to withdraw the direction, and by not doing so he was, in my view, acting *ultra vires* the section. While I accept that these proceedings initially contained allegations of misfeasance of public office as against the second, third and fourth named defendants and of fraud against the first named defendant, both of which claims have been withdrawn, the proceedings in themselves do not, in my view, entitle the first named defendant to have maintained the direction in place once it was known that there was not going to be a criminal prosecution in relation to the funds in the account.

56. The fact that an Act or provision thereof is wrongfully administered does not mean that the Act or provision is itself unconstitutional. In *The State (Boyle) v Governor of Curragh Military Barracks* [1980] I.L.R.M. 242 Barrington J. stated at p. 254 that

‘The Act, he alleges, is coloured by the way in which it is administered. I cannot accept this submission. The Act was either valid or invalid on the day on which it was enacted by the Oireachtas and its constitutional validity cannot be affected by the manner in which it is administered’.

57. In the present case, the failure of the impugned section to provide for a time limit in relation to the direction to the bank is not, of itself, enough to displace the presumption that the section is constitutional. The lack of a specified time limit does not and cannot be held to authorise the open-ended maintenance of the direction by the Garda authorities, who, in their own words in the direction, clearly envisaged that the bank would be given further instructions by them. In *Boyle*, the Court stated that the appropriate remedy for an aggrieved party in circumstances such as these lay in the institution of proceedings against the authority concerned and not in a challenge to the legislation under which that authority purported to act. In *O’Callaghan v. Ireland* [1994] 1 I.R. 555 Finlay C.J. stated at p.563 that:

'If any member of the Garda Síochána should in purported exercise of the powers conferred on him ... expose any person to unnecessary harassment, distress or embarrassment, it would be an abuse of [those] powers and an unconstitutional violation of that person's rights, for which that person would have the appropriate and correct remedies'.

58. Similar sentiments were expressed in *Brennan v. Minister for Justice* [1995] 1 I.R. 612 and in *Murphy v. GM* [2001] 4 I.R. 113 and are of equal application to the present case.

59. It is clear that as an account holder with the first named defendant, a contract existed between the plaintiff and the Bank. The account, being a current account is such that funds held by the Bank are to be released to the plaintiff on demand. However, the Bank, like every other financial institution has obligations under inter alia legislation enacted to deal with criminal activity such as money laundering. To this end, the Bank, pursuant to its statutory obligations under s. 57 of the Criminal Justice Act, 1994 as inserted by Section 21 of the Criminal Justice (Theft and Fraud Offences) Act 2001, prepared and submitted a Suspicious Transaction Report to the Gardaí. The direction issued pursuant to s. 31 of the Act of 1994, upon receipt of the report clearly states that:

'For the purpose of Section 31(8) I hereby direct you not to deal in any way with the account listed above without my specific consent until further notice'.

60. The Bank, 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. The Bank, in honouring its obligations under s. 57, having become suspicious of the circumstances in which the plaintiff sought to have the cheque lodged, made the report. It then 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 Bank in these circumstances where it complied with a lawfully issued direction by a member of An Garda Síochána. The Bank 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. It was at any time prior to the order of this Court as made on the 22nd day of November, 2005, open to the plaintiff to have made an application for leave to have the direction judicially reviewed. The extent of the Bank's duty 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 lies on the gardaí. In the instant case, no liability attaches to the Bank.

61. Accordingly, in the circumstances I am satisfied that the presumption of constitutionality which, as a matter of law, pertains to s. 31(8) of the Criminal Justice Act 1994 remains undisturbed. I am further satisfied that the Governor and Company of the Bank of Ireland have no liability herein to the plaintiff, since to have disobeyed the direction as issued by An Garda Síochána may have left the Bank of Ireland open to a criminal prosecution, and in the circumstances they could hardly do otherwise than comply with the direction. Finally, I am satisfied that the garda authorities in not lifting the direction at the end of August, 2005, at a time when they knew there was not going to be any prosecution of the plaintiff in respect of the funds held by the directive, acted in a manner that was *ultra vires* their powers as provided for by s. 31(8) of the Act of 1994 and as substituted by s. 21 of the Act of 2001.

62. I will hear the submissions of counsel as to the form of the order to be made.