Neutral Citation [2013] IEHC 276

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2012 No. 875 JR]**

**BETWEEN/**

**THOMAS FINNEGAN**

**APPLICANT**

**AND**

**DISTRICT JUDGE MICHAEL WALSH, THE COMMISSIONER OF AN GARDA SIOCHANA, THE JUDGES OF THE DUBLIN METROPOLITAN DISTRICT AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**THE HUMAN RIGHTS COMMISSION**

**NOTICE PARTY**

**JUDGMENT of Kearns P. delivered the 21st day of June, 2013.**

In these proceedings the applicant seeks various reliefs by way of judicial review in respect of the first named respondent's refusal to grant an order for disclosure to the applicant in the context of an application brought by him under s.19 (1) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (hereinafter referred to as the "2010 Act").

The applicant is the holder of an account at Tallaght West Credit Union, Dublin 24, which said account has been the subject matter of successive "freezing" type orders under s. 17 of the 2010 Act. The relevant sections of the 2010 Act provide as follows:-

> ***"17. Direction or order not to carry out service or transaction.***
>
> *(1) 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 [suspicious transaction] 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 ….*
>
> ***18. Notice of direction or order.***
>
> *(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.*

***19. Revocation of direction or order on application.***

*(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.*

***20. Order in relation to property subject of direction or order.***

*(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—*

***21. Cessation of direction or order on cessation of investigation.***

*(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 Síochána 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.*

***22. Suspicious transaction report not to be disclosed.***

*A [suspicious transaction] 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."*

**BACKGROUND FACTS**

The applicant holds an account in his own name in Tallaght West Credit Union, Fortunestown Shopping Centre, Tallaght, Dublin 24. On 10th May, 2012, a direction was issued by Detective Superintendent Eamonn Keogh pursuant to s. 17(1) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 directing the authorised officer at Tallaght West Credit Union not to carry out any service or transaction on the applicant's account from 10th May, 2012, to 16th May, 2012, inclusive, being a period not exceeding seven days.

On 11th May, 2012, Detective Garda Aileen Kelly of the Garda Bureau of Fraud Investigation, Harcourt Square, Dublin 2, applied to District Judge Cormac Dunne sitting in District Court 1 of the Criminal Courts of Justice, Parkgate Street, Dublin 7, for an order pursuant to s. 17(2) of the 2010 Act. Judge Dunne, having received information on oath and in writing from Garda Kelly, was satisfied to grant the relief sought, directing the authorised officer at Tallaght West Credit Union not to carry out any transaction on the account during the period from 11th May, 2012, to 7th June, 2012, being a period not exceeding 28 days. Similar orders have since been sought and obtained from time to time on the application of An Garda Síochána, such that an order pursuant to s. 17(2) of the 2010 Act has remained in force in relation to the Account from May 2012 up to and including the date of hearing of the within application.

On 18th May, 2012, the applicant's solicitor wrote to Detective Superintendent Keogh seeking a copy of the order dated 11th May, 2012, the sworn information put before the learned District Judge, any supporting documentation put before the court and full disclosure of "any and all information/documentation granting [*sic*] the application".

Detective Superintendent Keogh responded, by letter dated 24th May, 2012, seeking clarification of the statutory basis underpinning the request. On 15th June, 2012, the applicant's solicitor replied, stating that his request was based on the concept of "fair procedures and transparency" rather than any specific statutory basis, and making a request for documentation in similar terms to that previously sought in respect of a further s. 17(2) order which had been granted by the District Court and served upon the applicant in the intervening period.

On 19th June, 2012, Detective Superintendent Keogh responded to the latter correspondence, enclosing a copy of the court orders but declining to provide the further disclosure sought, on the grounds that there was:-

"[A]n 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".

Detective Superintendent Keogh also noted that, as stated in the notices of orders pursuant to s. 18 of the 2010 Act, which had been issued to the applicant, the applicant had a right to make an application under the provisions of ss. 19 or 20 of the 2010 Act to have the Order revoked or varied.

On 29th June, 2012, a further letter was sent by the applicant's solicitor seeking "detailed reasons for the making of the Order", stating that s. 18(4) of the 2010 Act, when read in light of the provisions of s. 18(5), created a requirement that "detailed reasons were to be given save where provided" under the 2010 Act. Furthermore, the letter asserted the applicant's constitutional right to fair procedures, which, it was claimed, "dictated that detailed reasons for the making of the Order be given". A further request was made for disclosure of information and documentation as previously sought.

On 16th July, 2012, Detective Superintendent Keogh replied, reiterating his view that the applicant had been served with a notice of successive orders made in accordance with s. 17(2) of the 2010 Act, in full compliance with the requirements set out at s. 18 thereof.

On foot of the correspondence outlined above, the applicant, on 10th August, 2012, made an application on notice pursuant to s. 19(1) of the 2010 Act before the first named respondent sitting at Court 3 of the Criminal Courts of Justice, Parkgate Street, Dublin 8.

Accepting that the onus under s.19 fell on the applicant, counsel for the applicant told the court that the applicant had no knowledge of the basis upon which the second named respondent had sought and obtained the various orders which had been granted in relation to the account. Counsel argued that it was impossible for the applicant to challenge the existence of "reasonable grounds" (i.e., to suspect that activities and services on the account would comprise or assist in money laundering or terrorist financing), in circumstances where he had been furnished with no information as to the nature of the grounds for that suspicion. For this reason, the applicant sought disclosure of relevant documentation showing reasons so as to facilitate the making of the application under s. 19(1) of the 2010 Act.

Acknowledging that Part 3 of the 2010 Act did not explicitly provide for disclosure, counsel for the applicant submitted that where the District Court had been granted a jurisdiction pursuant to legislation it had an intrinsic power and a responsibility to ensure that such jurisdiction was exercised in accordance with the Constitution and that the constitutional rights of those affected by that jurisdiction were protected, in particular the right to fair procedures. The decision in *DPP v. Gary Doyle* [1994] 2 I.R. 286 was opened in support of this proposition, predicated on counsel's assertion that while this authority related specifically to a criminal prosecution, the broad principles set out therein were applicable in the instant case.

Counsel for the fourth named respondent resisted the above application for disclosure, relying upon ss. 18(5) and 22 of the 2010 Act, and submitting *inter alia* that the ratio in *DPP v. Gary Doyle* was inapplicable in this case, insofar as the *Gary Doyle* decision related specifically to a criminal prosecution. It was further submitted on behalf of the fourth named respondent that it was not necessary for the first named respondent to order disclosure, as it was sufficient for the applicant to succeed in making his application pursuant to s. 19 of the 2010 Act, to prove that the monies held in the account came from a legitimate source, a matter uniquely within his own knowledge.

In reply, counsel for the applicant sought *inter alia* to distinguish conceptually between a requirement to demonstrate the source of the monies held in the account and a requirement to prove that no reasonable grounds existed for the suspicion that the use of the account would comprise or assist in money laundering or terrorist financing, the latter of which it was submitted was the applicable burden on the applicant in an application under s. 19(1). Having heard these submissions, the first named respondent then adjourned the matter, reserving his determination regarding jurisdiction to 20th August, 2012.

On 20th August, 2012, the first named respondent held that he had jurisdiction to hear an application for disclosure but refused to grant such relief, holding that the application was premature and "peremptory", as the investigation was ongoing and no criminal charges had yet been brought. Following this determination, counsel for the applicant submitted that proceedings pursuant to s. 19 of the 2010 Act could *only* be brought during an investigation and before charges had been brought, and sought clarification on the issue of jurisdiction. At this point, the first named respondent apparently indicated that he was possessed of jurisdiction to hear the application under s.19, but declined to rule on the issue of whether the court was possessed of jurisdiction to grant the relief sought.

In light of the approach adopted by the first named respondent, the applicant felt he could not proceed with the s. 19 application in the absence of disclosure and brought the present judicial review proceedings. Leave was granted by Peart J. on 22nd October, 2012, for the applicant to apply by way of judicial review for a number of reliefs, in particular for an order of *certiorari* in relation to the decision of the first named respondent which effectively was a decision to refuse disclosure.

**THE LAW**

The Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 was enacted to transpose various EC money laundering directives into Irish law, thus bringing domestic law into line with the position at European Union level regarding money laundering and terrorist financing. The relevant sections are set out in full *supra*.

Section 17(1) of the 2010 Act provides for a "freezing" type order over bank accounts, initially on direction of a member of An Garda Síochána not below the rank of superintendent for an initial period not exceeding seven days. A further application may be moved under s. 17(2) before a Judge of the District Court, grounded on the sworn information of a member of An Garda Síochána, showing "reasonable grounds to suspect that the transaction or service would, if it were to proceed, comprise or assist in money laundering or terrorist financing" and providing evidence also that an investigation is taking place.

If satisfied that the statutory requirements have been met, the District Judge may grant an order directing a person not to carry out a specified service or transaction for a specified period, not exceeding 28 days. Section 17(3) provides that an application may be made under s. 17(2) on more than one occasion, stipulating no upper limit on the number of such applications that may be moved.

The foregoing applications proceed on an *ex parte* basis. However, s. 18 of the 2010 Act further requires that persons affected by orders granted under s. 17 should be given notice of the direction or order, as appropriate. Although the section requires that reasons should be furnished to persons affected, subs. (5) makes clear that no detailed reasons need be furnished where there are "reasonable grounds" to believe that the dissemination of same may prejudice the investigation.

Section 19 of the 2010 Act sets out a mechanism whereby a person affected by a direction or order under s. 17 may apply, on notice to An Garda Síochána, for the revocation of same, with the onus being upon the affected person to satisfy the court that the basis

upon which the direction or order under s. 17 has issued is either unsound or no longer applies. Similarly, s. 20 of the 2010 Act provides that an affected person may apply, again on notice to An Garda Síochána, to the District Court to vary an order or direction so as to allow for the discharge of reasonable business or living expenses.

Section 21 of the 2010 Act provides that a s. 17 direction automatically ceases to have effect upon the cessation of the relevant investigation. Therefore, relief under s. 19 may only be granted during the currency of an investigation, but before charges have been brought. Accordingly, the applicant submitted to this Court that it was "irrational" for the District Judge to have deemed the application for disclosure to have been premature, in circumstances where the jurisdiction to grant relief under s. 19 would cease to exist once charges were formally laid.

The applicant contended that the 2010 Act, by implication, countenances disclosure being granted, on the basis that s. 18(5) thereof explicitly excludes from the scope of any disclosure "details the disclosure of which may prejudice the investigation". It was clear, counsel argued, that other "details" could be disclosed. Furthermore, as s. 22 specifically states that a "suspicious transaction report" compiled under Chapter 4, Part 4 of the 2010 Act shall not be disclosed in the course of proceedings under ss. 17 or 19 to any person other than the District Judge concerned, it could be seen that a similar inference (*i.e.*, that *other* details could be provided) arose from that provision also.

Without some form of disclosure, the applicant was entirely deprived of the opportunity to make his case under s. 19, in circumstances where the onus fell upon him to establish the absence of "reasonable grounds". In support of this argument, the applicant cited the judgment of Laffoy J. in *Vehicle Tech Limited v. Allied Irish Banks plc & Ors*. [2010] IEHC 525 as authority for the proposition that to place such an onus upon him, in the absence of adequate disclosure of the reasoning behind the s. 17 application, constituted a breach of his right to fair procedures. That case concerned a direction issued under s. 31(8) of the Criminal Justice Act 1994, as amended, which may be regarded in many respects as a precursor to the 2010 Act.

In *Gary Doyle's* case, Denham J. (as she then was) stated at page 301:-

> "The District Court Judge has the duty of ensuring that justice, incorporating fundamental constitutional concepts of fair procedures, is delivered in court. In the absence of legislation the test for the District Court Judge to apply in each case is whether in the interests of justice on the facts of the particular case the accused should be furnished pre-trial with the statements on which the prosecution case will proceed."

It was submitted by the applicant that the s. 19 application should be treated as a hybrid or *sui generis* form of proceedings, in a manner analogous to civil forfeiture applications under the Proceeds of Crime Act, 1996 and the Criminal Justice Act, 1994.

Certainly, there could be no doubt but that the District Court has power to direct disclosure of documents in civil proceedings. Order 46A the Rules of the District Court relates to discovery in civil matters, and in Rule 3 states:-

> *"It shall be lawful for the Court at any time during the course of civil proceedings to order the production to any party thereto upon oath of such of the documents in the possession, power or procurement of such party relating to any matter in question in such proceedings as the Court shall think proper; and the Court may deal with such documents, when produced, in such manner as the Court may think just."*

In reply, the respondents argued that the application for disclosure, moved as it had been in the District Court on the basis of the *Gary Doyle* principles, was fundamentally misconceived. The application having been made on an incorrect basis, the District Court judge was correct in deciding he had no jurisdiction to grant the relief sought. A different case from that argued before the District Court was now being advanced.

The respondents further submitted that in any event a simple mechanism exists whereby an applicant may discharge the onus upon him under s. 19, and that is to demonstrate that the provenance of monies passing through the account is from legitimate sources. This the applicant had not sought to do and relief should be refused for these reasons.

**DECISION**

In their submissions, the respondents placed particular emphasis upon the public interest in the integrity of an ongoing investigation into criminal activity as a factor in determining whether it is appropriate for the District Court to grant disclosure in the context of a s. 19 application. This is undoubtedly true and has been emphasised in a number of cases. In *Murphy v. Dublin Corporation* [1972] I.R. 215 Walsh J. stated at page 234:-

> "It is clear that, when the vital interests of the State (such as the security of the State) may be adversely affected by the production of a document, greater harm may be caused by ordering rather than by refusing disclosure or production of the document. In such a case the courts would refuse the order but would do so on their own decision."

Similarly, in *McDonald v. RTÉ* [2001] 1 I.R. 355, McGuinness J., in upholding a claim of privilege over documents generated in the course of a murder investigation, held at page 376:-

> "…the file has been assembled in connection with the investigation of a criminal offence of abduction and murder which on the evidence before the court is still a live investigation. I would accept the submission … that in such a situation it might be of interest to various persons to discover not only what was on the file but what was not on the file. It seems to me that in principle it would be injurious to the public interest to bring some of the relevant documents into the public arena through the means of discovery."

Hogan and Morgan in *Administrative Law* (4th Ed) summarise the position thus at p. 1115:-

> "… there will be situations where the constitutional guarantee of fair procedures, which of course, is not absolute, may have to yield to the need to preserve confidential information."

The foregoing authorities, however, do not operate so as to preclude an application for disclosure, but rather constrain the classes of documents which may be subject to an order for disclosure. It is unclear whether or not the learned District judge based any of his reasoning in this case on considerations of privilege.

I am left in a position where I can find no clear reason or basis for the court's decision. To the extent that the ruling found that the application was premature, this can not have been correct, given that no other opportunity is provided for under the Act to make the

application at a later stage. No reason was given for this ruling and overall there is an absence of any clear principle underpinning the court's decision. Some rationale must appear which indicates why the court ruled as it did.

In *O'Mahony v. Ballagh* [2002] 2 I.R. 410, Murphy J., speaking for the Supreme Court, said at p. 416:-

> "I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing."

The case of *Foley v. Judge Murphy* [2008] 1 I.R. 619 is of assistance in this regard. In his judgment, having reviewed *inter alia* the decisions in *O'Mahony v. Ballagh and Lyndon v. Collins* (Charleton J., 21st January, 2007), as well as the decision of the Court of Appeal of England and Wales in *Flannery v. Halifax Estate Agencies Ltd.* [2000] 1 W.L.R. 377 and in *English v. Emery Reimbold & Strick Ltd.* [2002] EWCA Civ 605, [2002] 1 W.L.R., McCarthy J. held that:-

> "It seems to me that, in the light of what I regard as the absence of reasons of sufficient particularity or specificity, the decision is a nullity as being a breach of the constitutional entitlement to fair procedures. Of course it would be wholly wrong for me to enter into the issue of whether or not the decision was irrational or unreasonable since, as I have said, the first respondent rightly decided the matter within the ambit of the evidence, correspondence and submissions, but we cannot know whether or not it might be irrational or unreasonable unless the more specific reasons are given."

I am of the view, in this case, that the reasons furnished by the learned District Judge in declining to order disclosure in this case were not of "sufficient particularity or specificity", to adopt the phrasing of McCarthy J. in *Foley v. Judge Murphy*, so as to apprise the parties of which arguments had or had not been accepted by the court in determining the issue.

It is entirely unclear, on the evidence put before this Court, as to whether the learned District Judge held that he was in fact possessed of 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 at ss. 18(5) and 22 of the 2010 Act, or whether he had concluded that he was not possessed of the 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 the circumstances I am driven to conclude that the applicant must succeed in his application and that the decision of the learned District Court judge must accordingly be quashed.