Neutral Citation Number: [2009] IEHC 184

IN CAMERA MATTER

THE HIGH COURT

REVENUE

2008 98 MCA

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 908 OF THE TAXES CONSOLIDATION ACT 1997

BETWEEN

L. McL.

APPLICANT

AND

J. D. (OTHERWISE S. D.) AND E. D.

RESPONDENTS

Judgment of Miss Justice Laffoy delivered on the 3rd day of April, 2009.

Section 908 of the Taxes Consolidation Act 1997
Before outlining the issues with which the Court is concerned in this judgment, it is convenient to set out the provisions of s. 908 of the Taxes Consolidation Act 1997, as amended (the Act of 1997), under which the proceedings are brought. Section 908 is the section of the tax code under which an authorised officer of the Revenue Commissioners may apply to this Court seeking an order requiring a financial institution to allow inspection of documents and to furnish information. Sub-section (2) of s. 908 provides as follows:-

> "An authorised officer may, subject to this section, make an application to a judge for a order requiring a financial institution, to do either or both of the following, namely –
>
> (a) to make available for inspection by the authorised officer such books, records or other documents as are in the financial institution's power, possession or procurement as contain, or may (in the authorised officer's opinion formed on reasonable grounds) contain information relevant to a liability in relation to a taxpayer,
>
> (b) to furnish to the authorised officer such information, explanations and particulars as the authorised officer may reasonably require being information, explanations and particulars that are relevant to any such liability,
>
> and are specified in the application."

Sub-section 3 sets out certain pre-conditions to the making of such an application. The authorised officer must have the consent in writing of a Revenue Commissioner. Further, the authorised officer must be satisfied in relation to a number of matters: first, that there are reasonable grounds for suspecting that the taxpayer may have failed or may fail to comply with any provisions of the Acts, as defined; secondly, that any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax having regard to the amount of a liability in relation to the taxpayer; and thirdly, that the information likely to arise from the documents and information sought is relevant to the proper assessment or collection of tax.

The Court's powers on the making of an application under subs. (2) are set out in subs. (5) and (8). Sub-section (5) provides as follows:-

> "Where the judge, to whom the application is made under subsection (2), is satisfied that there are reasonable grounds for the application being made, the judge may, subject to such conditions as he or she may consider proper and specify in the order, make an order requiring the financial institution –
>
> (a) to make available for inspection by the authorised officer, such books, records or other documents and
>
> (b) to furnish to the authorised officer such information, explanations and particulars, as may be specified in the order."

Sub-section (8) provides as follows:-

> "Where a judge makes an order under this section, he or she may also, on the application of the authorised officer concerned, make a further order prohibiting, for such period as the judge may consider proper and specify in the order, any transfer of, or dealing with, without the consent of the judge, any assets or moneys of the person to whom the order relates that are in the custody of the financial institution at the time the order is made."

The proceedings
These proceedings were initiated by an originating notice of motion dated 7th July, 2008, which was returnable for 21st July, 2008. On 21st July, 2008 the applicant, who is an authorised officer of the Revenue Commissioners, sought orders pursuant to paragraphs (a) and (b) of s. 908(5) for inspection of documents and furnishing of information in relation to the respondents which were directed to four financial institutions: Bank of Ireland, Allied Irish Banks, ACC Bank and Irish Life and Permanent. The applicant also sought an order pursuant to s. 908(8) effectively freezing any assets or money of the respondents in the custody of those financial institutions.

The application, which was made *ex parte*, was heard in camera as required by s. 908(7) on 21st July, 2008. It was grounded on the affidavit of the applicant, which had been sworn on 4th July, 2008. That affidavit ran to 83 paragraphs and exhibited 57 documents or groups of documents. It was patently a carefully constructed document. It exhibited a consent of a Revenue Commissioner as required by subs. 3. Further the applicant averred that she was aware of the pre-conditions to bringing an application stipulated in that sub-section and she averred that, for the reasons set out, she believed that the three conditions were satisfied. The affidavit disclosed that the first respondent is an accountant and tax advisor and that the second respondent is the wife of the first respondent.

The most controversial disclosures in the grounding affidavit were that in November 2006, in the course of an investigation, the Criminal Assets Bureau (the Bureau) carried out searches of a number of premises including an office in a dwelling house which it was averred was the home address of the first respondent. A laptop, which the applicant believed to be the property of the first respondent, was seized. The Bureau extracted material from the laptop and passed the material to the Revenue Commissioners under the provisions of s. 8(7) of the Criminal Assets Bureau Act 1996 (the Act of 1996). There was exhibited a letter dated 30th January, 2008 from the applicant to the Bureau requesting the provision by the Bureau of tax related information "pertaining to the [first respondent]". It was stated that the information requested included any documents or records created by the first respondent (including those under the names of companies), which might "be relevant to the proper assessment and collection of tax". There was no suggestion that such documents or records might be relevant to the imposition of tax on the proceeds of criminal activity or suspected criminal activity on the part of the first respondent. There was no reference to the second respondent. The request was expressed to be made pursuant to s. 8(7) of the Act of 1996. It was stated that the information might be used in evidence in the course of court proceedings. The letter was exhibited. Under cover of a letter dated 18th February, 2008, a disc containing the information relating to the first respondent was furnished by the Bureau to the applicant together with an index of its contents, without comment. The letter and index were exhibited.

In her grounding affidavit the applicant averred that a full review of the documents recovered from the laptop indicated that the first and second respondents had accumulated very substantial capital and furthermore had substantial income which had not been returned for tax purposes. The applicant went on to refer to a number of documents which had been disclosed and exhibited some of them.

Having also analysed other information which was at her disposal, the applicant set out the basis on which she believed that the respondents had accounts in the four financial institutions in question. She summarised her belief, in the light of the facts she had set out, as being that both of the respondents had evaded very substantial personal tax liability from 1997 onwards which, on the basis of the information then available to her, suggested that those liabilities could exceed €6,400,000. She also averred as to her belief that there were reasonable grounds for suspecting that Revenue offences had been committed by the respondents under s. 1078(2) of the Act of 1997 and that the offences had resulted in a serious prejudice to the proper assessment and collection of tax.

In support of the application for a freezing order, the applicant averred that she believed that there was a real and substantial risk that the respondents or their servants or agents would remove any monies or assets standing to their credit in the accounts of the four financial institutions unless restrained by court order. She identified, in this respect, a number of matters of particular concern: first, that the respondents owned property, and had a bank account and equity investments, outside the jurisdiction; secondly, that a dissolved company used by the first respondent had well over €1,000,000 passed through its account from an offshore source in a three year period; thirdly, that a substantial property was for sale, initially by public auction, and, at the time, by private treaty; fourthly, that the first respondent had transferred his shareholding in a company to the second respondent; and, fifthly, that in the previous months the first respondent had transferred a number of properties or assets into the name of the second respondent. The applicant also referred to the disregard shown by the respondents for their statutory duties and the difficulties experienced by the Revenue Commissioners in trying to engage with them. The applicant averred that the Revenue Commissioners were prepared to give an undertaking as to damages in the event of the Court being prepared to grant an injunction freezing the respondents' accounts.

An order was made on foot of the applicant's application on 21st July, 2008 by me, which, after reciting the undertaking as to damages given by counsel for the applicant, contained the following elements:

> (a) orders pursuant to paragraphs (a) and (b) of s. 908(5) directed to each of the four financial institutions in question, the said orders being stayed until 10.30am on 30th July, 2008;
>
> (b) an order pursuant to s. 908(8) prohibiting until 10.30am on 30th July, 2008 any dealing with, without the consent of the Court, any assets or monies of the respondents or either of them in the custody of any of the four financial institutions in question;
>
> (c) a proviso that the respondents and each of them should have liberty to apply to the Court on 24 hours notice to the Revenue solicitor to vary or discharge the order; and
>
> (d) an order that the applicant was at liberty to issue a notice of motion returnable for 10.30am on 30th July, 2008 seeking an order continuing the freezing order.

As required by s. 908(8), the order under that section was made following the making of an order under s. 908(5). Although the operation of the latter was stayed, the former had immediate effect.

On 25th July, 2008 the applicant issued a further notice of motion returnable for 30th July, 2008 seeking the continuance of the freezing order. Both that motion and the adjourned motion came before the Court on 30th July, 2008 when both respondents were represented. By consent of the parties the freezing order was continued until 27th August, 2008 subject to certain variations, which permitted the withdrawal of certain weekly amounts out of certain accounts of the respondents and also payments on foot of standing orders and direct debits which had been extant prior to 21st July, 2008. The stay on the order under s. 908(5) having expired, the four financial institutions were allowed eight weeks from the date of the making of the order within which to make available and furnish the relevant documentation and information. The matter was then adjourned to the vacation sitting on 27th August, 2008.

On 27th August, 2008 both respondents were represented by counsel. The matter was adjourned on the terms agreed between the parties, which were annexed to the order as a schedule. Under those terms, each of the respondents undertook to furnish a statement of affairs to include "both offshore and onshore assets" and all bank accounts to the Revenue Commissioners on or before 30th September, 2008. There was a further undertaking by the first respondent to furnish bank statements for "all bank accounts offshore and onshore which he owns or controls directly or indirectly" by the same date. The respondents undertook "not to dispose of any properties" before 13th October, 2008, with the exception of the property which was for sale when the applicant swore her

affidavit and which was mentioned in that affidavit. The applicant, in turn, agreed to "the lifting" of the freezing order against both respondents and to notify all the relevant institutions immediately. Both respondents had sworn replying affidavits prior to 27th August, 2008, the first respondent on 15th August and the second respondent on 21st August and the applicant had sworn a supplemental affidavit in response to the replying affidavit of the first respondent on 26th August, 2008. It was agreed that each of the parties would be at liberty to file further affidavits or motions or notices to cross-examine as they deemed appropriate prior to 30th September, 2008. It was also agreed that the applicant's motion be adjourned to 13th October 2008 for mention "to seek a date for hearing of substantive issues".

In his replying affidavit, the first respondent had sought an order vacating the freezing order element of the orders which had been made. In her replying affidavit, the second respondent sought the vacation of the orders of 21st July, 2008 and 30th July, 2008. I think it is probably true to say that on the 30th July, 2008 and at the vacation sitting on 27th August, 2008, the legal advisers for all parties took a realistic view of the prospects of getting a hearing of the issues and dealt with the matter in a pragmatic way.

The matter was next considered by the Court on 20th October, 2008, when, on the basis that the undertakings given by the respondents would continue, it was adjourned to 3rd November, 2008. On that occasion, having heard counsel for each of the parties, and counsel for the respondents urging that the substantive issue whether the freezing order was lawfully obtained be tried, I made an order that an issue as to whether the freezing order element of the order dated 30th July, 2008 should be vacated be tried as a preliminary issue. I directed a time schedule for the delivery of statement of grounds by the respondents and the applicant's response. It was ordered that the undertakings which had been given should continue until further order and it was ordered that the respondents be at liberty to apply to be released from their undertakings on notice to the applicant.

The preliminary issue
There are a number of points to be noted in relation to the issue to be tried as formulated in the order of 3rd November, 2008 – whether the freezing order should be vacated. In fact, the freezing order was no longer extant. By agreement of the parties, as set out in the schedule to the order of 27th August, 2008, the freezing order element of the order of 30th July, 2008 had been "lifted". In any event, the order made on 30th July, 2008 had expired by effluxion of time on the 27th August, 2008, in the same way as the order made on 21st July, 2008 had expired by effluxion of time on 30th July, 2008.

On reviewing the matter, I am satisfied that the question which it was intended to have addressed by way of preliminary issue was whether the freezing order was properly made on the 21st July, 2008, so that, if it was still extant, whether it would have been discharged. That is the issue I propose addressing in this judgment. It is the preliminary step in addressing the respondents' contention, founded on their assertion that it was not properly made, that they are entitled to an inquiry as to damages to compensate them for damage they incurred in consequence of the making of the freezing order. In summary, the position in February 2009 when the issue was heard was that no freezing order was in being and the applicant was not seeking a freezing order. The undertakings given by the respondents remained in place. At the hearing, it was submitted on behalf of the second respondent that those undertakings, which related to the non-disposal of "any property", rather than monies and assets with the four financial institutions, were not substitutes for the freezing orders, a proposition with which counsel for the applicant took some issue. Save to say that my understanding is that the respondents were free to operate the accounts in the four financial institutions, I consider it unnecessary to express any view on the scope of the undertakings.

There was controversy as to what evidence the Court should have regard to in determining the issue, counsel for the applicant contending that, in the absence of an allegation of *mala fides*, it was the evidence which was before the Court on 30th July, 2008 when both sides were represented. That evidence was the grounding affidavit of the applicant on foot of which the *ex parte* order had been made. That overlooks the fact that when the freezing order was made *ex parte*, the order expressly provided that the respondents might apply to have it varied or discharged and the order of 30th July, 2008 continuing the freezing order, subject to variation, was made in the context of the issues between the applicant and the respondents being adjourned to 27th August, 2008 and all parties being at liberty to file affidavits and to plead during the Long Vacation. Although no formal motion to discharge was brought, that was, in effect, what the respondents sought in their respective replying affidavits.

Accordingly, having regard to what transpired after the freezing order was made, in my view, the issue falls to be determined by reference to all of the evidence which was before the Court and the submissions made on behalf of all of the parties at the hearing on 17th and 18th February, 2009. The parties reached agreement on 27th August, 2008 in relation to the lifting of the freezing order, but on the basis that the substantive issue as to whether it was properly made was to be determined. That issue falls to be determined on the basis of the evidence as to the circumstances which prevailed when it was made on 21st July, 2008.

It was against that background that the preliminary issue came to be heard. The practical implication of the exercise is that, as counsel for the applicant recognised, the determination of the issue may lead to an inquiry as to whether the applicant has any liability to the respondents on foot of the undertaking as to damages which was given in anticipation of the grant of the freezing order. Apart from that, the issue is moot, because the freezing order no longer exists.

Although the same firm of solicitors is on record for both respondents and both relied on the same statement of grounds, each was represented by a separate team of counsel at the hearing of the preliminary issue. I propose considering the case of each separately.

Summary of grounds of the first respondent
Many points made in the statement of grounds delivered on his behalf were not pursued on behalf of the first respondent. The points which were pursued were as follows:-

> (a) That the applicant was not authorised to apply for a freezing order under s. 908(8), as distinct from being authorised to make an application under s. 908(2).
>
> (b) That before bringing an application under s. 908, the Revenue Commissioners should have adopted the procedure under s. 900 of the Act of 1997.
>
> (c) That the information received by the Revenue Commissioners from the Bureau pursuant to s. 8(7) of the Act of 1996 was obtained illegally.
>
> (d) As there was no risk of flight or no risk of removal of assets, the freezing order should not have been made against the first respondent.

I will consider each of those grounds in turn.

Application for freezing order not authorised?
It was submitted on behalf of the applicant that, as the consent given by a Revenue Commissioner to the applicant, which was exhibited in her affidavit, was expressly limited by its terms to making an application under s. 908(2), and she had obtained no written consent to the making of an application under s. 908(8) for a freezing order, the application for the freezing order was *ultra vires*.

It is worth recording that, on this point and on all of the other issues which arose, counsel for the applicant advocated a strict construction of s. 908 as part of a taxation statute and submitted that a purposive approach to construction is not appropriate. It was pointed out there was nothing in s. 908(8) which imposes any requirement to obtain the consent of a Revenue Commissioner to an application for a freezing order. It was further submitted that to find such a requirement in s. 908 would involve reading into subs. (3), which stipulates that the consent in writing of a Revenue Commissioner is a prerequisite to making an application under subs. 2, a requirement that obtaining such consent was a prerequisite to making an application under subs. (8) and adding something to the statute which the Oireachtas had not put there.

In my view, reading s. 908 as a whole, a consent obtained for the purposes of bringing an application under subs. (2) also covers an application under subs. (8) for a freezing order. The primary focus of s. 908 is the making of an application to Court for an order directed to financial institutions to provide information. The power to make an order on foot of an application under subs. (2) is conferred on this Court by subs. (5). The power to make a freezing order under subs. (8) only arises where an order has been made under subs. (5). The power to make the freezing order is, accordingly, contingent on the Court having power to make the order under subs. (5). In other words, the power conferred by subs. (8) is secondary or ancillary to the power conferred by subs. (5). In my view, on the proper construction of s. 908, the consent which the applicant obtained to bringing an application under subs. (2) gave an entitlement to seek relief which was secondary or ancillary to the primary relief sought in subs. (5), including an order under subs. (8).

Accordingly, in my view, there is no merit in this ground.

Section 900 should have been resorted to first?
Under the Act of 1997 and subsequent amendments, the Oireachtas has conferred a wide range of powers on the Revenue Commissioners which are designed to facilitate the enforcement of taxation legislation by enabling them to access relevant information. Indeed, counsel for the first respondent not only pointed to

s. 900, which empowers an authorised officer to call on the taxpayer for production of books and information and so forth, as a necessary port of call before advancing to s. 908, but he also referred to s. 902, s. 902(A), s. 906(A) and s.907 as being less invasive of the taxpayers' constitutional rights. In fact, some of the information relied on by the applicant in her grounding affidavit in relation to a company in which the first respondent was involved had been obtained by the Revenue Commissioners from one of the financial institutions pursuant to s. 906(A).

The applicant's response was that no authority had been cited by the first respondent for that proposition and none existed and there was nothing in the legislation to support the proposition.

Section 908 is one of a range of provisions contained in Chapter 4 of Part 38 of the Act of 1997 which confer powers on the Revenue Commissioners. Section 908, in my view, *ex facie* is a standalone provision. By its plain terms it may be invoked by an authorised officer irrespective of what other avenues are open to the authorised officer and irrespective of what other avenues have been availed of by the authorised officer. It is true that the power to seek a freezing order under subs. (8) is limited to circumstances where an order has been made under subs. (5), a pre-condition for the grant of which is compliance by the authorised officer with the requirements of subs. (3). Subject, however, to compliance with the requirements contained within s. 908, having made an order under subs. (5), the Court has a discretion to make an order under subs. (8).

The constitutional rights which counsel for the first respondent invoked in advancing the argument that an application for a freezing order under s. 908, which he described as the "nuclear option", should only be utilised as a last resort, were the right to privacy, including privacy of banking records, and the right to property. As I understand it, the gist of the argument was that, while s. 908 does not expressly require an applicant for orders under that section to exhaust the other routes available to achieve the objective, the possibility of its implementation, without availing of other options available which are less intrusive of constitutional rights, infringes the rights of the taxpayer which are protected by the Constitution. The first respondent did not challenge the constitutionality of s. 908 in his grounds of claim. Nor did he serve a notice on the Attorney General under Order 60 of the Rules of the Superior Courts, 1986. The argument based on the asserted infringement of the first respondent's constitutional rights by the enforcement of s. 908(8) is not properly before the Court and I express no view on it.

Accordingly, in my view, this ground also fails.

Information received under s. 8(7) of the Act of 1996 obtained illegally?
In its long title the Act of 1996 is described as an Act to make provision for the establishment of the Bureau and to define its functions. The appointment of "bureau officers" is dealt with in s. 8. Section 8(7), which is in issue here, is a sub-section which prohibits disclosure of information and material by a bureau officer except to certain designated public officials, for example, another bureau officer, or a member of An Garda Síochána for the purposes of Garda functions. Insofar as it is relevant for present purposes s. 8(7) provides as follows:

> "Any information or material obtained by a bureau officer for the purposes of this Act may only be disclosed by the bureau officer to -
>
> (a) …
>
> (b) …
>
> (c) any officer of the Revenue Commissioners for the purposes of the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue,
>
> (d) …
>
> (e) …
>
> and information, documents or other material obtained by a bureau officer or any other person under the provisions of this

subsection shall be admitted in evidence in any subsequent proceedings."

Subsection (7) relates to "information or material obtained … for the purposes of this Act". As I have stated, the establishment of the Bureau and the delineation of its functions are the primary purposes of the Act of 1996. Section 3 provides for the establishment of the Bureau and s. 4 sets out its objectives. Its objectives are centred upon the identification and confiscation of the assets of persons "which derive or are suspected to derive, directly or indirectly, from criminal activity". Section 5 sets out the functions of the Bureau and provides that, operating through its bureau officers, its functions shall be the taking of all necessary actions in defined areas, for example, in accordance with "Garda functions" and under "the Revenue Acts", each of which expressions is defined in s. 1. In relation to the Revenue Acts the function is expressed as follows:

> "(1) Without prejudice to the generality of s. 4, the functions of the Bureau, operating through its bureau officers, shall be the taking of all necessary actions –
>
> (a) …
>
> (b) under the Revenue Acts or any provision of any other enactment, whether passed before or after the passing of this Act, which relates to revenue, to ensure that the proceeds of criminal activity or suspected criminal activity are subjected to tax and that the Revenue Acts, where appropriate, are fully applied in relation to such proceeds or activities, as the case may be …".

Section 14 of the Act of 1996 deals with search warrants. It empowers a Judge of the District Court, or in a case of emergency where it is impracticable to apply to a Judge of the District Court, a bureau officer who is a member of the Garda Síochána not below the rank of Superintendent, to issue a warrant but only where -

> "he or she is satisfied that there are reasonable grounds for suspecting that evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts, is to be found in any place …."

A warrant issued under s. 14 empowers the named bureau officer to seize and retain any material found at the place named in the warrant which he believes "to be evidence of or relating to assets or proceeds deriving from criminal activities, or to their identity or whereabouts". Under s. 14, "place" includes a dwelling.

In relation to the averments contained in the applicant's grounding affidavit setting out the information extracted from the first respondent's laptop, in his replying affidavit, the first respondent averred as follows:

> "… I object to the introduction of those matters as evidence in this case on the basis that the evidence was improperly obtained from the laptop. The true circumstances of the acquisition of the laptop and the contents thereof have not been properly explained. They arise from the fact that the … Bureau investigated a certain unnamed person who had employed me to do tax returns for him. I say that I did this based solely on information supplied by the said client to me. In the course of their investigations, they detained the laptop for the purposes of investigating the tax affairs of that unnamed person. I say that any of the information on that laptop obtained and used by the Revenue Commissioners or … [the] Bureau or any other person does so without authority and the same has been illegally obtained and is inadmissible in evidence in any matter".

In a supplemental affidavit sworn by the applicant in response to the affidavit of the first respondent, referring to that averment, she averred that she believed that the question of whether or not information was properly obtained was a matter for legal argument. She asserted that the information was legally obtained and was properly put before the Court. Accordingly, the fact deposed to by the first respondent, that the Bureau detained his laptop for the purposes of investigating the tax affairs of an unnamed client, was not contradicted.

In the grounds of claim, the argument put forward on behalf of the first respondent was that the information obtained from the Bureau did not disclose the commission of an offence and had no connection with the Bureau's investigation in the "other matter" and, therefore, it was not obtained for the purposes of the Act of 1996, which was a requirement which had to be complied with before information was capable of being transferred to the Revenue Commissioners under s. 8(7). In the applicant's points of defence, it was asserted that any information retrieved from the Bureau had been obtained for the purposes of the Act of 1996 and that the Bureau was empowered to pass on the information to the Revenue Commissioners under s. 8(7). Counsel for the applicant, in their submissions, answered the first respondent's contention that the laptop had no connection with the Bureau investigation, and, therefore, did not come within the purview of s. 8(7), by submitting that the first respondent had not offered any evidence to support that assertion and that, in the absence of evidence to the contrary, information obtained by the Bureau in the course of searches forming part of their investigation must be presumed to be information obtained for the purposes of the Act of 1996. It was also asserted that s. 8(7) does not require that the information disclose the commission of an offence before the information can be disclosed to the Revenue Commissioners.

At the hearing of the preliminary issue, the case made on behalf of the first respondent was that the information on the laptop seized by the Bureau was illegally and unconstitutionally obtained by the applicant. The bureau officer could not have obtained a warrant under s. 14 of the Act of 1996 to search the first respondent's office arising out of the first respondent's personal and business affairs solely, because he could not testify that there were reasonable grounds for suspecting that evidence of or relating to assets or proceeds derived from criminal activities, or their identity or whereabouts, were to be found in the office, it was submitted. In consequence, the Court cannot permit the evidence obtained from the laptop to be used to support the applications made under s. 908.

Counsel for the first respondent submitted that the Court should adopt the principles enunciated by the Supreme Court in *People (Director of Public Prosecutions v. Kenny* [1990] 2 I.R. 110. That case concerned evidence obtained as a result of a search of the appellant's flat pursuant to a search warrant under s. 26 of the Misuse of Drugs Act 1977, as amended. The Court of Criminal Appeal held that the warrant was invalid, because there was no evidence that the Peace Commissioner who issued it had inquired into the basis of the suspicion of the applicant Garda, and, accordingly, he had failed to exercise his judicial discretion and had failed to carry out his function under the Act of 1977. However, the Court granted leave to appeal and on the appeal declared that the evidence was admissible. On appeal to the Supreme Court under s. 29 of the Court of Justice Act 1924 it was held by the majority, in allowing the appeal, that evidence obtained as a result of a deliberate and conscious violation of constitutional rights of a citizen must be excluded unless the Courts in its discretion was satisfied that there were extraordinary excusing circumstances which justified the admission of the evidence or that the Act constituting the breach of constitutional rights was committed unintentionally and accidentally. The passage from the judgment of Finlay C. J. relied on by counsel for the first respondent followed an analysis of the

case law on the admissibility of unconstitutionally obtained evidence, with particular regard to arguments which had been advanced in the case as to the choice between "the deterrent and absolute protection principles" (*per* Finlay C. J. at p. 131). In the passage relied on, Finlay C. J. stated as follows (at pp. 133 – 134):

> "As between two alternative rules or principles governing the exclusion of evidence obtained as a result of the invasion of the personal rights of a citizen, the Court has, it seems to me, an obligation to choose the principle which is likely to provide a stronger and more effective defence and vindication of the right concerned.
>
> To exclude only evidence obtained by a person who knows or ought reasonably to know that he is invading a constitutional right is to impose a negative deterrent. It is clearly effective to dissuade a policeman from acting in a manner which he knows is unconstitutional or from acting in a manner reckless as to whether his conduct is or is not unconstitutional.
>
> To apply, on the other hand, the absolute protection rule of exclusion whilst providing also that negative deterrent, incorporates as well a positive encouragement to those in authority over the crime prevention and detection services of the State to consider in detail the personal rights of the citizens as set out in the Constitution, and the effect of their powers of arrest, detention, search and questioning in relation to such rights.
>
> It seems to me to be an inescapable conclusion that a principle of exclusion which contains both negative and positive force is likely to protect constitutional rights in more instances than is a principle with negative consequences only.
>
> The exclusion of evidence on the basis that it results from unconstitutional conduct, like every other exclusionary rule, suffers from the marked disadvantage that it constitutes a potential limitation of the capacity of the courts to arrive at the truth and so most effectively to administer justice.
>
> I appreciate the anomalies which may occur by reason of the application of the absolute protection rule to criminal cases.
>
> The detection of crime and the conviction of guilty persons, no matter how important they may be in relation to the ordering of society, cannot, however, in my view outweigh the unambiguously expressed constitutional obligation 'as far as practicable to defend and vindicate the personal rights of the citizen'.
>
> After very careful consideration I conclude that I must differ from the view of the majority of this Court expressed in the judgment of Griffin J. in *The People v. Shaw* [1982] I.R. 1. I am satisfied that the correct principle is that evidence obtained by invasion of the constitutional personal rights of a citizen must be excluded unless a court is satisfied that either the act constituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary excusing circumstances which justify the admission of the evidence in its (the court's) discretion".

The constitutional rights with which the cases analysed by Finlay C. J. were concerned were personal rights, being either the right to liberty or the inviolability of the dwelling, rights which the Court, pursuant to Article 40.3.1 of the Constitution, as far as practicable, must defend and vindicate (*per* Finlay C. J. at p. 133).

Counsel for the first respondent, while making the bald assertion that the first respondent's constitutional rights were consciously breached, did not, in developing this ground identify the constitutional rights in question, although, as I have indicated, he invoked the right to privacy and the right to property in developing the argument that s. 908 remedies should only be sought as a last resort. Although the applicant averred that one of the premises searched by the Bureau was an office at what she described as the first respondent's "home address", my understanding is that it is not the first respondent's case that the information passed by the Bureau to the Revenue Commissioners was obtained by the Bureau in breach of his right to the inviolability of his dwelling.

The case pleaded by the first respondent was that the disclosure of the information by the Bureau to the Revenue Commissioners was *ultra vires*, not that it was in breach of the first respondent's constitutional rights. In my view, the first respondent has not made out a case, either on the evidence or in law, that the disclosure was in breach of his constitutional rights. There is no basis on which the Court could make a finding based on the *ratio decidendi* of the decision of the Supreme Court in the *Kenny* case that the information obtained from the laptop is inadmissible.

In relation to the narrower proposition, that the Bureau, in transmitting the information, and the Revenue Commissioners, in receiving it, acted *ultra vires*, counsel for the first respondent drew a very instructive analogy between a filing cabinet containing paper files, on the one hand, and a laptop containing files, folders, Excel spreadsheets, Word documents and suchlike. He gave an example of a bureau officer, who on foot of a search warrant issued under the Act of 1996 to search a tax consultant's office on the basis of reasonable grounds for suspicion that evidence is to be found there relating to the proceeds of crime in an investigation of a client of the tax consultant, say, Mr. X., seizes a filing cabinet which contains files in relation to other clients of the tax consultant or the tax consultant's own personal affairs. He submitted that the authority conferred by the search warrant does not extend to any file in the filing cabinet other than files in relation to Mr. X. If it were otherwise, he submitted, the requirements and safeguards in relation to obtaining search warrants would be overridden and rendered nugatory. In my view, that submission is correct.

In this case, the evidence is that the applicant requested the information on the laptop from the Bureau under s. 8(7). It was furnished by the Bureau. The applicant relies on s. 8(7). Therefore the question is whether the information received by the applicant and relied on in support of the applications under s. 908 was information obtained by the Bureau for the purposes of the Act of 1996, that is to say, for the performance of the various functions of the Bureau in relation to the proceeds of crime, including ensuring that such proceeds are subject to tax. The first respondent has averred that the laptop was obtained by the Bureau in the course of the investigation of an unnamed client of his tax consultancy business. In the absence of evidence to contradict that averment, the Court is constrained to conclude that so much of the information on the laptop as did not relate to the unnamed client's affairs, was not obtained for the purposes of the Act of 1996 and that, accordingly, the Bureau had no authority to transmit the information to the Revenue Commissioners pursuant to s. 8(7).

Once the first respondent put evidence before the Court that the investigation by the Bureau did not relate to his activities, but related to the activities of an unnamed client, there could be no presumption that the information on the laptop relating to the first respondent was obtained for the purposes of the Act of 1996.

Accordingly, I find that the evidence derived from the first respondent's laptop and transmitted by the Bureau to the Revenue Commissioners is not admissible, to support the applicant's application under s. 908, notwithstanding the mandatory nature of s. 8(7).

As to the implications of the evidence from the laptop not being admissible, the question which arises is whether there was other evidence led by the applicant to support the applicant's application. Having reviewed the evidence contained in the applicant's grounding affidavit, excluding the information contained in paragraphs 61 to 68 inclusive, which summarise the evidence derived from the laptop, in the light of the facts deposed to in the replying affidavit of the first respondent, I am satisfied that there was. Of particular significance, in my view, was the lack of response by the first respondent to the applicant's investigation of his tax affairs as outlined in paragraphs 55 to 59 of the grounding affidavit, to which I will refer later, given that, at the hearing, the first respondent abandoned the technical objection which he had previously advanced that the applicant did not have power to investigate his tax affairs prior to 3rd July, 2008.

I will consider the implications of the exclusion of the information derived from the laptop in the context of the grounds advanced for seeking a freezing order in dealing with the next ground.

No risk of flight or removal of assets?
In developing this ground, counsel for the first respondent pointed to the similarity between a freezing order made under s. 908(8) and what is commonly called a Mareva-type injunction. He submitted that, in determining whether to grant an order under s. 908(8), the Court should apply the principles enunciated by the Supreme Court in *O'Mahony v. Horgan* [1995] 2 I.R. 411. In particular, he referred to the following passage from the judgment of Hamilton C.J. (at p. 420):

> "Before being entitled to the relief sought by him, the liquidator must establish that there was a likelihood that the assets would be dissipated with the intention that they would not be available to meet any decree or part of a decree ultimately made against the appellant in the proceedings."

Earlier (at p. 419) Hamilton C.J. had considered a number of authorities and had stated the principle as follows:

> "Consequently, the cases establish that there must be an intention on the part of the defendant to dispose of his assets with a view to evading his obligation to the plaintiff and to frustrate the anticipated order of the court. It is not sufficient to establish that the assets are likely to be dissipated in the ordinary course of business or in the payment of lawful debts."

It is the case that a Mareva-type injunction which is addressed to a bank or other financial institution and an order under s. 908(8) are similar in effect. However, the test which the Court applies in determining whether to grant such an injunction is not necessarily the test to be applied to give effect to the statutory power conferred by s. 908(8). The latter test is to be ascertained by reference to what the Oireachtas has empowered the Court to do in s. 908.

While it may appear at first sight that the Court is given a very broad discretion in relation to making an order under subs. (8) of 908, on a closer examination of s. 908 as a whole it becomes clear that the power is very circumscribed. First, it can only be exercised where an order is made under subs. (5). That means that the pre-conditions which I have already outlined have to be fulfilled and, as regards making a freezing order, in my view, it means that the Court has to be satisfied that there are reasonable grounds for applying for the freezing order. Looking at s. 908 as a whole, there must be reasonable grounds for apprehending that the collection of tax from the taxpayer, in respect of whom there are reasonable grounds for suspecting default in his obligations under the taxation code, is likely to be seriously prejudiced. The crucial question for the Court is whether it can be reasonably inferred from the evidence that there is a real risk that the taxpayer will move assets out of the financial institutions to which the order under subs. (5) is directed with a view to the assets not being available to meet his liability for tax. Secondly, the order only relates to assets and money in the custody of the financial institution to which the order under subs. (5) is directed, not other assets. Thirdly, the Court has to make a judgment as to the proper duration of the order, which has to be specifically referred to in the order. Fourthly, the prohibition on dealing with assets and moneys applies "without the consent of the Judge". Therefore, there is a degree of flexibility built into subs. (8).

What happened in this case is that, with the consent of the applicant, the freezing order was varied on 30th July, 2008 and it was "lifted" on 28th August, 2008. It is reasonable to infer that at that stage the applicant was satisfied that there was not a risk that the first respondent would move assets so that they would not be available to meet his liability to tax.

An assessment of the particular concerns expressed by the applicant in seeking the freezing order, which I have outlined earlier, against the evidence, but excluding the information derived from the laptop and taking into account the facts deposed to by the first respondent in his replying affidavit, leads to the following conclusions as to whether there are reasonable grounds for inferring that the first defendant would move the funds in the four institutions with a view to removing them from the potential grasp of the Revenue Commissioners to meet his liability as to tax:

> (1) The mere existence of property, bank accounts and other assets outside the jurisdiction would not, on its own, justify the inference that a suspected defaulting taxpayer is likely to move assets with a view to defeating a valid claim by the Revenue Commissioners. However, the fact that the existence of foreign bank accounts may make it easier to move funds is a relevant factor.
>
> (2) The facts deposed to by the applicant in relation to the funds which passed through a bank account of a dissolved company, being a bank account which was opened by the first defendant and in respect of which he was the sole signatory, was an understandable concern on the part of the applicant. The averment of the first respondent in his replying affidavit that he had no "interests, legal, equitable or beneficial in any monies invested in the company" does not allay that concern.
>
> (3) The fact that a substantial property was for sale, which clearly was a matter of public knowledge and not a surreptitious transaction, in my view, should not have given rise to undue concern.
>
> (4 & 5) Neither the transfer of the shareholding from the first respondent to the second respondent, nor the transfer of property and other assets from the first respondent to the second respondent should have given rise to undue concern, particularly, as the property transfers came to light as a result of the submission of particulars delivered forms to the Revenue Commissioners in relation to stamp duty, although the propensity of the first respondent to divest himself of assets certainly gives rise to questions.

Of the particular concerns articulated by the applicant, the disregard of the first respondent in complying with his statutory duties and the difficulties experienced by the Revenue Commissioners in engaging with him, in my view, is a significant feature. In response to the applicant's averments setting out his failure to respond to enquiries, in the course of her investigation, the first respondent

questioned the applicant's authority but abandoned this ground at the hearing.

Having regard to the totality of the admissible evidence, I am satisfied that there were reasonable grounds as of 21st July, 2008 for apprehending that the first respondent would move assets in the four institutions so as to avoid liability to tax.

Submission of the second respondent
The main contention advanced on behalf of the second respondent was that the freezing order should not have been made against her because no grounds existed for making such an order. That contention was advanced on the basis of two propositions of fact: that the tax affairs of the second respondent were in order; that she had no liability to the Revenue other than the possibility of liability to capital gains tax, which is the subject of an appeal; and that there was no evidence that she intended leaving the jurisdiction or doing anything improper.

In relation to the first and second propositions, it was submitted that, on the basis of the evidence contained in the second respondent's replying affidavit, the only matters which were outstanding between the Revenue Commissioners and the second respondent were two capital gains tax assessments which were under appeal and which were being dealt with in the appropriate forum. The second respondent's tax affairs were in order, it was submitted, and there were no assessments or correspondence to indicate any problems in relation to the returns made by her. In her professional capacity, she was in receipt of a tax clearance certificate dated 28th August, 2008. There were no circumstances which justified the Court in making a freezing order or, alternatively, in making it without notice to her.

In relation to the third proposition, the second respondent deposed to her personal and familial circumstances as corroborating evidence that she had no intention of moving her permanent residence to another country.

Counsel for the second respondent adopted the argument advanced on behalf of the first respondent in relation to the admissibility of the evidence derived from the laptop, insofar as it was relevant.

The second respondent's history of filing tax returns in her maiden name and on a self assessment basis and the tax she paid in the years from 1997/1998 to 2006 are deposed to in paragraphs 50 and 51 of the applicant's grounding affidavit. Paragraphs 52, 53 and 54 set out facts in support of the applicant's contention that the second respondent has evaded very substantial tax liabilities from 1997 onwards. In paragraph 55, the applicant set out her endeavours in her investigation of the second respondent to establish the extent of the capital accumulation and the correct tax liabilities of the second respondent. Correspondence of 18th April, 2007 (requiring the making of a return of property on form S.A.1), 8th June, 2007, 17th August, 2007 and 21st November, 2007 elicited no response from the second respondent. In her replying affidavit the second respondent sought to excuse that failure by advancing an argument similar to the argument advanced by the first respondent – that the applicant had no "lawful jurisdiction" to deal with her affairs. As that argument was not advanced by the second respondent at the hearing, I take it to have been abandoned. It was the failure of the second respondent to deal with any of the applicant's correspondence which led to the applicant raising assessments to capital gains tax against the second respondent for 2000 to 2005. The applicant has averred that appeals against those assessments were only received when enforcement proceedings were commenced by the Revenue against the second respondent.

The second respondent did not contend that the order made under subs. (5) of s. 908 was not properly made. It was emphasised that her complaint related to the making of the freezing order. The basis on which it was argued that the freezing order should not have been made was the plaintiff's contention that she had engaged with the Revenue Commissioners, that she was tax compliant, and that there was nothing to suggest that there was money due by her to the Revenue Commissioners as was asserted in her replying affidavit, to which the applicant had not responded. Therefore, it was submitted that there was no conflict of fact. In my view, the contrary is the case. Each of those propositions is at variance with what was deposed to in the applicant's grounding affidavit. The second respondent did not seek leave to cross-examine the applicant, although by letter dated 17th December 2008, the respondents' solicitors gave the applicant's solicitor notice of intention to cross-examine the applicant.

Insofar as the second respondent implicitly accepted that the order under subs. (5) was properly made, there is implicit acceptance by her that there were reasonable grounds for suspecting that she may have failed or may fail to comply with the provisions of the taxation code to an extent that is likely to have led or to lead to a serious prejudice to the proper assessment or collection of tax. At any rate, when I made the order under subs. (5), I was satisfied that the requirement of subs. (5) had been complied with. The second respondent has not challenged that conclusion.

As I have stated, in my view, what is necessary to confer jurisdiction to take the additional step of making a freezing order under subs. (8) is that the evidence is such that the Court can reasonably infer that there is a real risk that the taxpayer will move any funds held by the financial institution to whom the subs. (5) order is directed, so as to take it out of the reach of the Revenue Commissioners. As the admissible evidence before the Court clearly demonstrates that the second respondent's financial affairs and asset ownership are intertwined to a very considerable extent with those of the first respondent, in my view, the position of the second respondent cannot be factually distinguished from that of the first respondent. Therefore, in my view, it can be reasonably inferred that, as of 21st July, 2008, there was a real risk that any assets in the name of the second respondent in any of the four institutions the subject of the orders under subs. (5) would be moved with a view to taking them out of the reach of the Revenue Commissioners.

Order
Accordingly, I find that, as regards the first respondent and the second respondent, the order made on 21st July, 2008 under s. 908(8) was properly made.