THE COURT OF APPEAL

Appeal No.: 2021/222

Donnelly J

Neutral Citation Number [2022] IECA 250

Noonan J

Ní Raifeartaigh J

LAWRENCE SHIELDS

APPELLANT

-and-

THE CENTRAL BANK OF IRELAND

RESPONDENT

-and-

AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES/ RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered on this 4th day of November 2022

1. This is an appeal against a refusal to grant leave to apply for judicial review. After a contested leave hearing, the High Court (Barr J, [2021] IEHC 444) refused to grant leave on the basis that the applicant, Lawrence Shields (hereinafter "the appellant"), had no *locus standi* and the application was premature. He also refused leave to join the appellant's instructing solicitors, James T Flynn & Co. Solicitors, as a second applicant in the proceedings. The High Court had ordered that the leave application be heard on notice to the respondent ("the Central

Bank") and to the Commissioner of An Garda Síochána and Ireland ("the notice parties"). The appellant was ordered to pay the costs of the respondent and the notice parties.

2. The appellant has appealed against those findings and the order for costs. In his notice of appeal, he raised a fresh issue. He claimed that the High Court had no jurisdiction to make any determination in respect of a matter of European Union law concerning a decision of the Central Bank under the Decision of the European Central Bank on the denominations, specifications, reproduction, exchange and withdrawal of Euro bank notes of 19 April 2013 ECB/2013/10 ("the ECB Decision"). The appellant's point in raising that issue at this late stage is to claim that the Central Bank ought to have told him that the High Court had no jurisdiction to hear the matter and that the correct order for this Court on appeal is to vacate the Order of the High Court and to award costs to the appellant.

The Background

3. The challenge by way of judicial review centres on a decision of the Central Bank taken on 15th May 2020 pursuant to Article 3(3)(b) of the ECB Decision. Specifically, the first relief sought in the statement grounding the application for judicial review was an Order of Certiorari of the decision "by which the [Central Bank] refuses to exchange and/or withhold banknotes pertaining to the applicant in the amount of €4,400 provided for exchange on or around the 17th April 2019". The ECB Decision permits the Central Bank, as a National Central Bank, to exchange damaged Euro notes for undamaged notes of the same value provided certain conditions are met.

4. In the decision of the 15th May 2020, the Central Bank outlined in brief the history of the application. The decision then stated:

> "The Central Bank has been informed by An Garda Síochána that they have commenced an investigation into the source of funds the subject of the firm's application. Accordingly, pursuant to Article 3(3)(b) of the ECB Decision, the Central Bank is not

exchanging and is withholding the damaged banknotes. Unless otherwise decided by the competent authorities, the damaged banknotes shall at the end of the investigation qualify for exchange under the conditions laid down in Articles 3(1) and (2) of the ECB Decision."

5. The first point of note about the decision of the 15th May 2020 is that it was taken after the Bank was informed by An Garda Síochána of an investigation into the source of the funds. In those circumstances, the Central Bank relied upon the Article 3(3)(b) of the ECB decision which is set out in para 25 of this judgment.

6. The second point of note is that the decision is addressed for the attention of Mr. James Flynn, Principal, JT Flynn & Co. Solicitors. The decision referred to the application to the Central Bank by JT Flynn & Co. Solicitors for the exchange of damaged banknotes. The decision goes on to record the history of the submission of these banknotes to the Central Bank, originally having been made in the name of a Ms. Sandra Daly, and the subsequent application for exchange in January 2020 from JT Flynn & Co., effectively taking over the application. The decision then referred to the completed application form with the necessary declaration signed.

7. The appellant does not take deny that the application made to the Central Bank was made by JT Flynn & Co., who were then, and continue to be, the solicitors acting on his behalf. In fact, the appellant expressly states in his affidavit grounding the application for judicial review: "I am seeking primarily to quash the decision of the Central Bank of Ireland to withhold and refuse to exchange banknotes in the amount of €4,000 which had been provided by me as payment for professional fee to my solicitors". The appellant's solicitor, Mr. James Flynn, also swore an affidavit relating to the application. Mr. Flynn stated that his firm, JT Flynn & Co., had been furnished with these banknotes as a fee payment by the appellant who is "a long-standing client of the firm".

8. The relevant history of events is that, on a previous occasion, this appellant personally submitted an earlier batch of damaged banknotes (face value €4,950) to the Central Bank for exchange. These earlier banknotes became the subject matter of separate judicial review proceedings. This history is referred to briefly in the judgment of Barr J., the subject matter of this appeal, and is set out in further detail in the High Court and Court of Appeal decisions in *Shields v Central Bank* [2020] IEHC 518 and [2022] IECA 241 It is only necessary to give a brief synopsis of the background to those proceedings.

9. In that earlier application to the Central Bank there had been a somewhat protracted exchange between the parties concerning how the notes were damaged. The claim had been made that the notes were damaged when an envelope containing €10,000 had been placed in a furnace by the appellant's partner but retrieved before incineration. The Central Bank initially formed a view that the notes were intentionally damaged. Further exchanges followed, and the appellant gave an explanation as to how certain chemicals might have been on the banknotes. The Central Bank indicated that they would seek further forensic testing. An application was moved *ex parte* for leave to seek judicial review challenging the withholding of the bank notes. Subsequently, the Central Bank wrote to the appellant informing him that in light of the further report they would in fact exchange the bank notes that he had submitted. The Central Bank defended those proceedings on the basis, *inter alia*, that they were moot.

10. In the present case, the appellant says that these banknotes were damaged in the same incident as the earlier batch. In the High Court and to a large extent in this appeal, the appellant claims that, despite not making the application for exchange, he has an interest in seeking to challenge this decision because he will be "on the hook" for fees if the damaged notes are not exchanged. It cannot be gainsaid however that neither the appellant nor his solicitor ever put that claim on affidavit. On the contrary, their affidavit evidence is that the money was paid over as payment of the professional fee involved.

11. In the oral hearing of this appeal, the appellant sought to expand the nature of his interest in the matter, in particular by reference to him being the source of the money, and that his claim for relief was a challenge to the decision to refer the matter to An Garda Siochána. He also referred to the claims he had made in respect of the orders of mandamus sought in his statement grounding the application for judicial review. It is appropriate to examine the claims he has made.

The Reliefs sought in the High Court

12. In his statement of grounds, the appellant initially sought six substantive reliefs, which later increased to eight substantive reliefs in his amended statement of grounds. The first relief claimed was an order of certiorari of the Central Bank's decision, the wording of which has been set out above at para 4. It is important to note that in his grounding affidavit, the appellant asserts that his primary claim was in respect of the decision *to withhold and refuse to exchange banknotes in the amount of €4,000* and then says that he "also sought orders of mandamus to compel the Central Bank to furnish him with materials upon which it made this decision, and certain declarations in relation to my due process rights."

13. In addition to the application for certiorari, the appellant included in his amended statement of grounds a claim for an order of mandamus to compel the Central Bank to make a final decision under Article 3 of the ECB decision in respect of the banknotes provided for exchange.

14. He sought two further orders of mandamus seeking to compel the Central Bank to provide him with details of any laboratory to which the banknotes were sent for testing or to provide him with a copy of the initial report (if any) on which it based its assessment that the banknotes, or banknotes from the same source, were "*intentionally damaged* and/or chemically altered." (Emphasis added). The underlined part appears to relate back to the earlier application for

exchange of damaged banknotes (which were in fact exchanged) that are the subject matter of the aforementioned appeal to this Court in which judgment is awaited.

15. The appellant claimed damages for breach of his rights under the Constitution and under the Charter of Fundamental Rights of the EU ("the Charter") and under the provisions or protocols of the European Convention on Human Rights ("the ECHR"). In his amended statement of grounds, he sought a Declaration that the immunity from damages afforded to the Central Bank by s.33AJ(2) of the Central Bank Act 1942 was unconstitutional, in breach of the Charter and contrary to provisions or protocols of the ECHR, having regard to s.3 of the European Convention on Human Rights Act, 2003.

16. The appellant also sought a declaration that where the Bank proposes to withhold and to exchange banknotes for value pursuant to Article 3(3)(b) of the ECB decision, the Central Bank "must know or have sufficient reason to believe that the said banknotes have been damaged in the course of a criminal offence prior to presenting them to the competent authorities to initiate or support an ongoing criminal investigation".

17. The final declaration sought was one that where the Central Bank proposes to withhold and declines to exchange monies for value pursuant to the ECB Decision, it must also have regard to a claimant's due process as well as property rights under the Constitution, the Charter, and the European Convention on Human Rights.

18. Ultimately, Barr J held that it was appropriate for the appellant to amend his statement of grounds so as to include all his grounds of challenge at the outset. The High Court went on to refuse the appellant leave to apply by way of judicial review. The respondent and notice parties did not appeal the order amending the statement of grounds.

The threshold for leave to apply for judicial review

19. It has long been established that the standard of proof required for an applicant who seeks leave to apply for judicial review pursuant to the provisions of Order 84 Rules of the Superior

Courts is one of arguability. (See *G -v- DPP* [1994] 1 I.R. 374). The issue is whether the applicant has arguable grounds for making the judicial review application. While this is a low bar, it is not a non-existent threshold. As Charleton J. said in *Esmé v Minister for Justice and Law Reform* [2015] IESC 26 "any issue of law can be argued: but that is not the test. The point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of rational preliminary analysis, ultimately have a prospect of success."

20. The issue of whether the appellant had *locus standi* is also one where the appellant only needed to establish that he *arguably* had *locus standi*. The respondent relied upon the decision of this Court in *O'Connell v Taxing Master Paul Behan* [2021] IECA 186 which concerned an appeal against a refusal to grant leave to apply by way of judicial review of a decision of the respondent Taxing Master. The Court of Appeal, in a judgment delivered by Murray J., restated the position that the refusal to grant relief by way of judicial review is a discretionary remedy of the High Court and that the standard of review was one where the court must offer considerable deference to the judgment of the High Court and ought to only grant leave if the judge erred in principle or, if the correct principles were applied, that he strayed outside the range of judgement calls which were open to the first instance court. He said the High Court also had a discretion to refuse to grant leave to seek judicial review and applied the same principles to the present appeal.

21. The decision in *O'Connell* is primarily directed to the situation where, despite the legal basis for judicial review being established, the Court has decided to withhold such relief on a discretionary basis. As Murray J stated (at para 43): "Clearly, while judicial review is a discretionary remedy the court is not at large in withholding such relief where the legal basis for it has otherwise been established." Murray J. then indicated that there were three broad grounds where discretionary factors were at play; a) action or inaction of the applicant e.g., delay, b) the impact of the remedy on others e.g. impact on third parties settled rights and c)

grounds relating to the practical value of the remedy such as mootness or futility. This discretion to refuse relief also applies to the refusal to grant leave to seek judicial review.

22. The first issue is whether the appellant can establish that he has an arguable legal basis to apply for leave for judicial review. If he has no legal basis, then there is no error in principle. If, however, he had a legal basis to apply for judicial review but was nonetheless refused on a discretionary basis by the trial judge, then this court must approach the exercise of discretion with an appropriate level of deference to that exercise of judicial discretion.

23. One of the main issues in this appeal has been that of *locus standi*. What was not argued was whether the High Court, in deciding the issue of *locus standi*, was deciding a discretionary issue or a substantive legal issue. In all the circumstances of this case, and without making a decision on what is the standard of appellate review, I will review the matter on the basis that if the appellant establishes that he has *locus standi*, then subject to other arguments on prematurity, he should be granted leave.

24. The position with regard to the application to join J.T. Flynn & Co as a second applicant is different. This is a discretionary matter and the standard of appellate review as identified in *O'Connell v Taxing Master* clearly applies.

ECB Decision

25. The Central Bank purported to exercise powers under the ECB Decision dated 19 April 2013. The relevant article thereof is Article 3 which provides for the exchange of damaged banknotes by national central banks. Article 3, titled 'Exchange of damaged genuine euro banknotes', provides that:

> "NCBs shall, upon request, under the conditions laid down in paragraph 2 and in the relevant decision of the Governing Council referred to in Article 6, exchange damaged genuine euro banknotes where:
>
> (a) more than 50 % of the euro banknote is presented; or

(b) 50 % or less of the euro banknote is presented, if the applicant proves that the missing parts have been destroyed.

2. Further to paragraph 1 the following additional conditions apply to the exchange of mutilated or damaged legal tender euro banknotes:

(a) where doubt exists as to the applicant's legal title to the euro banknotes or as to the authenticity of the euro banknotes: identification shall be provided by the applicant;

(b) when ink-stained, contaminated or impregnated euro banknotes are presented: a written explanation as to the kind of stain, contamination or impregnation shall be provided by the applicant;

(c) when the euro banknotes have been discoloured by activated anti-theft devices and they are presented by professional banknote handlers as referred to in Article 6(1) of Council Regulation (EC) No 1338/2001 of 28 June 2001 laying down measures necessary for the protection of the euro against counterfeiting (4): a written statement on the cause and the nature of neutralisation shall be provided by the professional banknote handlers;

(d) when the euro banknotes have been mutilated or damaged in bulk due to the use of anti-theft devices: they shall be presented in sets of 100euro banknotes, provided that the amount of euro banknotes presented is sufficient to form such sets.

3. Notwithstanding the above:

(a) Where NCBs know or have sufficient reason to believe that the euro banknotes have been intentionally mutilated or damaged, they shall refuse to exchange and shall withhold the euro banknotes, in order to avoid the return of such euro banknotes into circulation or to prevent the applicant from presenting them to

another NCB for exchange. However, they will exchange the mutilated or damaged euro banknotes if they either know or have sufficient reason to believe that applicants are bona fide, or if applicants can prove that they are bona fide. Euro banknotes which are mutilated or damaged to a minor degree, e.g. by having annotations, numbers or brief sentences placed on them, will in principle not be considered to be intentionally mutilated or damaged euro banknotes; and

(b) Where NCBs know or have sufficient reason to believe that a criminal offence has been committed they shall refuse to exchange the mutilated or damaged euro banknotes and shall withhold them, against acknowledgement of receipt, as evidence to be presented to the competent authorities to initiate or to support an ongoing criminal investigation. Unless otherwise decided by the competent authorities, the euro banknotes shall be returned to the applicant at the end of the investigation and shall thereafter qualify for exchange."

Locus Standi

26. In the High Court, Barr J. held that the appellant did not have *locus standi* to challenge the decision of the respondent communicated to Mr. Flynn on the 15th May 2020. He referred to Order 84, r20(5). Barr J. gave a number of reasons for his decision:

a) The notes were transferred to Mr. Flynn in part payment of legal fees in April 2019. The appellant did not have any title or beneficial interest in the notes after that date.

b) The appellant never applied to the Central Bank for exchange of those damaged bank notes.

c) The decision challenged did not concern the appellant.

27. Barr J. was satisfied that the appellant has no interest in the decision sought to be challenged.

28. On appeal, the appellant submitted that his standing is "manifestly clear". He says that he provided the banknotes to his solicitor as payment for fees and he is the source of the funds subject to the Garda investigation. In the High Court, the standing issue was advanced by him under a two-pronged approach, the first being that he had an interest in the monies (indeed, in the oral hearing of the appeal, counsel often referred to the banknotes as "my monies") and the second being that he was the source of the funds which are the subject of the investigation. It will be recalled that the primary relief of certiorari was directed solely against the decision of the Central Bank *not to exchange and to withhold* the damaged banknotes pending a Garda investigation that was underway. In the appeal, counsel's argument was directed more towards a challenge to *the reasoning or belief of the Central Bank that a criminal offence had been committed*, but as this judgment will demonstrate, no relief challenged the formation of this opinion.

29. I will deal first with the argument that is solely directed towards the decision of the Central Bank *not to exchange and to withhold* the damaged banknotes pending a Garda investigation that was then underway. For reasons that I will now set out, I am satisfied it is without merit.

30. In broad terms under Article 3 of the ECB Decision, the Central Bank is required, on request, to exchange damaged banknotes where certain conditions are met. For example, if doubt exists as to the legal title of an applicant to the banknotes, identification as well as proof of title must be provided. Article 3 also provides for exceptions to the requirement to exchange damaged banknotes such as a) where they have been intentionally damaged or b) where the Bank considers a criminal offence may have been committed.

31. The decision of the Central Bank at issue in these proceedings was directed to the person who made the application: Mr. James T. Flynn, (Principal, JT Flynn & Co.). The decision was a refusal by the Central Bank to exchange the notes. The central claim made by the appellant

was that the decision refusing to exchange and/or withhold the banknotes ought to be quashed by way of certiorari. The appellant's initial basis for that claim was that he had some kind of interest in the banknotes themselves (or the value of the banknotes) which gave him standing. I am satisfied that on the contrary, there is no conceivable basis upon which, on the evidence before the High Court, it can be said that the appellant had an interest in the banknotes giving him *locus standi* to challenge the matter. He paid his solicitor's fees with these notes. His solicitor made the application to the Bank for the exchange of the bank notes. The appellant has not made out that he had any title to these notes. He never made an application to the Central Bank. His claim that he is "still on the hook" for fees has never been put on affidavit by the appellant or by his solicitor, James Flynn, who has sworn two affidavits in these proceedings. In any event, even if it could be said that he was still somehow "on the hook" for the funds, this would not give him *locus standi* to challenge a decision which related to an application not made by him, regarding banknotes whose ownership he had transferred, and which decision was not addressed to him. The entire contention that he has an interest is tangential and hypothetical. It cannot be said to amount to a sufficient interest in a third-party decision-making process to amount to standing. I would also add that I consider the claim made by the appellant for the first time on appeal to this court that he had an entitlement to damages against the Central Bank because he might be on the hook for fees is entirely unstateable. He has failed in any way to demonstrate that he met the criteria for *Francovich* damages. Not only has he given no evidence that he is "on the hook" for those damages but there is nothing in this case to suggest that any breach, even if such breach could be established, was manifestly and gravely in disregard of the limits of the discretion granted to the Central Bank under EU law.

32. In so far as the appellant claims other reliefs, such as declarations and an order of mandamus, these reliefs all stem from and relate to the decision at issue. The appellant has no *locus standi* to challenge that decision of the Central Bank and he has no *locus standi* to

challenge it by way of those ancillary reliefs. Even the relief which was put forward by counsel as particularly significant was one seeking a declaration that referred, *inter alia*, to the Central Bank "know[ing] or having sufficient reason to believe that the said banknotes have been damaged in the course of a criminal offence prior to presenting them to the competent authorities to initiate an investigation" was premised upon the basis that "the [Central Bank] proposes to withhold and declines to exchange banknotes for value pursuant to Article 3(3)(b) of the ECB decision". Thus, the declaration was clearly linked to the decision to withhold or not to exchange the banknotes; the appellant therefore had no *locus standi* in this regard.

33. In his written submissions and during the course of the oral hearing of the appeal, counsel for the appellant based his appeal related to standing mainly upon an assertion that he was "the target of the investigation here", referring to the Garda investigation into the source of the banknotes. He said this became crystal clear when a letter from the Gardaí "miraculously appeared" the day after the leave hearing, which set out that it was Central Bank who had referred the matter to the Gardaí and, to quote counsel, "I am supposedly the person who has provided the proceeds of crime to my solicitor". Counsel submitted that this letter had been before the High Court, and was referred to by the High Court judge, but not adjudicated upon.

34. The High Court judgment notes that by consent of the parties, Mr. Flynn had sworn a further affidavit after the leave hearing. The affidavit, sworn on the 8th June, 2021, dealt with the nature of a criminal investigation conducted by the Gardaí. Mr. Flynn had been invited to attend for "a cautioned interview" on the 24th March, 2021, (before the leave hearing) and Mr. Flynn's solicitor had written to the Gardaí outlining Mr. Flynn's understanding of the matter. The Gardaí replied by letter dated 4th June, 2021, saying that they were investigating suspected money laundering and Mr. Flynn was suspected of being directly or indirectly involved in the receipt, movement and disposal of funds which are the subject of the investigation. The Gardaí were investigating the source of the funds and how they came to be lodged for exchange with

the Central Bank. The letter confirmed that a notification was received from the Central Bank under s.19 of the Criminal Justice Act 2011 on the 24th April 2020 concerning the *"€4,400 "Sandra Daly" lodgement"*. The Central Bank had not put this information into its Decision letter, nor had they included this prior event in their affidavit grounding their opposition to leave being granted. The decision letter had stated that the decision not to exchange was made after being informed by the An Garda Síochána of its decision to investigate.

35. It should be noted that the further affidavit of Mr. Flynn expressly stated that the documents were being furnished without comment or argument, but it was said that the documents speak for themselves.

36. Counsel for the appellant also relied on the grounds set out in his amended statement grounding the application for judicial review in support of his argument that he had standing because he was the target of the investigation. This refers to the grounds on which the reliefs were claimed. Ground 1 in the statement grounding the application was titled "Illegality". The ground was as follows:

> "The respondent has unlawfully and/or unreasonably deprived the Applicants of the value of damaged euro banknotes in the total amount of €4,400 (the "Banknotes"), which the Second Named Applicant had furnished to the Respondent for exchange under the provisions of the ECB Decision:
>
> (i) Pursuant to Article 3(3)(b) of the ECB Decision, the Respondent may only refuse to exchange and withhold damaged euro banknotes where it has "*sufficient reason to believe that a criminal offence has been committed*" and the banknotes are withheld as evidence to initiate or support an ongoing criminal investigation. Having conducted its own investigation into the source of the damage in identical circumstances, the Respondent could not have lawfully formed any reason to believe that any criminal offence had

been committed, and could not have lawfully formed any reason to believe that the Banknotes were damaged in the course of a criminal offence;

(ii) The Respondent has acted irrationally and unfairly, in breach of the right to due process, in failing to provide the First Named Applicant, upon request, with any evidence upon which it has based its reasons to believe that any criminal offence has been committed;

(iii) In refusing to exchange the Banknotes for value, the Respondent has, without proper or lawful reason, refused to accept that the First Named Applicant is a bona fide applicant, or that J.T. Flynn & Co Solicitors was a bona fide agent, for the purposed of Article 3(3)(a) and/or Article 3(3)(b) of the ECB Decision."

37. In Ground 2, the appellant further specified that his claim as to procedural unfairness was based upon the refusal to accept the *bona fides* of the appellant and his solicitor and the failure to accede to his request to advise if a complaint was made to An Garda Síochána and to provide that correspondence and the copy of any report regarding the assessment of the banknotes. Sub-ground 11 relates to an allegation of a breach of his right to good administration under Article 41 of the Charter in failing to make the assessment in reasonable time and in an impartial and fair manner.

38. The final sub-ground (iii) of Ground 1 i.e. the claim of agency, does not appear to have been pursued at all by the appellant; this would be for good reason as there is no evidential basis for any claim of agency. It is clear that sub-grounds (i) and (ii) relate to the refusal to exchange or the withholding of the banknotes. In other words, these are grounds to support the reliefs claimed which are directed at the decision to withhold the banknotes or to refuse to exchange them. The same is true of Ground 2 and the appellant's reference to procedural unfairness. The grounds relate to the reliefs sought, which are not directed at the decision to

refer the matter to An Garda Síochána. I am satisfied therefore that the mere fact that the grounds referred to the certain allegations of illegality arising out of the alleged referral to the Gardaí does not give the appellant any standing to challenge the decision not to exchange the banknotes and to withhold them. He simply had no legal interest in the particular decision to withhold and not to exchange the banknotes. Therefore, regardless of the illegality or otherwise of the making of that decision, the appellant does not acquire standing merely because he alleges that part of the illegality under investigation may concern him.

39. In answer to the Court enquiring as to how the fact that he was the subject of the investigation which led to the withholding of the banknotes by reason of being the source of the funds related to the actual decision being challenged, counsel for the appellant replied at first that he had challenged the formation of the opinion that a criminal offence is being committed. When it was pointed out that no such challenge to the formation of that opinion featured in the reliefs claimed, and that the challenge was to the decision to withhold the money, counsel then submitted that he did not have the information until after the leave hearing. That is a difficult point to understand, as the decision being challenged had clearly referred to the Garda investigation into the "source of funds" and the appellant was asserting from the very beginning that he was the source of funds (a phrase used by the appellant in submissions to the High Court). The subsequent letter from the Gardaí does not state that he was "the target of the investigation" but again refers to the "source of the funds". I would add further that even if any meaningful information in that letter had only become available after the leave hearing, there is no explanation as to why there was no further attempt to amend the statement grounding the application to include a relief seeking judicial review of that decision, or indeed to make a further legal submission to the High Court explaining why this information ought to be considered as part of his claim as to *locus standi*. The appellant's criticism of the High Court judge for not addressing this argument appears unwarranted.

40. The respondent and the notice parties both submitted that reliance by the appellant of being a "target of the investigation" was a new ground not relied on in the High Court and ought not to be entertained by the Court. To the extent that there must be a link between the decision made by the High Court and the nature of the appeal to this Court, that submission may well be correct. This Court does however have a certain flexibility to entertain a point that was not advanced in the High Court (see *Lough Swilly v Bradley* [2013] IESC 16). This is particularly so where it is a point that is closely connected to points argued and which would not have any implication for the evidence adduced in the High Court. In my view, while it may be debatable how closely connected this point is to the those argued, it is appropriate to entertain it on the hearing of this appeal against a refusal to grant leave where no further evidence is being adduced.

41. Addressing the point now relied upon i.e. that he was the target of the investigation, (and leaving aside whether it is a new argument), that claim does not have a link, not even an arguable link, to the primary relief claimed by the appellant which is an order quashing the decision to refuse to exchange or to withhold the banknotes. The fact that he may or may not be the target of the criminal investigation does not give him an entitlement to challenge a decision which relates to the withholding or refusal to exchange the notes in circumstances where it is abundantly clear that he has no legal title to, or beneficial interest in, those banknotes. He was in law a stranger to the application made by Mr. J.T. Flynn who had taken the money in payment for fees and who subsequently applied for (or took over an earlier application by Sandra Daly) for exchange of those damaged banknotes.

42. Counsel for the appellant relied upon the reference to the illegality of the Central Bank's reasoning or belief that a criminal offence had been committed in the *grounds* of the statement to make the case that he had *locus standi*. Such an approach inverts the basis upon which an application for judicial review may be made. A party under Order 84 is required to set out in

a statement the reliefs sought and then the grounds for claiming that relief. One cannot convert a ground into a claimed relief. Furthermore, given that the primary argument in the High Court was that he had *locus standi* on the basis that he had an interest in the monies, i.e. he was "on the hook" for fees, it is clear that the reason the reliefs were drafted as they were, was for the purpose of obtaining the value of the banknotes and not to challenge the referral to the Gardai.

43. I am satisfied therefore, that even if the appellant were the target of the investigation by the Gardaí, he has no *locus standi* to challenge the decision of the Central Bank to withhold the banknotes or refuse to exchange them. He did not challenge at any point the initial decision by the Bank to refer to the Gardaí (an entirely separate decision to the Decision of the 15th May 2020, which was to refuse to exchange having been informed by the Gardaí of an ongoing investigation). The appellant articulated in submissions to the High Court that he was the "source of the funds" and that it was the investigation into the source which gave him *locus standi,* yet at no point did he seek the relief which now seems of paramount importance to him; the quashing of the reasoning or belief of the Central Bank that a criminal offence had been committed. Nor did he seek to amend his pleadings after he received the letter subsequent to those High Court submissions to include such relief, although in my view it is not clear that this letter contained information that was new to him in light of the submissions he made before the High Court. The result is that there has never been a challenge to the formation of the opinion of the Central Bank in relation to its knowledge or reason to believe that a criminal offence had been committed. In so far as the decision to withhold or not to exchange the banknotes was made, the appellant has failed to demonstrate arguable grounds that he has *locus standi* in the matter.

44. Finally, from the perspective of assessing whether there is a sufficient interest by the appellant in the Decision of the 15th May 2020, it is worth considering what, if any, benefit would accrue to this appellant. He would not be entitled to return of the monies because he

has no title to those monies having regard to the circumstances. This decision is separate to the decision by the Central Bank to refer the matter to An Garda Síochána. Even if the decision of the 15th May 2020 were quashed, it would not in any way affect the decision to refer the matter to An Garda Síochána. Thus, from the point of view of obtaining the value of the notes, or of stopping the criminal investigation, he simply has nothing to gain from the application he seeks leave to make. In all the circumstances, I am satisfied that he has no arguable grounds upon which leave to apply for the orders of judicial review sought in his statement of grounds ought to be granted.

The application to join JT Flynn & Co., Solicitors as an applicant

45. The appellant's notice of motion seeking to join J.T. Flynn & Co as an applicant was issued on the 22nd June 2021. This was over 12 months after the decision of the Central Bank. It was also 12 months after the solicitors for the Central Bank pointedly clarified that the present application had been made by J.T. Flynn and Co. Solicitors and kept separate its response to the first application in time regarding banknotes which had been made by the appellant. Thus, the fact that there was an issue regarding the identity of the applicant for the exchange of the banknotes was clarified to Mr. James Flynn at the earliest opportunity.

46. The affidavit grounding the motion to join J.T. Flynn & Co. as a second applicant was sworn by Mr. Flynn. In this affidavit Mr. Flynn relied upon the provisions of Order 15 r.13, which permits a party to be joined to proceedings where it is in the interests of justice to do so, alleging that the rule applied to this case.

47. An application made pursuant to Order 84 r18 seeking leave to apply for judicial review must be made within 3 months from the date when grounds for the application first arose (Order 84 r21(1)). That time may be extended where the Court is satisfied that there is good and sufficient reason for the extension and that the circumstances which resulted in the failure to make the application within three months were either a) outside the control of or b) could not

have been reasonably anticipated by the applicant. At no point has Mr. James Flynn (or indeed the appellant) put forward any grounds explaining the failure to make the application within the allowed time, although reference was made to a letter sent by the appellant in November 2020 to the respondent of his intention to join the firm to the proceedings.

48. The appellant's submission was that the interests of justice would be served by this joinder by ensuring that all relevant parties were before the court at the hearing of the leave application and so that, if leave were granted, the central issues raised could be examined by a court in a full and proper manner.

49. Barr J. dismissed this application on the basis that it could not be used to circumvent time limits applying to specific proceedings. Permission to join J.T. Flynn & Co. to the judicial review proceedings would enable that applicant to gain advantage of the fact that the appellant had brought his proceedings in time. He held that if the Court were to treat the application by J.T. Flynn & Co. as an application for leave to seek judicial review, it was an application that was long out of time and Mr. James Flynn did not establish that he had met the circumstances set out in Order 84 r.21(3) to permit an extension of time.

50. In his appeal, counsel for the appellant submitted that the High Court erred in its application of Order 15. Counsel submitted that he ought not to have been prohibited from joining an applicant because the words of Order 15 were clear, and the trial judge erred in saying that it was circumventing the time limits in Order 84 r.21. His specific submission was that Order 84 r.21 only required "an application" for judicial review to be made within 3 months. The appellant had made that application within time and thereafter he ought to have been allowed join a co-applicant in accordance with the time of Order 15 r.13 which said that no cause or matter ought to be defeated by the non-joinder of a party. In answer to queries from the Court, he confirmed that his submission was that one person could move an application and if there was a problem with *locus standi* then they may effectively substitute

another applicant at a later stage and that no time limits then apply to that second person. Counsel also compared the situation to that of a notice party who will only be added after the leave application; this submission is at odds with the decision in *O'Connell v Taxing Master* [2021] IECA 186 that when an application for leave is contested, affected persons should then be on notice. He also submitted, without giving examples, that "It happens all the time that notice parties sometimes become applicants because that's in the interests of justice".

51. Order 15 r.13 was considered in a slightly different context by the Supreme Court in *Dowling v Minister for Finance* [2013] IESC 58. That appeal concerned an application by Permanent TSB to be made a notice party to a challenge to the direction order of the Minister for Finance regarding the capitalisation of Permanent TSB. These were special proceedings brought under the relevant legislation. In his judgment, Fennelly J. dealt with the distinctions between Order 15 r.13 and judicial review. He made reference to *BUPA Ireland Ltd v Health Insurance Authority* [2006] 1 I.R. 201 in which the Supreme Court had been, according to Fennelly J.,

> "primarily of the view that the judicial review rules provided the framework for the decision and that the High Court judge in that case had been mistaken in considering the matter in the light of Order 15, Rule13 and the decision in *Barlow v Fanning*, cited above. It concluded, nonetheless, that, even if Order 15. were to be treated as applicable, VHI should still be joined because the court was "strongly of the view that this case does involve exceptional circumstances and that the continued presence of the notice party in the proceedings is "necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter".".". (para 39).

52. In *Dowling*, Fennelly J stated at para 42:

"I am satisfied that the application to set aside a Direction Order has all or almost all of the indicia of an application for judicial review. It has few, if any, of the characteristics of a civil action. If a choice were to be made between the application of Ord 15 and Ord. 84, the latter would have to apply. Since the Act is silent on the matter and s.11(2) provides the only guidance by saying that the court *"may give such directions with regard to the hearing of the application as it considers appropriate in the circumstances"*. It seems to me that Order 84 must apply by analogy. It follows that an Applicant or an order pursuant to s.11 should serve the notice of motion and grounding affidavit on *'all persons directly affected…'*." (*Emphasis* in original)

53. The principle identified by Fennelly J in *Dowling*, namely that rules relating to judicial review proceedings apply to all proceedings which had as their substance the seeking of reliefs which are typical of judicial review applications, also applies in the case of judicial review time limits. For example, the Supreme Court in *Shell E & P Ireland Ltd v McGrath and Others* [2013] IESC 1 confirmed that the decision in *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301 was long established precedent to the effect that a judicial review time limit cannot be circumvented by resort to plenary action. In the circumstances of the *Shell* case, Clarke J. (as he then was) went so far as to say that "a party cannot circumvent judicial review requirements by the device of commencing plenary proceedings or by mounting a counterclaim in such proceedings."

54. The principle is one that is clearly established. The rules relating to judicial review, including the rules on time limits, apply to all actions in which the reliefs claimed amount substantively to claims by way of judicial review. This application is an application for judicial review. The rules relating to applications for judicial review apply to it. What the appellant is seeking to do here is to circumvent the time limit that applies to an application for judicial review by seeking to rely upon Order 15 r.13 to join Mr. Flynn. That is not permitted. Mr.

Flynn, if he wishes to be joined as an applicant must comply with the rules. As the trial judge correctly held (and no real grounds have been put forward to appeal those findings), he has not complied with those rules. Indeed, he made no attempt to address those rules.

55. For the sake of completeness, I reject as unstateable the appellant's attempt to make some sort of analogy with joining Mr. Flynn as a co-applicant and joining him as a notice party. A notice party may be a *legitimus contradictor* in proceedings but that is far removed from the position of an applicant. An applicant is seeking specified relief by way of judicial review, whereas a notice party is not, although he or she may support (or object to or be neutral to) the granting of such relief. In *Dowling*, the decision was to the effect that the rules regarding joinder of notice parties as set down in Order 84 were to apply to the special proceedings. Here, the provisions regarding an applicant for judicial review apply to a person seeking to be an applicant. Similarly, the submission that once an application for judicial review is made any person may be joined or substituted as an applicant is entirely unstateable. This too would contradict the clear principle that an applicant seeking reliefs of a judicial review nature must comply with the provisions set out in Order 84 of the Rules.

56. I therefore dismiss the appeal against the refusal of the High Court to join J.T. Flynn & Co. as a co-applicant.

Prematurity

57. In light of the foregoing, it is unnecessary for this Court to enter into any further examination of this point.

The new claim that the High Court had no jurisdiction

58. It is perhaps ironic that the appellant now seeks to make the case that the High Court had no jurisdiction in proceedings which he himself initiated in the High Court. In any event, the issue of *locus standi* was clearly brought to the appellant's attention at an early stage and he nonetheless persisted before the High Court and this Court, thereby causing the respondent and

notice parties to incur the cost of defending the case at both court levels. The Court has determined that he had no *locus standi* and it is not necessary to address the jurisdictional point he now seeks to raise for the first time on appeal.

Conclusion

59. The appeal is dismissed. The appellant has no arguable ground that he has *locus standi* to challenge in any way, by certiorari, mandamus or declaration the decision of the Central Bank of the 15th May 2022 to withhold or to refuse to exchange the banknotes which had been the subject matter of an application by J.T. Flynn & Co. In relation to the application to join J.T. Flynn & Co as a co-applicant, this application was clearly made outside the time set by Order 84 for applications for leave to apply for judicial review. No grounds were put forward or established to show that an extension of time ought to be granted. In accordance with well-established principles, the provisions of Order 84 clearly apply to this type of application and Order 15 r.13 does not apply.

Costs

60. The appellant raised the issue of whether the costs of the notice party were properly awarded at the High Court stage and this was left over for full argument. In light of that, it is appropriate to fix this matter for a short hearing as to costs at the earliest available date. The Registrar will contact the parties with a suitable date.