Neutral Citation: [2014] IEHC 386

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 28 J.R.]

BETWEEN

HARRY CASSIDY

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA, JUDGE CORMAC DUNNE, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered the 29th day of July, 2014

Background

1. The applicant in this case is a former Chief Executive Officer of Custom House Capital Limited (hereinafter referred to as "*CHC*"). CHC's core activities related to the provision of asset, portfolio and investment management services as well as pension advisory services as an approved Qualifying Fund Manager to Approved Retirement Funds. On 1st July, 2011, the Central Bank made an *ex parte* application to the High Court arising out of concerns it had about the affairs of CHC. The High Court appointed two inspectors to investigate and compile a report about CHC. On foot of the final report, the court appointed a Liquidator to CHC on 21st October, 2011.

2. The subject matter of these proceedings concerns approximately €180,000 in two accounts with Bank of Ireland, being account numbers 81859879 and 67532132. These accounts are held by Magpie Private Pension Trust, which was set up in or around January or February 2000 as a self-administered pension scheme to administer the pension of the applicant. In order for the applicant to set up the scheme it was necessary for him to obtain two independent trustees to act as trustees in relation to the pension fund. The trustees of the pension are John Mulholland and Ruth Woods. The applicant is the sole beneficiary.

3. The funds in the two accounts were earning deposit interest of only 0.3%. Bank of Ireland would not increase the interest rate. The applicant states that it was decided to transfer the funds to another bank to enable a more competitive deposit rate to be earned. As such, it became necessary to withdraw the funds from the bank. It is a prerequisite that two of the three signatories sign the withdrawal forms. In early June 2012, all three signed the request to the bank to close the account, but the bank did not act on this. When it was followed up in July 2012, the bank informed the trustees who in turn informed the applicant that they had been served with a freezing order dated 9th July, 2012, pursuant to s. 17(2) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (hereinafter referred to as "the 2010 Act").

4. The applicant states that he did not receive any notification of the freezing order dated 9th July, 2012, obtained by the first named respondent from District Court No. 1 in the Criminal Courts of Justice, nor was he in receipt of three further notifications of the renewal of this freezing order relating to the accounts. It was only when the applicant sought to challenge the freezing order that he received notification of further orders.

5. It appears from correspondence between the solicitor for the first named respondent and from subsequent notifications that freezing orders were issued pursuant to s. 17(2) of the 2010 Act, commencing on 9th July, 2012, and continuing on a monthly basis down to the present time.

6. The notices pursuant to s. 18 of the 2010 Act did not indicate the factual basis on which these freezing orders were made but stated as follows:-

> *"This order is to enable An Garda Síochána to carry out an investigation into whether or not there are reasonable grounds to suspect that the transaction on these accounts, if same were allowed to proceed, would comprise or assist in money laundering or terrorist financing. "*

7. The first named respondent was put on notice in writing by the applicant's solicitor that an application would be moved pursuant to s. 19(1) of the 2010 Act before District Court No. 1 in the Criminal Courts of Justice on 5th October, 2012 at 10.30am.

8. Solicitors for the first named respondent entered into correspondence with the applicant's solicitor on 2nd October, 2012, as to the basis on which the applicant was making the application. The applicant's solicitor sent a letter by return on 4th October, 2012, stating that the application was confined to s. 19(1) and sought specific information, including a copy of the sworn information grounding the making of the freezing order.

9. Before the court on 5th October, 2012, it was indicated by counsel for the first named respondent that the applicant would be furnished with a copy of the sworn information in respect of the most recent freezing order at that time. It was further indicated that the sworn information would be furnished in a redacted form. The matter was then adjourned on consent to 2nd November, 2012, to enable the applicant's consideration of this disclosure. The applicant's solicitor received this disclosure on 17th October, 2012.

10. On receiving the sworn information of which the third page was redacted, the applicant's solicitor wrote to the Chief States Solicitor's Office on 30th October, 2012, seeking disclosure of the un-redacted sworn information and/or reasons for the redaction stating that the information received was inadequate to bring an application under section 19.

11. The applicant's solicitor received a written response to this letter from the third named respondent on 31st October, 2012, stating that "*the sworn information contained information about the ongoing investigation which was not relevant as to why [their] clients*

had applied for an order under s. 17 of the 2010 Act". They further stated that they believed that they had given more information than required under the relevant Act and that the information provided up to that point was not inadequate to enable the applicant to bring an application under s. 19.

12. On 2nd November, 2012, an application was made to the second named respondent sitting in Court No. 1 in the Criminal Courts of Justice for disclosure of the un-redacted sworn information. The second named respondent held that the application before the court on that occasion concerned disclosure of the full content of the sworn information, rather than an application under s. 19 itself. The second named respondent stated as follows on that occasion:-

> *"The application that is made before this Court is, in a sense, an interim or halfway house application for further information before the full thrust of a s. 19 application can be canvassed, in whatever way the applicant will so wish to make it. And this Court is of the view that it does not have judicial jurisprudence (sic) to adjudicate on the application that is made before it today. So, the application, insofar as it is made under s. 19, on the basis that the court feels a full application under s. 19 for what it - the purpose of section - a full application under s. 19 has not been made, an interim application under a different guise has been made, a form of - you could describe it as a form of interrogatory or otherwise, and the court feels it doesn't have any jurisdiction for such applications. So the application is refused."*

13. In this application, the applicant seeks an order of *certiorari* quashing the refusal by the second named respondent to order disclosure of an un-redacted form of the sworn information herein.

Criminal Justice (Money Laundering and Terrorist Financing) Act 2010
14. Part 3 of the 2010 Act deals with directions, orders, and authorisations relating to investigations. Section 17 provides for the making of a freezing order over certain accounts. Section 18 deals with notification to persons who have an interest in the accounts and s. 19 deals with applications to lift a freezing order. It is necessary to set out these sections fully:-

> *"Directions, Orders and Authorisations Relating to Investigations*
>
> *17(I) A member of the Garda Síochána not below the rank of superintendent may, by notice in writing, direct a person not to carry out any specified service or transaction during the period specified in the direction, not exceeding 7 days, if the member is satisfied that, on the basis of information that the Garda Síochána has obtained or received (whether or not in a report made under Chapter 4 of Part 4), such a direction is reasonably necessary to enable the Garda Síochána to carry out preliminary investigations into whether or not there are reasonable grounds to suspect that the service or transaction would, if it were to proceed, comprise or assist in money laundering or terrorist financing.*
>
> *(2) A judge of the District Court may order a person not to carry out any specified service or transaction during the period specified in the order, not exceeding 28 days, if satisfied by information on oath of a member of the Garda Síochána, that-*
>
> > *(a) there are reasonable grounds to suspect that the service or transaction would, if it were to proceed, comprise or assist in money laundering or terrorist financing, and*
> >
> > *(b) an investigation of a person for that money laundering or terrorist financing is taking place.*
>
> *(3) An order may be made, under subsection (2), in relation to a particular service or transaction, on more than one occasion.*
>
> *(4) An application for an order under subsection (2) shall be made to a judge of the District Court assigned to the district in which the order is proposed to be served.*
>
> *(5) A person who fails to comply with a direction or order under this section commits an offence and is liable-*
>
> > *(a) on summary conviction, to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months (or both), or*
> >
> > *(b) on conviction on indictment, to a fine or imprisonment for a term not exceeding 5 years (or both).*
>
> *(6) Any act or omission by a person in compliance with a direction or order under this section shall not be treated, for any purpose, as a breach of any requirement or restriction imposed by any other enactment or rule of law.*
>
> *Notice of direction or order*
>
> *18 (1) As soon as practicable after a direction is given or order is made under section 17, the member of the Garda Síochána who gave the direction or applied for the order shall ensure that any person who the member is aware is affected by the direction or order is given notice, in writing, of the direction or order unless -*
>
> > *(a) it is not reasonably practicable to ascertain the whereabouts of the person, or*
> >
> > *(b) there are reasonable grounds for believing that disclosure to the person would prejudice the investigation in respect of which the direction or order is given.*
>
> *(2) Notwithstanding subsection (1)(b), a member of the Garda Síochána shall give notice, in writing, of a direction or order under this section to any person who is, or appears to be, affected by it as soon as practicable after the Garda Síochána becomes aware that the person is aware that the direction has been given or order has been made.*

(3) Nothing in subsection (1) or (2) requires notice to be given to a person to whom a direction is given or order is addressed under this section.

(4) A notice given under this section shall include the reasons for the direction or order concerned and advise the person to whom the notice is given of the person 's right to make an application under section 19 or 20.

(5) The reasons given in the notice need not include details the disclosure of which there are reasonable grounds for believing would prejudice the investigation in respect of which the direction is given or order is made.

Revocation of direction or order on application

19 (1) At any time while a direction or order is in force under section 17, a judge of the District Court may revoke the direction or order if the judge is satisfied, on the application of a person affected by the direction or order, as the case may be, that the matters referred to in section 17 (1) or (2) do not, or no longer, apply.

(2) Such an application may be made only if notice has been given to the Garda Síochána in accordance with any applicable rules of court. "

Order in relation to property subject of direction or order

20 (1) At any time while a direction or order is in force under section 17, in relation to property, a judge of the District Court may, on application by any person affected by the direction or order concerned, as the case may be, make any order that the judge considers appropriate in relation to any of the property concerned if satisfied that it is necessary to do so for the purpose of enabling the person -

(a) to discharge the reasonable living and other necessary expenses, including legal expenses in or in relation to legal proceedings, incurred or to be incurred in respect of the person or the person's dependants, or

(b) to carry on a business, trade, profession or other occupation to which any of the property relates.

(2) Such an application may be made only if notice has been given to the Garda Siochána in accordance with any applicable rules of court.

Cessation of direction or order on cessation of investigation

21 (1) A direction or order under section 17 ceases to have effect on the cessation of an investigation into whether the service or transaction the subject of the direction or order would, if it were to proceed, comprise or assist in money laundering or terrorist financing.

(2) As soon as practicable after a direction or order under section 17 ceases, as a result of subsection (1), to have effect, a member of the Garda Siochána shall give notice in writing of the fact that the direction or order has ceased to have effect to -

(a) the person to whom the direction or order has been given, and

(b) any other person who the member is aware is affected by the direction or order.

Suspicious transaction report not to be disclosed

22. A report made under Chapter 4 of Part 4 shall not be disclosed, in the course of proceedings under section 17 or 19, to any person other than the judge of the District Court concerned. "

15. The applicant submits that the failure of the first named respondent to provide an un-redacted copy of the sworn information used to ground the original and subsequent applications for orders pursuant to s. 17(2) of the 2010 Act, is unlawful and unfair. They point out that the burden of proof rests on the applicant to satisfy the court that the matters originally put before the court do not, or no longer apply. The applicant contends that he is not aware of the factual basis on which the applications were made. The respondents have denied this and stated as follows at para. 6 of the notice of opposition:-

"Insofar as the applicant contends that the is not aware of the factual basis on which the applications were made this is disputed. The reason for the application appears on the face of the s. 18 notice itself. There is provision under s. 19(1) of the Act for the applicant to make an application to the court to revoke the Order then in force. Should the applicant exercise his right under this section, it is open to him to show to the court that there is no reasonable ground for the suspicion held by the first named respondent. The applicant has chosen not to pursue his application for the same. Again, as the applicant well knows, the source of the monies held in the accounts subject to s. 17(2) orders are matters that are fully and uniquely within the knowledge of the applicant and as such further information is not required to enable the applicant to bring an application to amend or revoke any s. 17 Order. "

16. The applicant points out that when he first sought production of the redacted part of the sworn information, the respondents replied by letter in the following terms:-

"I confirm that the sworn information contained information about the ongoing investigation which was not relevant to why my clients had applied for an Order under section 17 of the 2012 Act (sic) and for this reason was redacted. I would point out that I had advised you when the matter was last in court that the sworn information furnished would be redacted. "

17. The applicant states that it was only later in the statement of opposition that it was argued that the redaction was permitted

because it was *"lawful"* that the grounds of suspicion not be disclosed in circumstances where it could prejudice a criminal investigation. The applicant argues that this was only put into the statement of opposition so as to mirror the terms of s. 18 of the 2010 Act.

Alleged interference with the applicant's property rights
18. The applicant submitted that legislation enacted by the Oireachtas permitting interference with the applicant's right to peaceful enjoyment of his property guaranteed by the Constitution and by the European Convention on Human Rights, can only enjoy the presumption of constitutionality where the statutory provisions are operated in a manner compatible with those guaranteed rights.

19. The applicant cited the well known decision of *East Donegal Co-op Livestock Mart Limited v. Attorney General* [1970] I.R. 317, where the court held at p. 341:-

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

20. The applicant further submitted that for there to be a lawful interference by the first and third named respondents with the applicant's right to peaceful enjoyment of his property guaranteed by the Constitution and under the Convention, the interference must be proportionate and in accordance with the aim of the legislation.

21. In *Heaney v. Ireland* [1994] 3 I.R. 593, Costello J. set out the proportionality test at p. 607 as follows:-

> *"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-*
>
> > *(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
> >
> > *(b) impair the right as little as possible, and*
> >
> > *(c) be such that their effects on rights are proportional to the objective: Chaulk v. R. [1990] 3 S.C.R. 1303 at pages 1335 and 1336."*

22. The applicant submitted that under the European Convention on Human Rights, it is accepted that a proportionate level of interference with property rights is permitted once such interference is proportionate and in pursuit of a legitimate aim. However, it was further submitted that the jurisprudence emanating from the European Court of Human Rights stresses that certain safeguards must be in place to prevent any arbitrary use of provisions allowing for such an intrusion into a citizen's property rights, and that a fair balance must be struck between the competing interests of the State and the citizen.

23. The applicant cited para. 50 of the judgment of the European Court of Human Rights in *James v. United Kingdom* (1986) 8 EHRR 123 where it is stated:-

> *"Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, amongst others, and mutatis mutandis, the above-mentioned Ashingdane judgment, Series A no. 93, pp. 24- 25, para. 57). This latter requirement was expressed in other terms in the Sporrong and Lonnroth judgment by the notion of the 'fair balance ' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (Series A no. 52, p. 26, para. 69). The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden' (ibid, p. 28, para. 73). Although the Court was speaking in that judgment in the context of the general rule of peaceful enjoyment of property enunciated in the first sentence of the first paragraph, it pointed out that 'the search for this balance is ... reflected in the structure of Article 1 (P1-1)' as a whole (ibid, p. 26, para. 69)."*

24. The applicant submitted that there was an absence of fair procedure in this case. He stated that by not disclosing the full sworn information, the applicant was prevented from putting before the court a full response to the imposition of a freezing order over funds which he alleged were part of his pension fund. The applicant stated that a person is deprived of a fair hearing if a judge is privy to information that remains undisclosed to one of the parties to the dispute. The applicant argued that if the redacted material was relevant to the consideration by the Court of the issues under s. 17, then it should be made available to the applicant to enable him to properly mount his application pursuant to s. 19 of the 2010 Act, wherein the onus rests on him to establish that the matters pertaining to that sworn information do not, or no longer apply.

25. The applicant referred to *Edwards and Lewis v. United Kingdom* (2004) 40 EHRR 593 where the European Court of Human Rights determined that there had been a violation of Article 6.1 in criminal proceedings in the United Kingdom. The applicant's complaints centred on the allegation that they had been entrapped by the police into committing armed robbery and as the trial judge had decided to withhold disclosure of certain evidence on grounds of public interest immunity, they were unable to properly mount their defence. The applicant relies on the following portions of the judgment in that case:-

> *"In the present case, however, it appears that the undisclosed evidence related, or may have related, to an issue of fact decided by the trial judge. Each applicant complained that he had been entrapped into committing the offence by one or more undercover police officers or informers, and asked the trial judge to consider whether prosecution evidence should be excluded for that reason. In order to conclude whether or not the accused had indeed been the victim of improper incitement by the police, it was necessary for the trial judge to examine a number of factors, including the reason for the police operation, the nature and extent of police participation in the crime and the nature of any inducement or pressure applied by the police ... Had the defence been able to persuade the judge that the police had acted improperly, the prosecution would, in effect, have had to be discontinued. The applications in question were, therefore, of determinative importance to the applicants ' trials, and the public interest immunity evidence may have related to facts connected with those applications.*
>
> *Despite this, the applicants were denied access to the evidence. It was not, therefore, possible for the defence*

representatives to argue the case on entrapment in full before the judge. Moreover, in each case the judge, who subsequently rejected the defence submissions on entrapment, had already seen prosecution evidence which may have been relevant to the issue. For example, in Mr Edwards ' case, the Government revealed before the European Court that the evidence produced to the trial judge and Court of Appeal in the ex parte hearings included material suggesting that Mr Edwards had been involved in drug dealing prior to the events which led to his arrest and prosecution. During the course of the criminal proceedings, the applicant and his representatives were not informed of the content of the undisclosed evidence and were thus denied the opportunity to counter this allegation, which might have been directly relevant to the judges' conclusions that the applicant had not been charged with a 'State-created crime' [see paragraph 33 above]. In Mr Lewis' case, the nature of the undisclosed material has not been revealed, but it is possible that it was also damaging to the applicant's submissions on entrapment. Under English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge is likely to find the balance to weigh in favour of non-disclosure (see R. v. Keane, [paragraph 39] above).

In these circumstances, the Court does not consider that the procedure employed to determine the issues of disclosure of evidence and entrapment complied with the requirements to provide adversarial proceedings and equality of arms or incorporated adequate safeguards to protect the interests of the accused. It follows that there has been a violation of Article 6.1 of the Convention in this case. "

26. The applicant also referred to the case of *Dombo Beheer B.V. v. Netherlands* (1994) 18 EHRR 213, which concerned civil proceedings against a bank arising from a sudden withdrawal of credit facilities. The applicant submitted that the relevance of this decision to his case was that the court held that a fair hearing requires "*equality of arms*" and a "*fair balance*" between the parties. The European Court of Human Rights stated as follows at para. 33:-

"Nevertheless, certain principles concerning the notion of a 'fair hearing' in cases concerning civil rights and obligations emerge from the Court's case law. Most significantly for the present case, it is clear that the requirement of 'equality of arms', in the sense of a 'fair balance' between the parties, applies in principle to such cases as well as to criminal cases (see the Feldbrugge v. The Netherlands judgment of 26 May 1986, Series A no. 99, p. 17, para. 44). The Court agrees with the Commission that as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-avis his opponent. "

27. In their response, the respondents submitted that the 2010 Act was enacted to provide for money laundering and related offences in line with various Treaty commitments. They submitted that while the effect of the provisions was to freeze an account for the currency of the investigation, the effect of releasing the property before completion of an investigation would be to risk facilitating or triggering the commission of a criminal offence.

28. The prevention of a criminal offence must be regarded, in the absence of weighty and countervailing factors, as a warranted justification for the interference with property rights. The respondents stated that the provision for the making of more than one freezing order recognised the reality that investigations for money laundering are often complex and may require some time to complete. The section is explicitly designed and operates to prevent the commission of a crime within the State.

29. In dealing with the issue of interference with property rights, it is necessary to set out the relevant portions of the Constitution concerning property rights.

30. Article 40.3 provides:-

"1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen. "

31. Article 43 provides:-

"1.1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2.1 The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2.2 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good. "

32. Protocol of the European Convention on Human Rights provides:-

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...."

33. The respondents submitted that the Constitution does not protect citizens from all attacks against property, merely unjust attacks. What constitutes an unjust attack must be determined not only on the basis of the individual's rights, but also by reference to what is required by "*civil society*" and the "*exigencies of the common good*". Likewise, the provisions of the Convention do not create an absolute right to property- this right is also subject to balancing with the public interest.

34. The respondents referred to the judgment of O'Higgins C.J. in *Blake v. Attorney General* [1982] I.R. 117, where the learned judge at pp. 135-136 of the report contrasted the provisions of Article 40 and 43 of the Constitution and reached the following conclusion:-

"Article 43 does not state what the rights of property are. It recognises private property as an institution and forbids its

abolition. The rights in respect of particular items of property are protected by Article 40, s. 3, sub-s. 2, by which the State undertakes by its laws to protect from unjust attack and, in the case of injustice done, to vindicate the property rights of every citizen. It is the duty of the Courts to protect such property rights from unjust attack and the decision as to what is such an attack is to be made by the Courts. "

35. In reaching this conclusion, the Chief Justice referred with approval to the judgment of Davitt P. in *The Attorney General v. Southern Industrial Trust Limited* [1960] 94 ILTR 161, and in particular to the following passage at p. 168:-

"Article 40.3 seems to me to be the only provision in the Constitution which protects the individual's rights to the property which he does own. By it the State guarantees to respect this right and by its laws, as far as practicable, to defend it and as best it may to protect it from unjust attack, and where injustice has been done to vindicate it. This is no absolute guarantee but is qualified in more than one respect. It impliedly guarantees that the State itself will not by its laws unjustly attack the right, and I think that the justice or otherwise of any legislative interference with the right has to be considered in relation, inter alia, to the proclaimed objects with which the Constitution was enacted, including the promotion of the common good. "

36. The respondents submitted that the investigation and prevention of crime is consistent with the exigencies of the common good and is something to be protected in civil society. There are competing constitutional rights at play- the public's right (and obligation) to investigate and prevent crime and the property rights of an individual. The respondents submitted that the interference with the applicant's property rights in this case were proportionate. The interference was temporary in nature and could only be done on foot of a court order. The restriction is partial in that it restricts access to the funds but does not extinguish the property rights therein. The affected person has a statutory right to apply to the courts to vacate the order at any time during the currency of such an order.

The framework of the 2010 Act

37. The 2010 Act contains a scheme for carrying out an investigation into money laundering and the financing of terrorists organisations. As part of this scheme, it is provided that an application can be made to the District Court for a freezing order for a period not exceeding 28 days. The application is made *ex parte* to a judge in the District Court. The application proceeds on the basis of a sworn information furnished by a member of the garda team investigating the particular matter. Notification of the making of the order is given to the people who appear to have an interest in the funds. The onus is passed to the "*person affected*" to make an application to the District Court if he wants the freezing order lifted.

38. The owner of the funds is the person who knows most about the source of the funds in the particular bank account. Under the legislation, it is this person who bears the burden of proof. If he wants a freezing order lifted, he must swear an affidavit showing why he maintains that the funds, the subject of the freezing order, are not being used as part of a money laundering operation or are not funds used for the financing of terrorist activities. Being the owner of the funds, he is in the best position to demonstrate the source of the funds in his account.

39. Once the person affected puts his case on affidavit for the purpose of a s. 19 application, it is then up to the gardaí to put in a replying affidavit setting out the basis on which they contend that the funds are connected to a money laundering operation, or are used to finance terrorism. This application under s. 19 should be listed before a District Judge who has not been involved in the granting of the orders pursuant to section 17. This is due to the fact that such a judge would have heard evidence from the gardaí when they produced the sworn information for the purpose for the s. 17 application. The reason why the matter must be listed before a different District Judge, is to avoid the situation whereby one party to a dispute would have private communications with the judge hearing that dispute.

40. Thus, when hearing an application under s. 19 of the 2010 Act, there must be equality of arms. This means that the respondents, if they wish to contest the lifting of the freezing order, must put in an affidavit setting out why they say that the freezing order should be maintained in place. When both sides have put their respective cases on affidavit then the matter can be set down for hearing.

41. The applicant makes the case that in order to mount his application pursuant to s. 19 of the Act, he must be shown the redacted part of the sworn information which was put before the District Judge at the time of s. 17(2) application. I do not agree with that assertion. Once a freezing order has been made, the burden of proof is shifted to the applicant if he wishes to have the freezing order lifted. He has to establish that the matters referred to in s. 17(1) or (2) do not, or no longer apply. In effect, he has to establish that the service or transaction were it to proceed, would not assist in money laundering, or terrorist financing. I do not think that the applicant has to have sight of the full sworn information to enable him to discharge this burden of proof. As the funds in the accounts allegedly belong to the applicant as constituting his pension, he is uniquely placed to show from where the funds were obtained. If he puts this on affidavit, the respondents will then have the option of either putting in a replying affidavit, or refraining from so doing. It would not be acceptable for the respondents, at the hearing of the s. 19 application, to put before the District Judge material which was not made available to the applicant.

42. In the course of argument, references were made to *Finnegan v. District Judge Michael Walsh & Ors* [2013] IEHC 276. Kearns P. had to deal with a similar application for disclosure of the reasons for the making of a freezing order over certain accounts. The gardaí had refused to furnish the disclosure sought, on the grounds that there was "*an ongoing criminal investigation and there were reasonable grounds for believing that disclosure of this material at [that] time would prejudice the investigation in respect of which the orders were made*". The learned President ruled that it was unclear from the reasoning of the learned District Judge whether he had held that he had jurisdiction to grant an order for disclosure, but was refusing to exercise that jurisdiction based on submissions as to privilege, or the statutory exceptions contained in ss. 18(5) and 22 of the 2010 Act; or whether he had concluded that did not have jurisdiction to order disclosure; or whether he had concluded that the application for disclosure following *Gary Doyle* principles was misconceived, and should properly have been framed as an application for discovery or disclosure pursuant to the rules of the District Court. In these circumstances, the learned judge held that the decision of the District Judge would, accordingly, be quashed.

Hearings held in Private

43. It would appear from the transcript of the hearing in the District Court on 2nd November, 2012, that the earlier applications to the court for orders pursuant to s. 17 were heard in private in the District Court. The applicant states that when considering and granting the freezing orders, the second named respondent and the other judges who dealt with the matter on previous occasions were administering justice and that, as such, the applications should have been heard in public. The applicant states that this exercise of jurisdiction was in breach of Article 34.1 of Bunreacht na hEireann.

44. It should be noted that s. 17 of the 2010 Act was amended by s. 3 of the Criminal Justice Act 2013 to provide that an application

under s. 17(2) shall be made *ex parte*, and shall be heard otherwise than in public. Section 3 of the 2013 Act came into force on 14th June, 2013.

45. The respondents make two points in response to this application. Firstly, they deny that the granting of a freezing order under s. 17 is an administration of justice by the District Judge. Secondly, they argue that it is implicit in the scheme of the 2010 Act, that applications under s. 17 should be heard otherwise than in public. They state that the fact that this was explicitly stated in the amending legislation does not mean that there was no right to have the application in private under the earlier legislation.

46. In support of their first argument, the respondents pointed to the provisions relating to the issuing of search warrants. They argue that in *Ryan v. O'Callaghan* [1987] IEHC 61, it was held that the issuing of a search warrant prior to the commencement of a prosecution was part of the process of criminal investigation and was executive rather than judicial in nature. Similar findings were made in *Buckley v. Edwards & Ors* [1988] I.R. 217 and in *Byrne v. Grey* [1988] I.R. 31.

In *Brady v. Judge Gerard Haughton & Ors* [2006] 1 I.R. 1, it was held that the function of the designated District Judge pursuant to s. 51 of the Criminal Justice Act 1994, in receiving evidence to be used in a foreign investigation, was purely administrative in nature and as there was no determination of the rights of an individual in the position of the applicant, he was not entitled as of right, derived from the principles of constitutional justice or otherwise, to be present and represented in the procedures before the designated judge.

47. In *McDonald v. Bard na gCon* [1965] I.R. 217, Kenny J. in the High Court set out the characteristics of an "*administration of justice*" at pp. 230-231 of the report as follows:

> *"It seems to me that the administration of justice has these characteristic features:*
>
> *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. "*

48. Having regard to the various authorities cited in argument, I am satisfied that in granting the freezing order, the District Judge was administering justice. While the effect of this order did not determine the ownership of the funds in the relevant bank accounts, it did constitute a significant restriction on the applicant's capacity to deal with the funds. The District Judge had to consider the sworn evidence that had been put before him by the gardaí. He had to be satisfied that there were reasonable grounds to suspect that the service or transaction would, if it were to proceed, comprise or assist in money laundering or terrorist financing and that an investigation of a person for that money laundering or terrorist financing was taking place. In receiving and considering the relevant information, I am satisfied that the District Judge was administering justice.

Whether this administration of justice was required to be heard in public

49. The applicant has argued that as the District Judge was involved m the administration of justice when considering the applications under s. 17, the hearings should have been in public. The respondents argue that it was implicit in the scheme established by the 2010 Act that applications under s. 17 could be heard otherwise than in public. They state that the fact that this was expressly stated in the amending legislation of 2013 does not mean that the amendment necessarily changed the existing law.

50. I accept that when a particular provison is provided for in amending legislation, this does not necessarily mean that it made a change in the law existing at that time. As Griffin J. states in *Cronin (Inspector of Taxes) v. Cork and County Development Company Limited* [1986] I.R. 559 at p. 572:-

> *"...the Court cannot in my view construe a statute in the light of amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral - it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be. "*

51. That principle was accepted by Laffoy J. in *Revenue Commissioners v. Hans Droog* [2011] IEHC 142.

52. Having regard to the fact that the obligation to administer justice in public is provided for in Article 34.1 of Bunreacht na hEireann, and where the proceedings can only be heard in private in "*such special and limited cases as may be prescribed by law*", I have reached the conclusion that if the former statutory scheme had intended the applications to be heard in private, this would have been expressly stated in the legislation. There does not seem to me to be any basis for the argument that it was implicit in the 2010 Act, prior to its amendment in 2013, that applications under s. 17 be heard in private.

53. Thus, I am satisfied that the hearings that were held in private prior to June 2013 were held in breach of the provisions of Article 34.1 of the Constitution. However, it does not seem to me that this is of any real benefit to the applicant, because those applications were going to be heard on an *ex parte* basis in any event. Accordingly, I hold that the fact that the hearings prior to June 2013 were held in private in breach of the provisions of the Constitution, does not give any remedy to the applicant as the orders made by the District Court as a result of those hearings have been spent and have been replaced by orders which were obtained in compliance with the law.

Conclusion

54. It could be argued that on a literal reading of the transcript of the District Court hearing that all the District Court judge decided was that he did not have jurisdiction to entertain an application that a full version of the sworn information be delivered to the applicant prior to the hearing of the s. 19 application. As already noted, the second named respondent stated as follows at the hearing on 2nd November, 2012:-

> *"So, the application, insofar as it is made under section 19, on the basis that the court feels a full application under*

section 19 for what it - the purpose of section - that a full application under s. 19 has not been made, an interim application under a different guise has been made, a form of- you could describe it as a form of interrogatory or otherwise, and the court feels it doesn't have any jurisdiction for such applications. So the application is refused, gentlemen."

55. Where the District Court is seized of an application pursuant to s. 19 of the 2010 Act, it seems to me that the District Court judge hearing the matter must have jurisdiction to ensure that the hearing before him is carried out in accordance with the principles of constitutional justice. Thus, he would have an inherent jurisdiction to adjudicate on whether one of the parties before him is entitled to an un-redacted version of a document that is before the court. Thus, on a narrow issue, the court has ordered that *certiorari* of the decision of the second named respondent must issue in that he does have jurisdiction to decide whether or not the applicant is entitled to a full version of the sworn information.

56. In deference to the extensive arguments on both sides, the court has ruled on whether or not the applicant is entitled to sight of such documentation.

57. The court has ruled that on a s. 19 application, the applicant is not entitled to have sight of the un-redacted sworn information which was used to obtain the freezing order in question. The applicant must bear the burden of proof of establishing that there were no grounds to make the order under s. 17 of the 2010 Act, or that such reasons no longer apply. When he has set out the origins of the funds on affidavit, it is then up to the first named respondent to place on affidavit the grounds on which he alleges that the s. 17 order should not be revoked. The court has also indicated that in an effort to ensure equality of arms the matter should be heard before a judge who has not previously heard any s.17 application involving the same funds.