THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 961 JR]

BETWEEN

BPSG LIMITED, TRADING AS STUBBS GAZETTE

APPLICANT

AND

THE COURTS SERVICE

THE MINISTER FOR JUSTICE AND EQUALITY

IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 28th day of March, 2017.

1. The applicant is a limited liability company which trades under the name Stubbs Gazette as a provider of credit referencing, credit management, credit scoring and other information services to businesses, public bodies and individuals. Stubbs Gazette is a publication with a long history in Ireland and has traded here since it was established in 1828. Until 2008 the company was owned by the international credit rating agency, Dun & Bradstreet, and in that year BusinessPro, the plaintiff, acquired its worldwide rights to publication.

2. The first defendant is a statutory body established under the Courts Service Act 1998, with the stated function of managing the courts in the State, providing information on the courts system to the public and providing facilities for users of the courts. The second respondent is a minister of government and a corporation sole and is sued as the body having control and oversight over the Courts Service. The fourth respondent is sued in her representative capacity.

3. The applicant commenced application for judicial review on 18th December, 2013, by way of an ex parte application, seeking an order of certiorari and declaratory relief regarding the withdrawal of access to the records of judgments maintained in the District and Circuit court offices in the State.

4. Leave to bring judicial review was granted by O'Malley J. on 18th December, 2013.

Grounds of claim

5. For many years the Courts Service had provided, on an ad hoc basis, access to the internal court records of unregistered judgments in the District and Circuit Courts. In 2010 access to this information was withdrawn by Courts Service. Certiorari is sought that the decision be quashed and the applicant seeks a declaration that the failure or refusal of the Courts Service to provide details of unregistered judgments is in breach of Articles 34.1, 40.3, 40.6.1 and 43 of the Constitution, and that the failure or refusal has the effect that the State is in breach of Article 4(3) of the Treaty on European Union, and Articles 49, 56, 101, 102 and 106 of the Treaty on the functioning of the European Union ("TFEU"), in that the decision impacts the applicant's freedom to provide services and do business, the right to freedom of expression, including the right to receive information of the kind at issue and that the decision is unlawful because of the failure of the Courts Service to provide adequate reasons.

6. The other grounds of the claim will appear in the course of the judgment.

Grounds of opposition

7. The respondents argue that the approach taken by the Courts Service to the request for access to the cause books was a lawful exercise of its authority and statutory competences under the Courts Service Act, 1998, and in particular that it was entitled to take the decision in the light of its obligations under the Data Protection Acts 1988 to 2003 ("the Data Protection Acts"), and the legal rights and obligations of third parties under that legislative scheme. Further, in answer to the argument that the decision to withdraw access to the books and records was unreasonable or arbitrary it is pleaded that as the information maintained in the records is not, and cannot by its nature be, either complete or up to date, it acted reasonably and in accordance with the Constitution, the European Convention on Human Rights Act 2003, the Charter of Fundamental Rights of the European Union and the Data Protection Acts, and common law in making the decision it did.

8. Finally, the first respondent pleads that the custody and control over court records vests in the particular judges and courts by operation of law, and that Article 35.2 of the Constitution which enshrines the independence of the judiciary, limits the ability of the Courts Service to interfere with the judicial functions, and ipso facto with the mode of control by a particular judge of his or her court records.

Relevant background facts

9. The applicant avers that for a period of approximately ten years up to October, 2010 the Courts Service made details of unregistered judgments of the District and Circuit Courts available for public inspection. A UK-registered company, Registry Trust Limited ("Registry Trust"), obtained details of judgments through having access to the cause book records of courts and court offices throughout the State, and by having its agents transcribe details of unregistered judgments from those books. The applicant in turn purchased reports of these unregistered judgments from Registry Trust for the purposes of its credit referencing, business information, and other related services.

10. In or about October, 2010 the Courts Service advised that it considered that as a matter of law no general public right of access to the records exits and withdrew access by Registry Trust to the cause books of the relevant courts.

11. On 15th December, 2010 Mr. Treacy had a meeting with John Coyle, the Head of the Circuit Court and District Court Operations

Directorate in the Courts Service. In the course of that meeting Mr. Treacy outlined his concerns, and the effect the decision would have on businesses, and access to credit generally within the country. Mr. Coyle says that he explained the background to the decision and the particular concerns.

12. On or around 4th March, 2011, High Court proceedings against the Courts Service were instituted by Registry Trust bearing record number 2011 No. 2084 P arising from the withdrawal of access, and the applicant did not seek to be joined or to have any involvement in those proceedings.

13. The applicant was informed by Registry Trust sometime in the summer of 2013 that its proceedings against the first respondent had been compromised without admission of liability by the Courts Service.

14. The applicant, then, by letter of 24th September, 2013 wrote to the Courts Service and requested a meeting to discuss the reasons for the withdrawal of access to the court records. In a reply of 1st October, 2013 it was stated that the Courts Service did not regard itself as required by law to make available for public inspection the cause books of the relevant courts, and that these were not public records. Concern was also expressed that the making available of such records might expose the Courts Service to challenge under the Data Protection Acts. Finally, it was said that no warranty could be given by the Courts Service as to the accuracy or completeness of the records, as they did not show on the face of the record whether the relevant judgment had been satisfied in whole or in part.

Is the application out of time?
15. The respondents make a preliminary procedural argument that the application is out of time as access to the relevant records ceased in or about the month of October, 2010, and the applicant company knew of the content and import of the decision at the latest by 15th December, 2010.

16. It is not in dispute that the relevant officers of the applicant company had meetings regarding the availability of the records in late 2010, and that the applicant company was fully aware by December, 2010 of the effect and import on its business of the decision now sought to be challenged. The uncontroverted affidavit evidence shows that the applicant knew of the litigation commenced in March, 2011 and subsequently compromised between Registry Trust and the first respondent.

17. The applicant says that the operative date of the decision under challenge is 1st October, 2013, the date of the letter sent in reply to its request for an explanation and reconsideration of the decision, but pleads in the alternative that if the operative decision was made in 2010, time should be extended, because the point in issue is of great legal importance, and because what is sought is declaratory relief which it is argued is not to be dealt with under the strict time limits on O.84.

18. Order 84, rule 21 provides for the fixing of time for the bringing of judicial review to be reckoned from the date "when grounds first arose".

19. Reliance is placed on the general proposition stated in Hogan & Morgan "*Administrative Law in Ireland*" (4th Ed.) at para. 16.22 (p. 827) as follows:

> "Any applicant from mandamus must first call on the administrative body concerned to do its duty, and this must have been refused, although there is nowadays some room for doubt whether this 'formalistic approach' will be adopted in every case. The requirement that there be a 'demand and refusal' has much to commend it: it makes sense that the administrative body concerned be given the chance to mend its hand before the aggrieved citizen resorts to litigation. But the courts do not insist upon this requirement where it is unsuitable, or where the refusal can be inferred from the circumstances."

20. It is argued by the respondent that the applicant could have made demand of Court Service once it became aware that access to the records had been denied to Registry Trust, either on 13th October, 2010, or on 4th November, 2010. The applicant argues that it was too remote from that decision, and while it was impacted thereby in its commercial activity, it was not the addressee of the decision, and the impact was indirect rather than direct. The applicant argues that the narrow timeframe in which an application may be brought for judicial review cannot be ascertained by means of a consideration of the actual or subjective knowledge of an applicant, and that the date of a decision, directed to a third and unrelated party, cannot be the operative date for the purposes of the running of time. It hoped indeed that the plenary proceedings commenced by Registry Trust would be successful, and it was only after it became aware that those proceedings were compromised without a resolution that would enable access to the books and records, and without any concession being made by the respondents, that it sought to challenge the decision.

Discussion on time argument
21. *Locus standi* is established in respect of a challenge by way of judicial review provided an applicant has "a sufficient interest in the matter to which the application relates", as provided by O. 84, r. 20(5). The applicant company has had a sufficient interest in the decision by the Courts Service in October, 2010 to refuse further access to Registry Trust, as it frankly admits that it was directly impacted by the decision and lost its primary source of the judgment information on which it depended for much of its commercial activity.

22. There is no rule of law that limits standing to an addressee of a decision, and the provisions of r. 20(5) provide a wider test of standing. I consider that the applicant did have standing to commence proceedings, whether by way of plenary action, or otherwise, as soon as it became aware of the decision by which the access was withdrawn in October, 2010 or at the latest on 15th December, 2010, the date at which it first communicated with the relevant officer of the Courts Service. I consider that the applicant was aware of the restriction on the availability of the records, the impact that this was likely to have on its business, and the identity of the decision maker at the latest by December, 2010.

23. No authority has been identified which suggests the broad proposition for which the applicant contends, namely that the applicant had to make formal request for the judgment information before time ran against it. In my view the evidence clearly points to the applicant being impacted by the decision made in late 2010, being aware of the nature and source of the decision, and I accept the argument of the respondents that the attempt to characterise the correspondence that occurred in 2013 as the decision making process in respect of which this application is brought is contrived and does not start time afresh.

24. The applicant argues for a general rule that an applicant for judicial review should make formal demand that a decision be made to enable the decision maker to meet the request. However, even if such a rule exists, and I do not need to resolve that question here, it cannot avail the applicant in that it knew of the decision in late 2010, that plenary proceedings had been commenced and later discontinued by Registry Trust, and that the decision stood and was not intended to be reversed.

25. For completeness I accept the argument made by the applicant that the internal circular sent by the Courts Service to the registrars and court officials in the Circuit and District Courts on the 4th of November 2010 could not be characterised as the effective decision for the running of time. This internal circular or memo was just that, a communication of a decision already made and which had already been communicated to Registry Trust in October 2010. That argument does not avail the applicant.

26. In *M.P. v. DPP* [2015] IEHC 40 Kearns P. stressed the mandatory nature of the time limitations in judicial review. Judicial review is a form of process which is convenient and relatively speedy, and avoids the costs and expenses of conducting an action where the proofs are met by oral evidence, and is a mode of trial convenient in particular where the action rests primarily on questions of law, or the construction of documents.

27. For these reasons I conclude that the applicant is out of time.

Declaratory relief: different time limits?
28. The applicant also makes the point that, even if it is out of time to seek certiorari by way of judicial review, what it terms as "classic judicial review relief", an application for declaratory relief may still be within time. It relies on the provisions of O. 84, r. 27(5):

> "(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in a civil action against any respondent or respondents begun by plenary summons by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by plenary summons."

29. The argument is that this sub-rule gives the court a power to ignore the three-month time limit in respect of judicial review in general if the relief sought is declaratory relief. I disagree with that reading of the Rules and the power thereby vested seems to me to permit the continuation of an application for declaratory relief by way of plenary proceedings, in the event of which the action would be concluded or continued as a plenary action. The present proceedings were not conducted or continued as a plenary action, but were commenced and continued grounded on affidavit evidence, and no oral evidence was adduced, or sought to be adduced, nor was there any application to cross-examine any of the evidence of the respondents.

30. This interpretation is consistent with the provisions of O. 84, r. 27(7) which provides as follows:

> "(7) At any stage in proceedings in prohibition, or in the nature of quo warranto, the Court on the application of any party or of its own motion may direct a plenary hearing with such directions as to pleadings, discovery, or otherwise as may be appropriate, and thereupon all further proceedings shall be conducted as in an action originated by plenary summons and the Court may give such judgement and make such order as if the trial were the hearing of an application to make absolute a conditional order to show cause."

31. Reading the two sub-rules together, then, an application for judicial review which is directed or permitted to be continued or prosecuted as if it were a plenary action is one in respect of which the court has wide powers to direct pleadings, and following such directions the proceedings "shall be conducted" as if they were plenary proceedings at which oral evidence to establish the proofs would be required.

32. I am not satisfied that there exists a different time limit for the commencement of an application for judicial review by way of declaratory relief as the applicant contends. The applicant could have sought a declaration by plenary action.

Discretion to extend
33. The applicant argues that I should exercise the discretion to extend time having regard to the conduct of the applicant in attempting to resolve the matter through direct contact with officials in the Courts Service.

34. By email of 15th of December, 2010 James Treacy the managing director of the applicant company made representations to the Minister for Science, Technology and Innovation. Mr. Treacy made representations to the Minister regarding what he described as "the recent decision of the Irish Courts Services to prevent access to our correspondents collecting the unregistered judgments from courts throughout the country". Mr. Treacy refers to earlier discussions with the Minister, and to his meeting with John Coyle which he described as "very helpful in explaining why they took this step". Mr. Treacy outlined his view that the absence of information would damage Ireland's credibility as a business location and would not be in accordance with international best practice in credit management.

35. The next contact was a letter from Mr. Treacy to the Courts Service on 30th January, 2013 in which he referred to a "long-standing and unresolved issue that has been injurious to our business" and identified the decision of the Courts Service in October, 2010 as the source of that issue. A meeting was requested with Mr. Brendan Ryan, the Chief Executive Officer of the Courts Service. By letter dated 7th March, 2013, Mr Ryan declined the request by Mr. Treacy for a meeting, and correctly took the view that the ongoing proceedings meant that it was inappropriate for him to meet to discuss the issue at that time.

36. The applicant says that it was not until July, 2013 that it was informed that the Registry Trust proceedings against the first respondent had been compromised and discontinued. By letter of 24th September, 2013 Mr. Treacy sought a meeting with the Courts Service to discuss the issue and noted the previous correspondence with Mr. Ryan, where Mr. Ryan had declined an invitation to meet having regard to the ongoing proceedings. In this letter Mr. Treacy asked that Mr. Ryan would meet him "to discuss the rationale of your predecessor's decision and at the very least restore access on an ad hoc basis, pending a broader review of the issue".

37. Mr. Ryan, in a letter of 1st October, 2013, noted that the High Court plenary proceedings had been struck out on 11th April, 2013. He reiterated his position, namely that the records were not records required by law to be made available for public inspection and set out details of the reasons. Mr. Ryan concluded his letter by saying that, in the light of legal advice that he had received, he did "not consider that the Courts Service is in a position to provide the facility you seek". No answer was given to the specific request for a meeting.

38. I consider that it was reasonable for the applicant to await the resolution of the plenary proceedings commenced by Registry Trust before engaging further with the respondents, and I consider that Mr. Ryan's letter by which he had prudently refused to meet with Mr. Treacy recognised the interconnection between the complaints of the two companies and the likely overlap of issues. It would perhaps have been inappropriate for a court to entertain an application by this applicant for judicial review of the decision when the plenary proceedings were still live, and the obvious risk that a different decision could result from each action, or that the applicant would be held to be premature, was a real one. The applicant also in my view cannot be criticised for attempting to resolve

the matter informally, or on an ad hoc interim basis, once it learned that the Registry Trust proceedings had concluded. There is nothing on the evidence before me that would suggest that the applicant was aware, as early as April, 2013 that the proceedings had been discontinued, and I must accept the uncontroverted evidence of Mr. Treacy on affidavit that the applicant did not become aware of this until July, 2013, although he does not state the day in that month.

39. Equally too, it seems to me that the applicant would have faced an argument had the Registry Trust proceedings run to a conclusion and been determined in favour of one or other party, that an authoritative precedent existed. The decision in the plenary proceedings could have resolved the matter in one way or the other and the result would inevitably have impacted on the applicant's access to the information in question. Thus, it seems to me that the applicant was correct to wait until the conclusion of the Registry Trust proceedings.

40. The reply from Mr. Ryan on 1st October, 2013 was, in my view, a justiciable decision, and there having been no resolution of the matter in the plenary proceedings by another court, the matter remained to be resolved and was dealt with by both parties as being ongoing pending the conclusion by whatever means of those plenary proceedings.

41. Accordingly, then, I conclude that while the applicant is out of time to commence this application for judicial review, that I should exercise my discretion to extend time for the reasons stated. My discretion is engaged by virtue of the fact that the applicant sensibly awaited the conclusion of the plenary proceedings and sought to resolve the matter informally in late 2010. The approach of the applicant in so doing meant that there was not a multiplicity of proceedings, and it prudently awaited the determination of proceedings which would have, had they run to conclusion and judgment, resolved the issue one way or the other.

42. I do not for that reason propose to consider the applicant's argument that the reasons for the withdrawal of information given in the letter of 1st October, 2013, and further expanded in the letter of 13th December, 2013 are different reasons and sufficiently different to start time running afresh, or to constitute the true decision which is challenged. The correspondence from Mr. Ryan is clear, and while his letter of 13th December, 2013 is longer and more detailed, it gives the same substantive reasons as were given by him, earlier in his letter of 1st October, 2013.

The nature of the records

43. The Judgments (Ireland) Act 1844 provides for the "registering of all judgments in Ireland". The relevant court at the date of enactment was the High Court. Section 3 provides that any judgment so registered must be made available for inspection to the public. The Register of judgments maintained in the Central Office of the High Court established for the statutory purpose is a complete register of all judgments and orders made in the High Court.

44. Section 2(1) of the Circuit Court (Registration of Judgments) Act 1937 enables, but does not require, the registration of District Court and Circuit Court decrees in the Register of judgments maintained in the Central Office of the High Court:

> "Any judgment of the Circuit Court obtained after the commencement of this Act may be registered in the Central Office in like manner as a similar judgment of the High Court may be registered in that Office."

45. The provision is extended by s. 25(1) of the Courts Act 1981:

> "Any decree of the District Court made after the commencement of this section may be registered in the Central Office of the High Court in like manner as a similar judgment of the High Court may be registered in that Office."

46. Because registration is a matter left to the judgment creditor in the case of judgments and orders obtained in the District Court and the Circuit Court, the Register cannot be said to be, nor can it be as a matter of law required to be, a full record of all judgments and orders made in those lower courts.

47. However, even the Register of High Court judgments, insofar as it reflects the orders and decrees made by judges of the High Court, is not of its nature a complete and up to date record of the status of a judgment debt. After a judgment debt has been paid in full, or compromised, the judgment creditor or debtor may lodge a satisfaction piece. The evidence of John Coyle, Head of the Circuit Court and District Court Operations Directorate in the Courts Service is that the number of satisfaction pieces entered in court records is in relative terms quite small, and by way of illustration in the year 2013 just over one per cent of the judgments marked in the Circuit Court were recorded as being satisfied. Furthermore, the evidence is that even when a judgment is compromised or satisfied the debtor or creditor, as the case may be, does not always act promptly in entering a satisfaction piece, and accordingly, at any given time the record may not accurately state the true position in regard to satisfied or compromised debts.

48. There is maintained in the offices of the local District and Circuit Courts books containing records of civil debt proceedings known as "Cause Books" in which are contained details of the names and addresses of plaintiff and defendant, summary of the claim and the details of any judgements granted. Some of the records are in digital form, but the majority are hard copy ledger type books written up in handwriting.

49. There is also maintained in the cause books details of judgements entered in the offices of the relevant court in the statutory default jurisdiction, when an Appearance has not been entered by a defendant. Such judgements are entered as a result of administrative action in which there is no judicial involvement.

The administration of justice in public

50. The applicant relies on the principles of what it terms "open justice" from Article 34.1 of the Constitution, that justice be administered in public. It argues that the records of the judgments or rulings of all courts, and default judgements made in the office, must be available to members of the public in general, and that the principle of the open and public administration of justice extends not only to contested hearings between parties, but also to circumstances where judgment is entered by a default procedure.

51. The nature and purpose of the principle that justice be administered in public was explained by Walsh J. in *In Re R. Limited* [1989] 1 I.R. 126 at p. 134:

> "Article 34 of the Constitution provides that justice shall be administered in courts established by law and shall be administered in public save in such special and limited cases as may be prescribed by law. The actual presence of the public is never necessary but the administration of justice in public does require that the doors of the courts must be open so that members of the general public may come and see for themselves that justice is done. It is in no way necessary that the members of the public to whom the courts are open should themselves have any particular interest in the cases or that they should have had any business in the courts. Justice is administered in public on behalf of all the

inhabitants of the State."

52. The rationale was explained by Hogan J. in *Allied Irish Bank Plc v. Tracey (No. 2)* [2013] IEHC 242:

> "22. The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse."

53. The requirement for the administration of law in public has been strictly construed. Laffoy J., in *Roe v. Blood Transfusion Service Board & Ors*. [1996] 3 I.R. 67, rejected the argument that the plaintiff was entitled to prosecute proceedings using a fictitious name to keep her identity out of the public domain. She based her consideration on the first principle that there be no concealment from the public, and that members of the general public "see for themselves that justice is done".

54. A similar conclusion was reached by Clarke J. in *Doe v. Revenue Commissioners* [2008] IEHC 5, [2008] 3 I.R. 328 where he described the constitutional imperative of open justice as having "weighty nature". In that case Clarke J. also referred to the established practices by which the court may restrain the full publication of all that transpired during a hearing including the names of the parties, but considered that the right to privacy or right to a good name were not sufficient to displace the constitutional imperative.

55. Peart J., in *McKeogh v. Doe & Ors. (No. 1)* [2012] IEHC 95 noted that the Defamation Act 2009 did not include a provision conferring discretion on a court to hear defamation proceedings other than in public, and held that the reporting of the court proceedings was permitted.

56. The applicant contends that the cause books, the books and records of the officers of the court which contain a record in scheduled form of the judgments and orders already pronounced in open court, or in the case of default judgments, given under the procedures in the office, must be open to public inspection as these are an essential element of the administration of justice.

57. That the public has an interest in general in the judgments of the courts in the State and specifically in money judgments is not a contentious proposition. Evidence is available in correspondence from Coolock Artane Credit Union and exhibited in Mr. Treacy's third affidavit that the Credit Union is assisted in making informed lending decisions, and dealing with anti-money laundering regulations, by having judgment information made available to it. It can scarcely be controversial that credit institutions need information regarding the credit status of customers before lending, and the fact that a court judgment has been entered against an individual would be a critical factor in decision-making regarding credit and the credit management process generally.

58. The central issue regarding the open administration of justice in the present case, however, is whether documents prepared after the conclusion of a case, which record the decision of the court and the records of default judgments, are a sufficiently close part of the process of the administration of justice to require that they be openly available. The applicant argues in broad terms that all court records are public documents which must be available for public inspection at all times.

59. It is, in my view, beyond doubt that the pronouncement of a judgment by a judge in every court in the State, whether that be a judgment delivered orally or in a written judgment, is to be considered to be part of the administration of justice, and must be done in a way that is sufficiently open and sufficiently public that the identity of the litigants and the result of the litigation is known, and capable of being known, by all members of the public.

60. Kenny J. in *McDonald v. Bord na gConn (No. 2)* [1965] I.R. 217 at pp. 230- 231 set out the conjunctive indicia of a process which is to be characterised as the administration of justice:

> "1, A dispute or controversy as to the existence of legal rights or a violation of the law;
>
> 2, The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
>
> 3, The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
>
> 4, The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;
>
> 5, The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country."

61. These principles were affirmed as recently as 2015 by the Supreme Court in *O'Connell & Anor. v. The Turf Club* [2015] IESC 57.

62. The requirement for the public pronouncement of judgments relates to the pronouncement of judicial determinations of the rights and obligations of parties to civil litigation or criminal trials. The right is a right to the conduct of a judicial or adjudicative process in public, and envisages the right applying when contested rights and duties are the subject of a dispute resolved judicially.

63. Judgments entered as a result of an administrative process do not involve any judicial determination of the respective rights of the parties and cannot be said to engage any adjudicative function such as is identified in the tests set out by Kenny J. and approved by the Supreme Court. The production of cause books or records of court judgments is not a judicial function but rather an administrative function which occurs after the judgment is delivered.

64. The production of documents of record after the conclusion of the public hearing is not a judicial function. Finnegan J. in *Minister for Justice Equality and Law Reform v. Information Commissioner* [2001] 3 I.R. 43 made an important obiter comment at p. 49:

> "While not relevant here I would hold that as the courts are entitled to regulate the conduct of court business a practice not having its origin in the Rules of the Superior Courts would likewise amount to a prohibition e.g. the practice of confining access to central office files to parties and their representatives."

65. The class of document to which these present proceedings relate is sufficiently akin to "central office files" and I consider that the dicta of Finnegan J. is persuasive which regard to any class of document which regulates the conduct of court business. A cause book or record of the results of a court hearing is undoubtedly such a document.

Judicial control of court documents
66. The matter must be dealt with also in the context of the clear provisions of s. 65 of the Court Officers Act 1926 by which control and custody of all proofs, documents and papers lodged or handed in to court in relation to any suit, or in the course of the hearing of any matter or suit, is held under the control of the judge and subject to his or her direction.

67. That a judge must be independent in the exercise of the judicial function has as a corollary an entitlement of an individual court to control its own procedures and processes. This principle is reflected in s. 65 of the Court Officers Act, 1926. The relevant sections of which provide:

> "(1) Nothing in this Act shall prejudice or affect the control of any judge or justice over the conduct of the business of his court.
>
> …
>
> (3) All proofs and all other documents and papers lodged in or handed in to any court in relation to or in the course of the hearing of any suit or matter shall be held by or at the order and disposal of the judge or the senior of the judges by or before whom such suit or matter is heard."

68. Section 65(3) suggests that all documents handed into court in the course of a hearing are held by or at the order and disposal of the judge hearing the matter. It is in that context that application for the release of documents adduced in evidence in the course of a hearing is made to the court itself. Equally, application for release of the DAR records is under Order 123, made to the judge having seisin of the hearing.

69. In *Chan U Seek v. Alvis Vehicles Limited* [2005] 1 W.L.R. 2965 Park J. observed at para. 30:

> "The general tenor of the cases is in favour of disclosure to the public of materials which, in proceedings in open court, have as it is sometimes put 'entered into the public domain'. The public includes the press and in many respects is effectively represented by the press, even if judges have on occasions become restive about some of the things which newspapers do."

70. Geoghegan J., giving the judgment in the Supreme Court in *Breslin & Ors. v. McKenna & Ors.* [2008] IESC 43, [2009] 1 I.R. 298, affirmed the general proposition that the approval of the court should be sought for the release in that case of books of evidence.

71. Absent such an order of court, the proofs and other documents handed in the course of a hearing held in open court may be disclosed to any party only by order of the court. A court officer could not therefore release the documents without an express order of the judge permitting such disclosure.

72. Hogan J. considered the import of that decision in *Allied Irish Bank Plc. v. Tracey (No. 2)* where he addressed the question whether a non-party who had an interest in the subject matter could gain access to affidavits in proceedings between the bank and Mr. Tracey:

> "23. In these circumstances the public are entitled to have access to documents which were accordingly opened without restriction in open court. This is simply part and parcel of the open administration of justice which the Constitution (subject to exceptions) enjoins. Entirely different considerations would naturally arise in respect of material which was not opened in open court or which was protected by the in camera rules or by reporting restrictions imposed, for example, pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008."

73. The applicant relies on this general proposition of Hogan J. and argues that the same principles apply to documents prepared following a court hearing as to those opened in court.

74. The judgment of Hogan J. in *Allied Irish Bank Plc. v. Tracey (No. 2)* deals with documents opened without any restriction in open court which he considered to have been "effectively read into the record of the Court". What the applicant seeks is access to documents which were not part of the court process itself, and did not exist in the currency of the conduct of the adjudicative process.

75. Finnegan J. in *Minister for Justice Equality and Law Reform v. Information Commissioner* [2001] 3 I.R. 43 held the disclosure of a transcript and shorthand notes were documents to which the public had a right of access, but only with leave of the court.

76. Insofar as there is a difference to be noted from the approach of Hogan J. in *Allied Irish Bank Plc. v. Tracey (No. 2)* and that of Finnegan J. in *Minister for Justice Equality and Law Reform v. Information Commissioner*, it does not require to be resolved by me in this case but the judgment of Hogan J. involved him in a consideration in the light of the provisions of Article 34.1 on which the applicant rests its case. Further, Finnegan J. was hearing an application by way of an appeal from a decision of the Information Commissioner under the Freedom of Information Acts, described as a "very special context" by Geoghegan J. in *Breslin & Ors. v. McKenna & Ors*. the Freedom of Information Act 1997 contained in its express terms a provision that court records were excluded from its remit.

Decision
77. I consider that the applicant is erroneous insofar as it argues that the record of the result of a court decision contained in the cause books is a document which is part of the public administration of justice. The judgment of Hogan J. in Allied Irish Bank Plc. v. Tracey (No. 2) is not authority for the broad proposition for which the applicant contends, namely that all documents, not merely those referred to, or read into the record of the court, are available for public inspection, and the cause books to which access is sought as of right by the applicant were never such, and were generated by court officials after the case concluded and by an administrative and not a judicial act. By their nature these documents are not created in the administration of justice, and were not intended, in my view, by the framers of the Constitution of 1937 to be part of the public nature of the court process.

78. The administration of justice in public might mean that the applicant is entitled to attend, through its agents, in every court in the land and to generate itself records of what occurred in those courts, but the access recognised by the constitutional imperative is access to the court process itself, and not to information in the form of records generated by administrative action after the public hearing has concluded.

79. The Oireachtas clearly intended that there be judicial control over such documents, and that control and the making of orders in

relation to such documents is part of the judicial function. In *Breslin & Ors v. McKenna & Ors*. the Supreme Court was considering the nature of this judicial function, and the discretion vested in a court in considering whether to permit access to documents. But Geoghegan J. firmly rooted the requirement that the approval of the court be sought for the disclosure of the book of evidence in the overall responsibility of the courts to ensure that due administration of justice (para. 36).

80. The fact that as a matter of law the release to a person not party to litigation of documents actually used in the course of the trial for a purpose other than those associated with that trial can be directed only with leave of the court, seems to me to import a recognition that the legal custody and control of documents which record the happening of any proceedings can be available only with leave of the court, and cannot be said to be documents to which the public generally has access. Further, express provision is made by statute for the registration of judgments. This is the record intended by the Oireachtas to be publicly accessible. It would be an impermissible exercise of policy making were I to mandate the production and availability of the records in that context.

81. The Credit Reporting Act 2013 made provision for the establishment, maintenance and operation by the Central Bank of a Central Credit Register for the holding of information about credit applications, credit agreements and parties to them, and makes provision for access to the information held on the Register for the assessment of creditworthiness and other purposes. The legislation arose from a commitment given by government as part of the EU/IMF Programme of Financial Support for Ireland, to develop a legal framework that would facilitate the collection and centralisation of credit information on borrowers. Data submissions by lenders for Phase 1 will commence from 30th June, 2017.

82. This legislative response will deal with some of the concerns of lenders and underlines the inappropriateness of a court engaging questions of policy in regard to records of judgments on the grounds derived from arguments of the common good on which the applicant relies. It is not open to me to create a right that records of the type sought be furnished in the manner contended.

83. In this regard it cannot be overlooked that judgments registered in the High Court are publicly available, and are required by law to be publicly available under the Judgment (Ireland) Act 1844. No such right at law exists in regard to the record of judgments, including default judgments, of the District Court and Circuit Court, unless the creditors themselves choose to avail of the option of registering those judgments in the High Court Register, registration on which is open to all.

Arguments from Articles 6, 10 and 11 of the ECHR

84. The applicant also relies on the right to a fair and public hearing contained in Article 6(1) of the ECHR:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

85. The applicant also relies on Article 10 of the ECHR which provides for a right of freedom of expression, importing the freedom to "receive and impart information and ideas without interference by public authority".

86. Article 10 of the ECHR states:

> "1. Everyone has the right to freedom of expression. This right shall Include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

87. Reliance is also placed on Article 11 of the Charter of Fundamental Rights of the European Union in identical terms.

88. The applicant relies on the right to communicate and to publish as relevant freedoms recognised by these provisions. It argues that the right of freedom of expression and the right to receive information import a corollary obligation on the part of the organs of State to provide that information in an accessible manner. It is also argued that any restriction on access to information must be proportionate. Reliance is placed on the dicta of Fennelly J. in *Mahon v. Post Publications Ltd.* [2007] IESC 15, [2007] 3 I.R. 338, where he described the principle of proportionality as it has developed in the Court of Human Rights, and in Irish law, as deriving from the requirement that a restriction be "necessary in a democratic society" and that it not be "any broader than strictly necessary to serve the interests invoked to justify it" (para. 62).

89. It was argued that the right to receive information imports access to the information sought, and an obligation on a public body to actively enable such access.

90. In *Társaság a Szabadságjogokért v. Hungary* [2009] ECHR 618 the European Court of Human Rights held a refusal of access to information constituted a violation of Article 10 of the Convention, derived from the fact that the public has a right to receive information of general interest, such that the applicant, a social watchdog, was entitled to have its processes and activities protected.

91. In the decision of *Kenedi v. Hungary* (2009) BRHC 335, the Court held that a denial of access to information by the State to a historian undertaking research into State security services in the 1960s was an unlawful interference with the right to freedom of expression.

92. In *Österreichische Vereinigung zur Erhantung, Starkung und Schaffung v. Austria* (2013) 36 BHRC, the ECtHR was hearing an application from a non-governmental organisation which had been denied access to decisions of a regional commission concerning property transactions, described by the court as a "social watchdog" and involved in the "legitimate gathering of information of public interest". The court held that the restriction was one prescribed by Austrian legislation but was not necessary. The court noted in particular that the State authorities enjoyed an information monopoly and that the complete refusal to give access to the applicant was disproportionate in particular in the light of that monopoly.

93. In *Guerra v. Italy* (1998) 4 BHRC 63 the court held that a right to receive information cannot be construed as imposing on a State positive obligation to collect and disseminate information of its own motion.

94. The applicant does not make the argument that it performs a public service, but it argues that it performs a function which serves an important public and commercial interest.

95. The jurisprudence of the ECtHR would suggest that the right of freedom of expression does not in itself create a general right of access to all information, or more importantly create a concomitant obligation on another body, even a public body, by way of a positive obligation to provide such information. This was the conclusion of the court in *Gaskin v. U.K.* [1989] ECHR 13.

96. In *Gaskin v. The United Kingdom* the applicant sought access to case records held by the local authority in whose statutory care he had been placed. The court said the following:

> "The Court holds, as it did its aforementioned Leander judgment, that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." (Series A no. 116, p. 29, para. 74). Also in the circumstances of this case, Article 10 (art. 10) does not embody an obligation on the State concerned to impart the information in question to the individual." (para. 52)

97. Fennelly J. in *McD. v. L.* [2010] 2 I.R. 199 set out the correct approach of the Irish courts in regard to the interpretation and application of the case law of the European Court of Human Rights, and stressed that judicial notice is to be taken of decisions of the court, but not of anticipated developments or trends that are argued by academics as evolving, and also pointed to the fact the it is the European Court which has the primary responsibility of interpreting the Convention, the decisions of which are binding on the contracting states, suggesting that "the courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence".

98. In reliance on that approach, I consider that the argument of the applicant in which it suggests that certain trends are evolving, or seem likely to evolve, which might result in a decision of the ECtHR adopting an approach that there exists a general right of access to information, and the corollary general obligation on a public authority to positively provide such information, is not yet an evolved principle, and not one which might inform my thinking.

99. I have already considered the argument of the applicant that the constitutional provisions called in aid by it import positive obligations on the State, and I have rejected the argument that such positive obligations exist. Accordingly, it seems to me that no breach of a right from the international conventions has been shown which might require the degree of vigilance for which the applicant contends.

100. No obligation at law has been shown to exist by which members of the public including commercial entities such as the applicant, and persons not directly involved in litigation, are entitled to have access to judgment information.

The freedom to earn a living/ rights in property

101. The applicant relies on its property rights under Article 40. 3 and Article 43 of the Constitution which it argues encompass a freedom to conduct its business free from unlawful interference from the respondents. It is argued that the refusal to provide access to the judgment records is without any lawful justification and amounts to an interference with the freedom of the applicant to conduct its business and an unlawful interference with its rights of property. The applicant argues that the absence of the judgment information means that part of its business enterprise cannot now develop.

102. The applicant also relies on Articles 15, 16 and 17 of the Charter of Fundamental Rights, the freedom to conduct business, which it says it has been unjustifiably and disproportionately interfered with.

103. The applicant also relies on Article 56 of the TFEU by which restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

104. The purpose of the Article is to provide free movement to persons and services within the Union. It does no more and no less. It does not import an obligation on a Member State to put structures in place to enable a particular service to be performed or provided, or to facilitate the operation of an identified business. The purpose of Article 56 of the TFEU is to prevent restrictions on the movement of services between Member States, and no argument is made that there is discrimination against the applicant as a result of which certain other operators do have access to the relevant information.

105. I consider that this argument does not have merit. No evidence is available of an unequal or discriminatory application of the impugned decision.

106. The proposition that the applicant has a right to conduct its business within the State without undue interference does not import a positive duty on the State to facilitate that business by the provision of access to information which does not have a public character, which is created as a result of an administrative action.

Failure to provide adequate reasons

107. The Courts Service provided evidence in correspondence of the reasons for its decision which can be summarised as follows:

> (i) The information is not of the type the Courts Service is required by law to make available for public inspection, as they are not court records.
>
> (ii) The making available of the information may expose the Courts Service to legal liability arising from the fact that the information may be inaccurate or incomplete. Liability may arise under the Data Protection Acts or otherwise from the disclosure of inaccurate information no warranty can be provided by the Court Service that the records are accurate and complete and therefore the records sought are not be relied upon as proof that a judgment remains unsatisfied, or that an identified person is indebted for an identified amount through an identified creditor.

108. The applicant argues that the reasons are incomplete, in particular as to how a liability might arise under the Data Protection Acts. It argues that the provision of reasons arises in a particularly stark way when, as in the present case, the information was provided without demur for very many years.

109. Reliance is placed on the often quoted dicta of Fennelly J. in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 I.R. 297 that:

> "Persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them." (para. 69)

110. The overriding reason given by the Courts Services for the discontinuance of the ad hoc process of permitting access to judgment information was the risk of liability arising from the absence of legislative regulation of access to the information. In the course of meetings in 2010 and correspondence in October and December, 2013 the reasons were explained in more detail and given a broader legal framework. The reasons given were rational and sufficiently reasoned or explained.

111. The applicant has made out no case that the legal basis for the decision was incorrect, but relies rather on an argument that because the applicant asserts a breach of what it argues are constitutional rights, that a higher degree of scrutiny must be exercised by me in engaging with the reasons.

112. It is common case that the judgment information constitutes "personal data" within the meaning of s. 1(1) of the Data Protection Act 1988, it being "data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller." Section 1(4)(b) of that Act excludes therefrom liability or prosecution under the Act where the person keeping the data "is required by law" to make it available to the public.

113. Section 46 of the Freedom of Information Act 1997 expressly provides that that Act "does not apply to…a record held by (i) the courts"…and relating to, or to "proceedings in a court".

114. That the information is not required by law to be made available to the public but that the information is "data" brings the High Court judgment information within the Data Protection Act 1998 to 2003, and while it is not my function in these proceedings to determine the data protection question definitively, the reasoning given by the Courts Service for refusing the information is rational and soundly based, as is its apprehension that liability may arise from the release to members of the public, including the applicant, of that information.

115. The applicant cannot assert any statutory right to the information, and relies rather on the source of the right as constitutional. Having regard to the clear provisions of the Freedom of Information Act 1997, the positive obligation for which the applicant contends is one directly at variance with the statutory provisions, and I cannot find a source of common law or under the Constitution which would enable me to ignore the directly relevant statutory exemptions.

Conclusion
116. For all of the above reasons I refuse the relief sought.