THE HIGH COURT

Record No.: 2006 / 3785P

DIGITAL RIGHTS IRELAND LIMITED

Plaintiff

-and-

THE MINISTER FOR COMMUNICATION, MARINE AND NATURAL RESOURCE,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
THE COMMISSIONER OF AN GARDA SIOCHANA,
IRELAND AND THE ATTORNEY GENERAL

Defendants

-and-

THE HUMAN RIGHTS COMMISSION

Notice Party

DRAFT JUDGMENT/RULING of Justice William M. McKechnie delivered on the 5th day of May 2010

1. The Plaintiff is a limited liability company, limited by guarantee, incorporated under the Companies Acts 1963-2003 on the 4th November 2005, and has its registered office at 1 Caiseal na Rí, Cashel, Co. Tipperary. It has as one of its objects, in its Memorandum of Association, the promotion and protection of civil and human rights, particularly those arising in the context of modern communication technologies.

2. The First and Second Named Defendants are Ministers of Government and corporations sole and have their principal offices at 29/31 Adelaide Road and St. Stephen's Green in the City of Dublin, respectively.

3. The Third Name Defendant ("The Garda Commissioner") is the person charged with responsibility for the Garda Síochána and has his principal offices at Garda HQ Phoenix Park in the City of Dublin. He is entrusted with a purported power under section 63(1) of the Criminal Justice (Terrorist Offences) Act 2005 ("CJ(TO)A 2005")to issue a Direction or Directions to telecommunications services providers.

4. The Fourth Named Defendant is Ireland and the Fifth Named Defendant is the law officer of the State designated by the Constitution of Ireland and is sued in his representative capacity.

5. The Notice Party, joined as such in these proceedings, is a statutory body corporate established by section 4 of the Human Rights Commission Act 2000. It is so joined pursuant to section 8(h) of the aforesaid Act and appears as *amicus curiae* in the above entitled proceedings.

6. This judgment relates to the following three matters, the first two moved by the defendants and the third by the plaintiffs, all of which were heard by way of preliminary issues:

i) The *locus standi* of the Plaintiff;

ii) Whether security for costs should be granted against the Plaintiff;

iii) Whether a reference to the European Court of Justice ("ECJ") under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") (formerly Article 234 of the Treaty establishing the European Communities ("TEC")) should be made.

Background

7. The background to the case is, the Plaintiff alleges, that in or around the 25th April 2002 the Minister for Public Enterprise, the predecessor of the First Named Defendant, issued a direction under section 110(1) of the Postal Telecommunications Services Act 1983 (as amended by the Interception of Postal Packets and Telecommunication

Messages (regulations) Act 1993) to certain telecommunications services providers to retain telecommunications data. Such direction was to be treated as confidential. Following this direction the First Named Defendant came into possession of, and had and exercised control over, data relating to the Plaintiff, its members and other users of mobile phones.

8. By letter dated 19th December 2002 the Data Protection Commissioner advised the Department of Communications, Marine and Natural Resources that the above-mentioned direction was *ultra vires*, constitutionally invalid and was in breach of the Data Protection Acts 1988 and 2003 and S.I. 192 of 2002, with the grounds therefor being that as the objectives sought by the direction amounted to a derogation from the then existing data protection legislative scheme, the same could only be enacted through primary legislation. The Data Protection Commissioner advised the Defendants that failing a satisfactory response he would issue judicial review proceedings to challenge the validity of any directions the Minister purported to make under the Postal Telecommunications Services Act 1983.

9. Some of the concerns of the Data Protection Commissioner were addressed in Part 7 of the Criminal Justice (Terrorist Offences) Act 2005 ("CJ(TO)A 2005"), which made provision for the retention of traffic and location data, relating to communications transmitted by fixed line or mobile telephone, and access to such data retained for law enforcement and security purposes.

10. The Plaintiff alleges that on a date or dates unknown, following the coming into force of the above Act of 2005, the Garda Commissioner issued a direction under the provisions thereof to telecommunications service providers to retain data.

11. The European legal framework in place at the time was governed by Directive 95/46/EC ('on the protection of individuals with regard to the processing of personal data and on the free movement of such data') and Directive 97/66/EC ('concerning the processing of personal data and the protection of privacy in the telecommunications

sector'), later repealed by Directive 2002/58/EC ('concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)'). These Directives aimed to harmonise the provisions of Member States:

> *"[T]o ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community"* (Article 1, Dir. 2002/58/EC)

The focus of these Directives was thus the protection of privacy rights arising from data retention.

12. On 6th May 2006 Directive 2006/24/EC ('on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC') was published. Article 1 of Directive 2006/24/EC states:

> *"1. This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.*
>
> *2. This Directive shall apply to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registration user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network."*

The ultimate purpose of this Directive was to clarify the right of Member States to legislate obligations of disclosure upon communications services providers in relation to traffic and location data, and to harmonise the minimum and maximum periods of retention of the specified data, namely six months and 2 years respectively (Article 6).

13. In this case the Plaintiff alleges that the Defendants have wrongfully exercised control over data, in that they have illegally processed and stored data relating to the Plaintiff, its members, and other mobile phone users contrary to: (i) statute, (ii) EC law, and (iii) the Constitution, in particular having regard to the Plaintiff's asserted rights to privacy, to travel and to communicate (Arts. 40.3.1°, 40.3.2° and 40.6.1°), and (iv) the European Convention on Human Rights ("ECHR"), in particular the right to private life, to family life, and to privileged communication (Arts. 6(1), 8 and 10). These allegations involve a claim that s. 63(1) of the CJ(TO)A 2005 is invalid on the within grounds and further that Directive 2006/24/EC is contrary to the Charter of Fundamental Rights ("CFR") and the ECHR.

14. The synopsis last given is simply that: the proceedings as shown by the pleadings are detailed and complex. For present purposes I would adopt as useful the following summary of the remedies sought by the plaintiffs:

i) Declarations to the effect that the Minister for Communications and/or the Garda Commissioner have acted in breach of the Data Protection Acts 1988 and 2003 and/or in breach of EU law;

ii) Declarations to the effect that s. 63(1) of the CJ(TO)A 2005 is null and void for breach of the Constitution and/or EU law, or is incompatible with Ireland's obligations under the ECHR;

iii) A Declaration that the State has failed in its obligation to give effect to EU law;

iv) A Declaration that Directive 2006/24/EC is null and void for breach of the EC Treaty and/or on the grounds that it was adopted without any legal basis;

v) Reliefs including injunctive reliefs directed towards the lawfulness of the April 2002 letter of the Minister for Public Enterprise;

vi) If necessary, a Declaration that s. 110 of the Postal and Telecommunications Services Act 1983, as amended, is repugnant to the Constitution;

vii) Injunctions restraining the Defendants from acting under or giving effect to the impugned instruments including the EC Directive;

viii) An Order pursuant to Art. 267 TFEU referring the following questions to the ECJ for a preliminary ruling:

- Whether Directive 2006/24/EC is valid notwithstanding:
  - a) Article 6(1) and (2) of the Treaty on European Union ("TEU")
  - b) Article 3a TEU and 21 TFEU (formerly Articles 10 and 18 TEC)
  - c) Articles 7, 8, 11 and 41 of the CFR
  - d) Article 5 TEU (formerly Article 5 TEC) (the principle of proportionality)
- Whether Directive 2006/24/EC regulating data protection is invalid insofar as it lacks a correct legal basis in EU law (this question has now been abandoned in light of *Ireland v. European Parliament and Council of the European Union* (Case C-301/06) (delivered on the 10th February 2009)).

ix) Damages;

x) Such other consequential reliefs and costs.

Locus Standi:

Submissions:-

15. Arguments were made on behalf of the parties in relation to the *locus standi* of the Plaintiff to claim infringement of certain of the rights asserted by it or on its own behalf and by it on behalf of other mobile phone users as an *actio popularis*. As being the moving party, it would be convenient to firstly deal with the Defendants' submissions in this regard.

16. The Defendants object to the extent of the rights claimed by the Plaintiff since the latter is a non-natural legal entity: in particular they deny it has the required standing to assert certain of the personal rights which it seems to rely upon. Further, whilst the

Plaintiff describes itself as a non-governmental organisation ("NGO"), it has no formal status or recognition as such, either under domestic or international law. Nor does it have a significant track record of any substance, having been incorporated no earlier than the 4th November 2005.

17. The Defendants argue that for the courts to entertain a constitutional challenge, it must be demonstrated that the litigant's rights have either been infringed or directly threatened. In relation to the rights claimed on behalf of others, the Plaintiff's position is different, since it is not a natural person. The doctrine of incorporation prevents a company from asserting rights on behalf of its members, except insofar as they are co-extensive with its own. A company therefore cannot assert rights which only its members would have; they must do that themselves. Furthermore, the Plaintiff cannot assert the putative rights of others, regardless of whom they may be, as such would be: (i) a claim to *ius tertii*, contrary to the Supreme Court decision in *Cahill v. Sutton* [1980] IR 269, and (ii) the position of the other people, namely in this case members of the Plaintiff company and "other users of mobile phones", is *nihil ad rem* (see *Norris v. Attorney General* [1984] IR 36 at 58). In addition it is claimed that a company cannot have a right to private life or privacy, a right to family life, a right to travel (and to confidentiality of travel) and a right to communicate; the Plaintiff having no physical manifestation.

18. Even if the Plaintiff does have some rights, those rights are limited. Whether commercial expression by non-media companies is protected under Article 40.6.1° is, the Defendants assert, unclear (*Attorney General v. Paperlink* [1984] ILRM 373 cited). With regards to a company's right to privacy, the Defendants draw attention to *Caldwell v. Mahon* [2007] 3 IR 542, where Hanna J. held that although a right to privacy exists in connection with the conduct of business affairs, such a right must be considered as being at *"the outer reaches of and the furthest remove from the core personal right to privacy"*.

19. The Defendants therefore contend that, in circumstances where the right is asserted over the fact and attendant circumstances of communication, as opposed to the content therein, the Plaintiff company has only the most limited right to privacy; certainly

the purchase of a single mobile phone by the Plaintiff just over two months prior to the institution of these proceedings cannot operate to confer standing upon it.

20. Further, the Defendants say, there is an over abundance of potential litigants who would have full standing to advance all aspects of the Plaintiff's claim; any natural person who uses a mobile phone, any person criminally charged against whom the D.P.P. proposes to offer retained telecommunications data as evidence, the Human Rights Commission, the Data Protection Commissioner – and this is to name but a few. This is not a situation where the persons potentially prejudiced would be unable to assert their rights, as with the unborn in *S.P.U.C. v. Coogan* [1989] IR 743. Instead it is a situation more akin to those at issue in *L'Henryenet v. Ireland* [1983] IR 193 where a fisherman was precluded from challenging the constitutionality of the Fisheries Acts on the basis that there was no question of the owner of the vessel in question not being in a position to assert his own constitutional rights.

21. Nor are there circumstances in this case which would merit a relaxation of the normal rules on standing. Such were considered in *Construction Industry Federation v. Dublin City Council* [2005] 2 IR 496, where the Supreme Court concluded, according to the Defendant, that there were two broad principles in this regard. Firstly, standing might be conceded to a person not directly affected in circumstances where administrative error (or maladministration) would otherwise go unchallenged, and secondly, a representative litigant should not be granted standing in circumstances where the interest it seeks to assert is that of its members and its members are themselves in a position to litigate.

22. This is not a case, either, involving the breach of a constitutional norm; that is a right which is constitutionally mandated, for example the administration of justice in public, the safeguarding of the institution of marriage, or the prohibition on the endowment by the State of any religion. The maintenance of these benefits all citizens equally and generally, such that one potential *bona fide* litigant is unlikely to be better qualified than any other. Nor is a public interest asserted, merely a collection of individual rights.

23. Finally, the Plaintiff cannot confer standing upon itself by virtue of its Memorandum of Association (*S.P.U.C. v. Coogan* [1989] IR 734 at 742).

24. Before embarking on a recitation of its position with regards to *locus standi*, it is convenient to deal with a submission made by the Plaintiff to the effect that this issue should not be determined as a preliminary one; instead it should take its normal place within the body of the action and await the Courts decision on all of the issues raised. I respectfully disagree with this assertion: I am satisfied that it is correct in this case to deal with *locus standi* as a preliminary issue. It is vital to the running of any case that the areas of dispute are laid out clearly. The issue of whether or not a Plaintiff has *locus standi* is fundamental, firstly to its existence as a plaintiff, and secondly to the range of arguments which may be advanced by it. Thus matters which a Plaintiff has no standing to bring are no longer relevant. If a Plaintiff should be found to lack standing in respect of all his claims, he will have no case at all. It is in the interests of all concerned, in particular with regards to costs and time, that this determination should be made as early as possible in the litigation, so that any future preparations and arguments may be made without the need to consider matters which are, in actuality, extraneous and/or irrelevant. It is of course acknowledged that the Court may not always usefully adopt this approach as there may well be cases where the critical framework can only be established at trial and after procedural steps, such as discovery *etc.* have been engaged upon. In this case however, I am satisfied that there has been sufficient engagement to properly inform a decision as to the standing of the Plaintiff *vis-à-vis* the various rights asserted by it.

25. By way of substantive reply, the Plaintiff asserts that this is a case where there should be a justified relaxation of the rules of standing. It notes the comments of Henchy J. in the Supreme Court in *Cahill v. Sutton* [1980] IR 269 at 285, that:

> *"This rule, however, being a rule of practice, must like all such rules, be subject to expansion, exception or qualification when the justice of the case so requires. Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure that persons*

entitled to the benefit of a constitutional right will not be prejudiced through being wrongfully deprived of it, there will be cases where the want of the normal locus standi on the part of the person questioning the constitutionality of the statute may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional vision that has been invoked."

The learned Judge gives examples of where the rules might be relaxed. These include where those prejudicially affected may not be in a position to assert their rights adequately, or in time, or if the impugned provision is directed at or operable against a group, which includes the challenger, or with whom the challenger may be said to have a common interest.

26. Drawing parallels with the liberal approach to *locus standi* in *Crotty v. An Taoiseach* [1987] 1 IR 713, the Plaintiff says that it is clear that the impugned provisions, which relate to the retention of data in respect of mobile phone, internet and e-mail communication of all persons who use such services, affect virtually every citizen and entity in the State, including the Plaintiff. In support of this contention the decision of the European Court of Human Rights ("ECtHR") in *Copland v. the United Kingdom* (Case 62617/00, 3rd April 2007) [2007] ECHR 253, was cited, in which it was held that the collection and storage of such personal data amounted to an interference with Art. 8 rights (ECHR). A more liberal approach should therefore be allowed, in the Court's discretion, to the issue of standing.

27. In response to the argument that as a company the Plaintiff should not be allowed to assert such broad interests, reference is made to *S.P.U.C. v. Coogan* [1989] 1 IR 734 and to *Blessington Heritage Trust Limited v. Wicklow County Council and Others* [1999] 4 IR 571. In the latter case, McGuinness J. held that a limited company had *locus standi* to bring proceedings challenging a planning decision. The Plaintiff also drew attention to the Supreme Court's comments on *locus standi* in *Lancefort Limited v. An Bord Pleanála and Others (No. 2)* [1999] 2 IR 270 at 308. Keane J. in that case went on to conclude that a company could have *locus standi* to bring proceedings even if it was unable to point to

any proprietary or economic interest in the impugned decision, and that a company may not be denied standing merely because it was not in existence at the time of the relevant decision.

28. In further submissions it is said that where the subject matter of the litigation involves questions of Community law, although in general procedural rules will be governed by national law, it must be borne in mind that there is an overriding obligation on the national court to uphold the Community law, and national procedural rules should not operate in such a way as to undermine a claimant's right to effective judicial protection. As noted by Keane J. in *Lancefort v. An Bord Pleanála (No. 2)* [1999] 2 IR 270 at 312:

> *"[T]he requirements of national law as to standing may in some instances have to yield to the paramount obligation on national Courts to uphold the law of the European Union."*

The Plaintiff seeks to make valuable use of this comment, noting that since this case involves a reference to the ECJ under Article 267 TFEU, the rules relating to *locus standi* (and security for costs) should be relaxed to take that into account.

Standing and Interest:

29. In considering this issue, it should be noted that with regards to the alleged infringements of the Plaintiff's rights, it is only necessary for the Court, in the context of deciding *locus standi*, to determine that a limited company may avail of such rights. It is not necessary for the Court to determine the extent or breadth of those rights. It is therefore sufficient for the Plaintiff to show that those rights are affordable to companies including it, and that the actions of the Defendants could affect them, for it to have *locus standi* to litigate as to whether those rights have in fact been infringed. Despite what follows, the context in which the discussion takes place should not be forgotten.

30. The seminal case in this regard is the decision of the Supreme Court in *Cahill v. Sutton* [1980] IR 269. Henchy J. proffered that:

> *"The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, by the operation of the statute."* (*ibid.* at 286)

However, this must also be read in light of his comments at p. 283 of the report where he stated that:

> *"While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional ... [w]ithout concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality."*

In his judgment, O'Higgins C.J. felt that were this to be otherwise it might open the doors of the courts to *"the busybody and the crank"* (*ibid.* at 277).

31. Both the High Court and Supreme Court considered the extent of this principle in *Crotty v. An Taoiseach* [1987] IR 713. In that case a challenge was brought in relation to the constitutionality of enacting the provisions of the Single European Act without a referendum. Issue was taken with the standing of the plaintiff as he was unable to show that he would be more affected by the statute than any other citizen who could bring the action. In the High Court, Barrington J. considered that:

> *"It does appear to me, assuming the plaintiff were otherwise devoid of constitutional standing, that he has raised matters which are common to him and to other citizens and which are weighty countervailing considerations which would justify, on their own, a departure from the rule in relation to locus standi. But it does appear to me that in relation to one matter – and it is a basic matter – the plaintiff clearly has a locus standi because his contention that what is being done involves an amendment to the Constitution which should be submitted to a referendum, and that he, as a citizen, has the right to be consulted in such a referendum and that his right has been infringed."* (*ibid.* at 733-734)

In the Supreme Court, Finlay C.J., with Henchy and Walsh JJ. concurring, agreed with the High Court. Finlay C.J. stated:

> *"The Court is satisfied, in accordance with the principles laid down by the Court in Cahill v. Sutton [1980] IR 269, that in the particular circumstances of this case where the impugned legislation ... will if made operative affect every citizen, the plaintiff has locus standi to challenge the Act notwithstanding his failure to prove the threat of any special injury or prejudice to him, as distinct from any other citizen, arising from the Act."* (*ibid.* at 766)

Thus it would appear that where the constitutionality of a law which will affect every citizen equally is impugned, a plaintiff will not necessarily be denied *locus standi* simply because he is unable to point to any specific prejudice or injury which the impugned legislation would visit upon him. See also para. 80 *et seq.* (*infra.*).

Corporate Standing:-

32. The above cases of *Cahill v. Sutton* and *Crotty v. An Taoiseach* both relate to the *locus standi* of a natural persons. Where the plaintiff is a corporate body do different considerations arise?

33. This question was considered in *S.P.U.C. v. Coogan* [1989] 1 IR 734. Referring to his decision in *A.G. (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] IR 593, Finlay C.J. quoted from p. 623 of that judgment as follows:

> *"If, therefore, the jurisdiction of the courts is invoked by a party who has a bona fide concern and interest in the protection of the constitutionally guaranteed right to life of the unborn, the courts, as the judicial organ of government of the State, would be failing in their duty as far as practicable to vindicate and defend that right if they were to refuse relief upon the grounds that no particular pregnant woman who might be affected by the making of an order was represented before the courts."*

He rejected as misconceived the defendant's proposition that this paragraph was qualified by reference to the special position of the Attorney General, and reaffirmed that the

"broad statement of principle contained in [this] paragraph remains unqualified" ([1989] 1 IR 734 at 742). The general test with regards to *locus standi* should thus be:

> *"[T]hat of a bona fide concern and interest, interest being used in the sense of proximity or objective interest. To ascertain whether such bona fide concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected."* (*ibid.* at 742)

34. Whilst Walsh J. in the same case emphasised the nature and importance of the right in question (the right to life of the unborn), his comments in my view have a broader application, especially when considered in light of the rights claimed in the case at hand. He stated at p. 743 of the report:

> *"The question in issue in the present case is not one of a public right in the classical sense ... but is a very unique private right and a human right which there is a public interest in preserving ... What is in issue in this case is the defence of the public interest in the preservation of that private right which has been guaranteed by the Constitution. It is a right guaranteed protection by public law as it is part of the fundamental law of the State by reason of being incorporated into the Constitution."*

The learned Judge further noted the exceptional importance of access to the courts, which was essential to the vindication of any other rights. Thus with regards to standing *"the essential question is has the plaintiff a bona fide interest to invoke the protection of the courts to vindicate the constitutional right in question"* (*ibid.* at 744). In relation to *Sutton v. Cahill* he was of the opinion that:

> *"The decision ... is not of such sweeping application as is sometimes thought. It can be understood only in the light of the narrow ground upon which the case was presented and argued and on the possible injustice to the defendant... It is quite clear ... that even in cases where it is sought to invalidate a legislative provision the Court will, where the circumstances warrant it, permit a person whose personal interest is not directly or indirectly presently or in the future threatened to maintain proceedings if the circumstances are such that the public interest*

warrants it. In this context the public interest must be taken in the widest sense." (*ibid.* at 746-747)

Finally, as the plaintiff was a company limited by guarantee, established for the sole object of protecting human life, a question arose as to its right to bring the application; Finlay C.J. notes that:

> *"I would accept the contention that [the plaintiff] could not acquire a locus standi to seek this injunction merely by reason of the terms of its articles and memorandum of association... [However] the particular right which it seeks to protect with its importance to the whole nature of our society, constitute sufficient grounds for holding that it is a person with a bona fide concern and interest and accordingly has the necessary legal standing to bring the action."* (*ibid.* at 742)

35. Whilst *Coogan* did not involve a constitutional challenge to any particular piece of legislation, there is no reason, in my view, as to why it would not equally apply to such a case. Therefore it would thus seem to me that, in principle, a company should not be prevented from bringing proceedings to protect the rights of others where, without otherwise being disentitled, it has a *bona fide* concern and interest, taking into account the nature of the right which it seeks to protect or invoke.

36. Some ten years after *S.P.U.C. v. Coogan* was decided, this issue was again addressed by the Supreme Court in *Lancefort Ltd. v. An Bord Pleanála & Ors. (No. 2)* [1999] 2 IR 270. At pp. 286-289 of the report, Denham J. said:

> *"In McGimpsey v. Ireland [1988] I.R. 567, Barrington J. held that it would be inappropriate for the court to refuse to hear the plaintiff's case on the grounds of lack of locus standi, particularly since the plaintiffs were patently sincere and serious people who had raised an important constitutional issue which affected them and thousands of others on both sides of the border. Prior to that case it had been accepted in Crotty v. An Taoiseach [1987] I.R. 713, that a citizen who was exposed to no greater injury than other citizens would still have status to challenge legislation on a treaty if he could show he was being denied a referendum and that the proposed Act violated the Constitution."*

This case related to an issue of environmental law, which the Court felt *"by [its] very nature affect[s] the community as a whole in a way a breach of an individual personal right does not."* (*ibid.* at 292)

37. Dealing specifically with the standing of a company, Denham J., in the same case, at 292 stated that:

> *"Indeed both the public interest and the benefit of corporations was addressed in R. v. Pollution Inspectorate; ex p. Greenpeace (No. 2) [1994] 4 All E.R. 329. An issue was whether or not the limited company had locus standi in the judicial review, the law required it had 'sufficient interest'. Otton J. stated:-*
>
> > *'It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before the court. There would have to be an application either by an individual employee of BNFL or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties.'"*

She continued that:

> *"A company is not barred per se from being a party to judicial review proceedings. A company may be formed for many reasons; once formed, it is a legal person with the right, inter alia, to litigate. The notice party in this case is a company, it is a vehicle. The applicant is also being used as a vehicle for people to pursue environmental objects. The fact that the applicant was established after the decision of the first respondent which is in issue does not exclude it per se from access to the courts, rather it is a factor for consideration in light of the history of the relevant events."*

She did note that the *bona fides* of the company may be a relevant factor in considering if it has *locus standi*, and in the circumstances the corporate veil may be lifted to determine this.

38. This having been established, the company should be considered in light of the public interest:

"Here we find a tension between the public interest as represented by public bodies established for that benefit by the State i.e. the first respondent, balanced against the right of persons (incorporated or not) to have access to court to litigate the issue as to whether the public interest, indeed the common good, is being protected. It is a fundamental right in a democracy that there be access to the courts. The fact that a statutory body has been given a public duty on behalf of the State does not mean that its decisions are not reviewable. Nor does it exclude other persons from raising related issues in the public interest." (*ibid.* at 294)

Denham J. thus concluded at p. 296 *et seq.* that:

"I am satisfied that the applicant has locus standi in this case. In making this decision I have considered all the circumstances, fact and law as set out previously in this judgment. The fact that the applicant is a company does not bar it per se from the litigation, although its incorporation after the decision in issue by the first respondent must be considered carefully. Its bona fides, actions and documentation are all relevant. I agree with the trial judges that the veil of incorporation should be lifted and that the prior actions and involvement of the members be considered. On doing that, having also considered the documentation and actions of the applicant, I am satisfied that the applicant is acting bona fide...

The common law on locus standi has been developed to aid the administration of justice. The crank, vexatious litigant and stranger is excluded from the courts. The applicant does not belong to any of these categories.

The principles of locus standi have been extended by the courts in some cases to situations where concerned citizens have sought to protect the public interest. The analogy of those cases, where the constitutionality of laws was queried, should be applied in this case. The track laid by S.P.U.C. v. Coogan [1989] I.R. 734, Crotty v. An Taoiseach [1987] I.R. 713 and McGimpsey v. Ireland [1988] I.R. 567 and environmental actions such as Chambers v. An Bord Pleanála [1992] 1 I.R. 134 and R. v. Pollution Inspectorate; ex p. Greenpeace (No. 2) [1994] 4 All E.R. 329, is firm and the cases provide appropriate precedents. This approach is just, aids the administration of justice, would not permit the crank, meddlesome or vexatious litigant thrive, and yet enables the bona fide litigant for the public interest establish the necessary locus standi in the particular area of

environmental law where the issues are often community rather than individual related. The administration of justice should not exclude such parties from the courts. Whether or not they succeed in their action is quite another matter - but they should not be excluded from the courts to litigate the issue."

It should be noted that in this case Denham J. was in the minority as to the ultimate outcome; the Court finding that the company in this case lacked a "sufficient interest". However the principles of law enunciated above were effectively agreed with by Keane and Lynch JJ.

39. McGuinness J. in *Blessington Heritage Trust Ltd. v. Wicklow County Council & Ors* [1999] 4 IR 571 at 595, considering the extent to which companies incorporated for the protection of rights could be afforded standing, noted that:

"Over-reliance on the incorporation of companies such as the applicant in this case may tip the balance too far in favour of objectors or concerned local persons; on the other hand, blanket refusal of locus standi to all such companies may tip the balance too far in favour of the large scale and well-resourced developer. It seems to me that the balance is best preserved by the course followed by the learned Morris J. [in Lancefort Ltd. v. An Bord Pleanála [1998] 2 IR 511]. The court should look at the factual background in each case and, if necessary, maintain the balance by the making of an order for security for costs."

It is true that that case related to a planning challenge, but McGuinness J's comments hold equally true in a situation where the challenge is to the constitutionality of an action of the State, or organs thereof. In truth, there is even more justification for a broad and balanced approach to this issue where a challenge, particularly one of substance, is made to the constitutionality of a statute, since there is a constitutional imperative for the courts to uphold the Constitution and any alleged breaches thereof should be treated in the most serious manner.

40. The Defendants sought to rely on the Supreme Court decision in *Construction Industry Federation v. Dublin City Council* [2005] 2 IR 496 as an example of where standing has been refused. The plaintiff in that case was an unincorporated association

representing the interest of parties involved in the construction industry. The Court considered the English decision of *R. v. Inland Revenue Commissioners, ex parte Federation of Self-Employed Businesses Ltd.* [1982] 2 All ER 93, citing the *ratio* of the case as expressed in the headnote that:

> *"Whether an applicant for mandamus has a sufficient interest in the matter to which the application related ... depended on whether the definition (statutory or otherwise) of the duty alleged to have been breached or not performed expressly or impliedly gave the applicant the right to complain of the breach of non-performance."*(*ibid.* at 94)

The Court, having considered the case law on *locus standi*, however ultimately refused standing to the plaintiff saying:

> *"In the present case, the applicant claims to have a sufficient interest on the basis that the proposed scheme affects all or almost all of its members in the functional area of the respondent and, therefore, the applicant has a common interest with its members. However, it appears to me that to allow the applicant to argue this point without relating it to any particular application and without showing any damage to the applicant itself, means that the court is being asked to deal with a hypothetical situation, which is always undesirable. This is a challenge which could be brought by any of the members of the applicant who are affected and would then be related to the particular circumstances of that member. The members themselves are, in many cases, very large and financially substantial companies, which are unlikely to be deterred by the financial consequences of mounting a challenge such as this. Unlike many of the case in which parties with no personal or direct interest have been granted locus standi, there is no evidence before the court that, in the absence of the purported challenge by the applicant, there would have been no other challenger. ..."*

Whilst dismissing any suggestion that the plaintiff was acting vexatiously or irresponsibly in seeking relief, the Court nonetheless could not *"see any justifiable basis upon which it can be said that the applicant has any interest other than that of its individual members."*

41. In my opinion this case is entirely distinguishable from the one at hand, indeed the Supreme Court stated that *"consideration of this question must depend largely on the*

circumstances of the individual case". The plaintiff in *C.I.F.* was not a company, but an unincorporated association. It was an action for judicial review, rather than constitutional challenge. As pleaded it raised hypothetical questions, whereas if the action had been taken by any of its members, a firm, definite and conrete framework could be established. In fact each such case would have been particular to the plaintiff, as separate variables would apply. It was also clear that the plaintiff would in no way be affected personally by the impugned provisions, as its interest was identified wholly with those of its members. The plaintiff was also seeking an order for *mandamus*, rather than *certiorari*, which may have been a factor. In the present case it is clear that the plaintiff has an interest in this matter separate and distinct from its members. Although there may be some overlap between the company's and its members' interests, this in no way precludes the company from relying on an interest it holds in its own right.

42. Nonetheless, the concept that a person, otherwise not prejudiced by the impugned action, may be found to have a sufficient interest was considered in *Cahill v. Sutton* [1980] IR 269 at 285-286, where Henchy J. stated:

> *"[T]he absence of a prejudice or injury peculiar to the challenger might be overlooked, in the discretion of the court, if the impugned provision is directed at or operable against a grouping which includes the challenger, or with whom the challenger may be said to have a common interest – particularly in cases where, because of the nature of the subject matter, it is difficult to segregate those affected from those not affected by the challenged provision."*

Thus, can the Plaintiff herein assert the rights of its members, as distinct from members of the public in general? In order for it to so do, the Plaintiff must have a *"common interest"* in the subject matter. From *C.I.F. v. Dublin City Council* it might be suggested that if that interest arises merely through its members, the action should be taken in their name, rather than in the company's. However, where an independent interest arises, a different question also arises. How closely are the rights asserted by the company concommitant with those of its members? If closely related, the company should be allowed to litigate those issues. However, if they are unrelated or only losely related, it is

argued that the company should not be able to assert the interests of its members, since it would clearly not be best placed to litigate those issues.

43. A more flexible approach may also be necessary where questions of European law are raised. The Court of Justice noted as far back as 1963 that:

> *"The European Economic Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. ... [T]he Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the instutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibibility laid down... Where the Community institutions are responsible for the administrative implementation of such measures, natural and legal persons may bring a direct action before the Court against the implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the natinoal authorities, such persons may plead the invalidity of general measures before the national Courts and can cause the latter to request the Court of Justice for preliminary ruling."* (*Plaumann & T Co. v. Commission* [1963] ECR 95 at para. 23)

Considering this extract, Cooke J., a former member of the Court of First Instances and a member of the High Court of Ireland, noted, speaking extra judicially, in October 2005,

> *"Membership of the Union involves radical transfer of regulatory competence to the organs of the Community from the Member states. What the European Court is saying in this judgment is that the far-reaching effects of this hand-over of power to the instutions is balanced by the gurantee that the legal order of the Treaty will protect the individual against the excessive and oppresive exercise of that power in a manner which is incompatible with superior rules of law and of*

fundamental human rights which the European Court will imply into the legal Order of the Community for the purpose."

44. The continuing development by the Court of Justice of the principles of effective protection of rights derived from Community law in national courts can be seen in a number of cases; the first being *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. The Court in *Verholen & Ors. v. Sociale Verzekeringsbank Amsterdam* [1991] ECR I-3757 noted at para. 24:

> *"While it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection ... and the application of national legislation cannot render virtually impossible the exercise of the rights conferred by Community legislation."*

The Court, more recently, in *Unibet (London) Ltd & Unibet (Int'l) Ltd v. Justitiekanslern* [2007] ECR I-2271 noted at paras. 37 – 45 that:

> *"[A]ccording to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).*
>
> *Under the principle of cooperation laid down in Article 10 EC, it is for the Member States to ensure judicial protection of an individual's rights under Community law. ... It is also to be noted that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law. ... Although the EC Treaty has made it possible in a number of instances for private persons to bring a direct action, where appropriate, before the Community Court, it was not intended to create*

new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law. ... It would be otherwise only if it were apparent from the overall scheme of the national legal system in question that no legal remedy existed which made it possible to ensure, even indirectly, respect for an individual's rights under Community law. ... Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection. ...In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)... Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring effective judicial protection of an individual's rights under Community law."

45. In summary, the Court held that the principle of effective judicial protection is a general principle of Community law, which flowed from the common traditions of the Member States, and the Member States must ensure judicial protection of an individuals rights under Community law. National procedural rules must therefore not undermine this right to effective judicial protection.

46. It is therefore clear that where issues of EU law arise in litigation, the Courts may be required to take a more liberal approach to the issue of standing so that a person's rights thereunder are not unduly hampered or frustrated. The rules on standing should be interpretted in a way which avoid making it *"virtually impossible"*, or *"excessively*

difficult" or which impedes or makes *"unduly difficult"* the capacity of a litigant to challenge EU measures of general appliaction under Art. 267 TFEU (see also *Van Schijnel v. SPF* [1995] ECR I-4705, para. 17; *Amministrazione delle Finanze v. San Giogio* [1983] ECR 3595, para. 14). That is not to say that where questions of EU law are raised and a preliminary reference requested, the Court is automatically precluded from refusing a plaintiff standing. However, as was the case with regards to the power to grant *interim* relief in *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd & Ors.* [1990] ECR I-2433, if the Court would be otherwise minded to allow standing in relation to the questions raised, but for a strict application of the national rules on *locus standi*, the Court should nonetheless grant standing where to do otherwise would render the plaintiff's Community rights effectively unenforceable.

47. In relation to the foregoing I respectfully agree with the view of Gilligan J., in the more recent decision of *The Irish Penal Reform Trust Ltd. & Ors. v. The Governor of Mountjoy Prison & Ors.* [2005] IEHC 305, that:

> *"[W]hether or not SPUC v. Coogan was indeed restricted to the right to present argument on behalf of the unborn child is not wholly relevant to the present case. The simple fact is that Cahill v. Sutton allows, in plain terms, for the relaxation of the personal standing rules where those prejudiced may not be in a position to adequately assert their constitutional rights. It does not restrict this category of persons to the living, the dead or the unborn nor does it give any indication of what category of person may not be in a position to adequately assert their constitutional rights. If a person is incapable of adequately asserting his constitutional rights for whatever reason, I am of the view that Cahill v. Sutton would support a relaxation of the personal standing rules, provided the relevant person or body is genuine, acting in a bona fide manner, and has a defined interest in the matter in question."*

I would add only that the nature, extent, importance and application of the asserted right may be of high relevance in the exercise of the Court's discretion when dealing with this rule in practice.

48. As can therefore be seen from the above case law a plaintiff may gain *locus standi* where, having regard to the rights in question, it can show either that it has a *bona fide* concern or interest in the provisions seeking to be impugned, or else where the rights which it seeks to protect are of general importance to society as a whole, and provided the Plaintiff is not a crank, meddlesome or a vexacious litigant. I should say that this latter point was not seriously argued, and I am firmly of the opinion that the Plaintiff herein is not such a litigant.

49. I would emphasise, however, that the Court should keep in mind the tension between, on the one hand, the public interest, as represented by public bodies established by the State, and, on the other, the right of access to the Court to litigate issues relating to whether the public interest is being protected (*per* Denham J. in *Lancefort (No. 2)*). Ultimately, the Court has a duty to prevent the unconstitutional abuse of public power, be it through legislation or otherwise. Thus where it is clear that a particular public act could adversely affect the constitutional, European, or Convention rights of a Plaintiff, or indeed society as a whole, a more relaxed approach to standing may be called for in order for the Court to uphold that duty, and vindicate those rights.

The Rights of a Company:-

50. It is obvious that if a plaintiff can show actual or potential infringement of a constitutional right, it must have *locus standi*. In this context it is therefore necessary to consider which rights, if any, a company, and therefore the Plaintiff herein, may have. If it is possible that these rights may be infringed by the actions of the Defendants, the Plaintiff has standing to challenge such. However, which constitutional and/or Convention rights can be afforded to corporate persons?

51. Some personal rights are clearly inapplicable to a company. Keane J. commented in the High Court in *Iarnród Éireann v. Ireland* [1996] 3 IR 321 that:

> *"Undoubtedly, some at least of the rights enumerated in Article 40, s 3, sub-s 2 – the right to life and liberty – are of no relevance to corporate boidies and other artificial entities."* (*ibid.* at 346)

In that case he considered that property rights under Article 40.3 of the Constitution, particularly, were in a different category and therefore capable of being enjoyed by corporate bodies. He noted that there would be:

> *"[A] spectacular deficiency in the guarantee to every citizen that his or her property rights will be protected against 'unjust attack', if such bodies were incapable in law of being regarded as 'citizens', at least for the purposes of [Article 40.3]."* (*ibid.* at 345)

It is therefore clear that some constitutional rights may be enjoyed by companies; leaving aside the extent to which they may differ from those rights as enjoyed by human persons.

52. Nonetheless it is necessary to examine the nature of the rights claimed by the Plaintiff in the present case. Broadly speaking, the Plaintiff claims that the retention of digital data infringes several rights, in particular:

i) the right to privacy;

ii) the right to family life;

iii) the right to communicate, and the corollary right to privileged communication;

iv) the right to travel, and the attendant right to travel confidentially.

In these regards, the Plaintiff has referred to Article 40.3.2° of the Constitution, Articles 8 and 10 of the ECHR, Articles 7, 8, 11 and 41 CFR, Article 3a TEU and 21 TFEU (formerly Articles 10 and 18 TEC), Article 6(1) and (2) TEU, Articles 7, 8, 11 and 41 of the CFR, and Article 5 TEU (formerly Article 5 TEC) (the principle of proportionality). I shall now endeavour to outine the extent of these rights and consider how and if they may be applied to a corporate person.

Privacy:-

53. As noted, rights of privacy may be derived from a number of sources. In an Irish context, it is well established that a person has a constitutional right to privacy (*Kennedy v. Ireland* [1987] IR 587). Privacy in business transactions was considered by Hanna J. in *Caldwell v. Mahon* [2007] 3 IR 542 at 548. Reviewing the previous case law *"in the context of busines transactions conducted through limited liability companies"*, Hanna J.

was of the opinion that *Haughey v. Moriarty* [1999] 3 IR 1 was of limited value when *"seen against the background of seeking a discovery order of a citizen's personal bank account."* Nor did he gain much assistance from *Hanahoe v. Hussey* [1998] 3 IR 69, noting in particular that although it involved a raid on a solicitor's office, such was lawful, and further, not only did the firm sue, but so did the solicitors personally:

> *"Therefore, insofar as the focus of the Court was turned upon the 'invasion' of the applicant's privacy, it was done so in the context of the solicitors carrying on their practice as solicitors in premises belonging to them. This they did with all the panoply of confidentiality and security attendant upon such practice, long recognised and protected by the courts."*

54. Ultimately Hanna J. was reluctant to hold that no such right existed, and indeed saw no reason why it should not, but:

> *"[S]uch a right can only exist at the outer reaches of and the furthest remove from the core personal right to privacy."*

In this regard he adopted with approval the *dicta* of Ackerman J. in the South African case of *Bernstein v. Bester* [1996] (4) B.C.L.R. (S.A.) 449, noting that:

> *"Given the distance at which the applicant's right to privacy in his business affairs stands from the 'inviolable core', such right must become subject to the limitation and exigencies of the common good and they weigh all the more heavily against it, subject at all times to the requirements of constitutional justice and fair procedures."* ([2007] 3 IR 542 at 548-549)

It is therefore clear that even though it may be accepted that there is a right to privacy in business transactions, that right may be limited by the exigencies of the common good, with the threshold for such interference being relative and being case or circumstance specific.

55. However, it is still open to question whether an independent right of privacy exists for the benefit of the company, as distinct from its members. It must be remembered that limited liability companies are legal creations; they are therefore afforded certain privileges, but also have imposed on them certain responsibilities and

limitations, *e.g., inter alia*, filing accounts, director's and shareholder's meetings, details of directors, and being amenable to enquiries and investigation under the relevant company legislation. These are, to a greater or lesser extent, all matters open to the public. A private citizen would clearly not be obliged to conduct his business subject to such requirements. Some commentators have suggested that in an Irish constitutional context, the right to privacy is concerned with securing individual autonomy. Such autonomy considerations could not apply to a corporate actor (see O'Neill, *"The Constitutional Rights of Companies* (2007), Ch. 15).

56. Despite such concerns, I am satisfied, as Hanna J. was, that there must exist a right to privacy in respect of business transactions carried out by corporate bodies. However, this right, given the legal and factual nature of such artificial persons, will inevitably be narrower than that applicable to natural persons. No serious suggestion could be made that regulations which sought annual returns or required the keeping of proper books and accounts would be invalidly interfering with a company's right to privacy. However, a requirement to divulge trade secrets may be quite a different matter. In general, I am satisfied that such a right to privacy must extend to companies as legal entities, separate and distinct from their members as natural persons. Such entities are an integral part of modern day business. It is therefore paramount that the interests of such legal persons are protected in the Courts. Much of the case law considering a company's right to privacy is considered in the context of the invasion of its premises, however this is not the only way in which a company's privacy might be invaded. As I have said, access may be sought to confidential information or research, or to information or documents generated as part of delicate business negotiations. Commerce and industries could not survive if such access was unregulated. It is therefore clear to me that in principle some right of privacy must exist at least over some areas of a company's activity. Having so decided, it is not necssary to determine where precisely on the spectrum such rights may fall.

57. In European law such a right is readily apparent from Arts. 7 and 8 CFR and Article 8 ECHR. For the sake of clarity it is worthwhile setting out these provisions. Article 7 CFR, headed *"Respect for private and family life"* provides:

> *"Everyone has the right to respect for his or her private and family life, home and communications."*

Article 8 CFR, headed *"Protection of personal data"* states:

> *"1. Everyone has the right to the protection of personal data concerning him or her.*
>
> *2. Such data must be processed fairly for specified purposes on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
>
> *3. ..."*

Article 8 ECHR states:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

58. In *Hoechst AG v. Commission* [1989] ECR 2859, and two companion cases (*Dow Benelux NV v. Commission* [1989] ECR 3137 and *Dow Chemical Iberica SA v. Commission* [1989] ECR 3165) the Court of Justice held that corporate privacy protection was a fundamental principle of Community law. However, referring to Art. 8 ECHR, the Court noted that this should not be taken as being a right to inviolability of business premises:

> *"The protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. ...*

Nonetheless ... any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection againt arbitrary or disproportionate intervention. The need for such protection must be recognised as a general principle of Community law." ([1989] ECR 2859 at paras. 18 – 19)

59. Subsequently, however, this issue was considered by the European Court of Human Rights ("ECtHR") in *Niemietz v. Germany* (1992) 16 EHRR 97. In that case the ECtHR ruled explicitly that the right to respect for private life in Art. 8 ECHR did extend to business premises since:

> *"to interpret the words 'private life' and 'home' as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8 (art. 8), namely to protect the individual against arbitrary interference by public authorities (see, for example, Marckx v. Beligium...)."*

Nonetheless such a right could be legitimately interferred with under Art. 8(2), and such interference *"might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case."*

60. The ECtHR, in *Société Colas Est and Others v. France* [2002] III-421, reiterated this point, noting that:

> *"[T]he Convention is a living instrument which must be interpreted in the light of present-day conditions (see, mutatis mutandis, Cossey v. the United Kingdom, judgment of 27 September 1990, Series A no. 184, p. 14, § 35 in fine). As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention (see Comingersoll v. Portugal [GC], no. 35382/97, §§ 33-35, ECHR 2000-IV). Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain*

circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises (see, mutatis mutandis, Niemietz, cited above, p. 34, § 30)."

61. These cases were later acknowledged by the Court of Justice in, *inter alia*, *Roquette Frères SA v. Commission* [2002] ECR I-9011, which noted that it was now clear from the jurisprudence of the ECtHR that the protections afforded to the family home under Article 8 may apply to business premises, although potentially subject to a greater level of legitimate interference.

62. Despite being supportive of some level of privacy right for corporate persons, it should be noted that the above Euroepan case law was primarily concerned with privacy in the context of premises and search and seizures. Whether such rights could therefore be said to extend to the collection of call data is, as a result, open to question. However, I am satisfied that there is recognised in both Irish and European law a right to privacy in business. Admittedly, such a right may be subject to a high level of justified interference, compared with the equivalent rights of natural persons; however for present purposes it is unnecessary to enter into discussion as to the legitimate scope of such rights; it is enough that they exist, and that they may have been infringed. In any event, it is clear that privacy with regards to personal data is explicitly within the contemplation of Art. 8 CFR. I can see no reason why such a right, although possibly more limited, may not apply to companies. Indeed such information may be commercially sensitive. The company would therefore have a great interest in protecting such data. I would thus allow the Plaintiff *locus standi* to raise issues relating to interference with its rights of privacy, whatever they might ultimately be found to be.

Family and Marital Privacy:-

63. As has been noted, corporate persons, by virtue of their nature, may not be capable of holding certain rights. Although not in the context of companies, by analogy I

would note the comments of Henchy J. in *Norris v. A.G.* [1984] IR 36 at 68, where he found that the plaintiff did not have *locus standi* since:

> *"as an irremediably exclusive homosexual, he will never marry. Therefore, he has no standing to argue what would in this case be abstract constitutional rights of married couples."*

Similarly, but in the context of corporate persons, in *Malahide Community Council Ltd. v. Fingal County Council* [1997] 3 IR 383 at 399, in a passage explicitly referred to as *obiter*, Lynch J. noted that:

> *"As an artificial body or person lacking the five senses of human persons, it can never experience the pleasure of open spaces, beautiful gardens and woods or the physical satisfaction of sports facilities: it can never be nauseated by foul smells nor deafened by noisy industry or loud and raucous music nor have a cherished view of open spaces obstructed by new buildings."*

64. It is therefore clear that it could not be possible for a corporate person to claim a right to marital privacy; such is obviously absurd, since it is unable to marry, reproduce or have children; it cannot form a family. I cannot therefore see how the plaintiff could have a sufficient concern and interst in these matters. I would therefore refuse the plaintiff standing in this regard.

Communication:-

65. That persons have a right to communicate would seem implicit in rights of free speech and freedom of association under Art. 40.6.1° of the Consitution (see *e.g.* the comments of Barrington J. in *The Irish Times v. Ireland* [1998] 1 IR 359 at 405; and *Attorney General v. Paperlink Ltd.* [1984] ILRM 373). However, in the current context it is clear that the alleged breaches of any right to communication are not claimed to be such that the right of the company to commnicate is being restricted, rather it is a breach of what has been described as a right to confidential communication.

66. With regards to natural persons such a right has been considered in the context of phone tapping and other communications interception, *e.g.* e-mail monitoring. In this

context, Hamilton P. noted, in *Kennedy v. Ireland* [1987] IR 487 at 593, that there had in that case been:

> *"[A] deliberate, conscious and unjustifiable interference by the State through its executive organ with the telephonic communications of the plaintiffs and such interference constitutes an infringment of the constitutional rights to privacy of the three plaintiffs."*

67. Such a right to communicate must, I feel, be inextricably linked to notions of privacy. As noted such a right to privacy is not absolute. In particular, it may need to balanced against the duty of the State to investigate and detect serious crime. Nonetheless, there has been much consideration of the status of evidence collected through such methods. Finlay C.J. in *D.P.P. v. Kenny* [1990] 2 IR 110 at 134 noted that:

> *"[E]vidence obtained by invasion of the constituional personal rights of a citizen must be excluded unless a court is satisfied that either the act consituting the breach of constitutional rights was committed unintentionally or accidentally, or is satisfied that there are extraordinary circumstanaces which justify the admission of the evidence in its (the court's) discretion."*

68. Considering physical surveillance undertaken by the Gardaí in relation to certain drug deals, the Court of Criminal Appeal in *People (D.P.P.) v. Byrne* [2003] 4 IR 423 noted that it had *"no doubt and no reason to doubt that this was a perfectly proper operation set up on foot of reasonable information and all this was demonstrated by the result."* Nonetheless it is clear that where surveillance is undertaken it must be justified and generally should be targetted. Finlay C.J. in *Kane v. Governor of Mountjoy Prison* [1988] IR 757 at 769 noted that:

> *"[I]f overt surveillance of the general type proved in this case were applied to an individual without a basis to justify it, it would be objectionable, and I would add, would be clearly unlawful. ... [S]uch surveillance is capable of gravely affecting the peace of mind and public reputation of any individual and the courts could not, in my view, accept any general application of such a procedure by the police,*

but should require where it is put into operation and challenged, a specific adequate justification for it."

69. Although *Kenny* and *Byrne* could be said to relate to physical surveillance, I can see no logical reason why the Court's comment could not apply *mutati mutandis* to electronic surveillance. A person has a right not to be unjustifiably surveilled; such is therefore a general right to confidential communication. Given my comments in relation to privacy generally *supra*, I can see no reason why such a right would not equally apply to corporate persons.

70. Under Art. 8 ECHR *"everyone has the right to respect for ... his correspondence."* Of course this right may be interfered with, but such must be in accordance with Art. 8(2). As with the Irish jurispruence, the ECtHR stresses that where surveillance is provided for it must be the subject of *"adequate and effective guarantees against abuse"* (*Malone v. United Kingdom* [1984] 7 EHRR 14). The ECtHR in the case of *Klass v. Germany* (1979-80) 2 EHRR 214 noted that:

> *"[P]owers of secret surveillance of citizens, charaterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safegaurding the democratic instituions. ... [T]he Court being aware of the danger of such a (telecoms interception) law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate."* (*ibid.* at paras. 42 and 49)

71. It is therefore clear that the interception of telephone conversations without lawful justification or surveillance of the public in general is illegal (see *Kennedy v. Ireland* [1987] IR 587. Although the collection of what might be called "physical" surveillance, is obviously useful, so too may the data associated with telecommunications messages. These data potentially can yield a wealth of information about the user, including, *inter alia*, who has been called, the duration of conversations, and where calls were made from. Of course technically it is the phone number which identified, and not the caller;

thus I may give you my phone to use; similarly with regards to the "called" phone. The ECtHR considered the question of whether the collection of such data would amount to an interference with Art. 8 ECHR in the case of *Copland v. United Kingdom* (Case 62617/00, 3rd April 2007) [2007] ECHR 253. The Court rejected the argument by the UK that the fact that there was no actual listening in on the conversations meant that there was no infringement of the claimant's rights. At paragraph 43 of its judgment the Court stated:

> *"The Court recalls that the use of information relating to the date and length of telephone conversation and in particular the numbers dialled can give rise to an issue under Article 8 as such information constitutes an 'integral element of the communications made by telephone' (see Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, §84). The mere fact that these data may have been legitimately obtained ... is no bar to finding an interference with rights guaranteed under Article 8 (ibid). Moreover, storing of personal data relating to the private life of an individual also falls within the application of Article 8 §1 (see Amann, cited above, §65). Thus, it is irrelevant that the data held ... were not disclosed or used against the applicant in disciplinary or other proceedings.*
>
> *Accordingly, the Court considers that the collection and storage of personal information relating to the applicant's telephone, as well as her e-mail and internet usage, without her knowledge, amounted to an interference with her right to respect for her private life and correspondence within the meaning of Article 8."*

72. Thus in the context of this application it would appear to me that the storage of communications data, even without use, may be an interference with a person's rights under Art. 8 ECHR. Therefore I would reject any assertion by the Defendants that it would be necessary for this information to be used before any challenge could be mounted to its collection. It is clear that the retention of such data, *prima facie*, may be an interference with the Plaintiff's rights to privacy. In this regard I would draw support from Art. 8 FCR which provides for the protection of personal data. Consequently I

would therefore allow the Plaintiff *locus standi* in this regard. However, I would stress, that is not to say that such interference is not legitimately justified or that the Plaintiff would be ultimately successful in its action; that is, and must be, a matter for the full hearing.

Travel:-

73. The Plaintiff also claims that the actions of the Defendants are an infringement of its rights to travel and, in particular, its right to confidential travel. In *State (M) v. Attorney General* [1979] IR 73 the Court outlined what it perceived to be a citizens right to travel. Having considered *Ryan v. Attorney General* [1965] I.R. 294, a seminal case with regards to unenumerated rights, Finlay P. noted:

> *"I have considered carefully whether there should be any special reason why the learned judge ... should have confined to a right to free movement within the State that which might be described ordinarily as a right to travel. ... [S]ubject to conditions, acceptable to the State, it appears to me that the citizens of the State may have a right (arising from the Christian and democratic nature of the State — though not enumerated in the Constitution) to avail of such facilities without arbitrary or unjustified interference by the State. ... [S]ubject to the obvious conditions which may be required by public order and the common good of the State, a citizen has the right to a passport permitting him or her to avail of such facilities as international agreements existing at any given time afford to the holder of such a passport. To that right there are obvious and justified restrictions, the most common of which being the existence of some undischarged obligation to the State by the person seeking a passport or seeking to use his passport — such as the fact that he has entered into a recognisance to appear before a criminal court for the trial of an offence. ... Furthermore, one of the hallmarks which is commonly accepted as dividing States which are categorised as authoritarian from those which are categorised as free and democratic is the inability of the citizens of, or residents in, the former to travel outside their country except at what is usually considered to be the whim of the executive power. Therefore, I have no doubt that a right to travel outside the State in the limited form in which I have already defined it (that is to say, a right to avail of such facilities as apply to the holder of an Irish passport at any*

given time) is a personal right of each citizen which, on the authority of the decisions to which I have referred, must be considered as being subject to the guarantees provided by Article 40 although not enumerated." (*ibid.* at pp. 80 – 81)

74. It is important to note that the Court in considering the right to travel saw it as analogous to a right to a passport. Even if such were in doubt, it would therefore appear that the right to travel is a person's right which can only be enjoyed by natural persons; a corporation requires no passport. I can see of no real sense in which a company could "travel" in the manner as mentioned. It is true that it may be present in many jurisdictions, but that is not the same thing as travel. At most the movement of companies to and from countries is a matter of establishment. To talk realistically of companies travelling is nonsensicle. I would therefore, on similar grounds as with rights of family and martial privacy, conclude that the Plaintiff cannot avail of this right, and thus does not have *locus standi* to raise it on its own behalf.

75. I should of course briefly also acknowledge the right to travel within the European Union, derived from, *inter alia*, Arts. 20 and 21 TFEU (formely Arts. 17 and 18 TEU), and confirmed in subsequent case law (see *e.g. Baumbast and R. v. Secretary of State for the Home Department* [2002] ECR I-7091; *Zhu and Chen v. Secretary of State for the Home Department* [2004] ECR I-9925; *Trojani v. CPAS* [2004] ECR I-7573). This right too is not absolute and may be restricted in certain circumstances.

76. In any event, it is not physical travel which is being impeded, it is the confidential nature of the travel which is alleged to be infringed. Unlike a right to communicate, a right to travel will inevitably be more circumcribed. The right to confidential travel must necessarily be split as between national and international travel.

77. With regards to the latter, as Finlay P. noted in *State (M) v. Attorney General* it must in any event be relient on international agreements. Pragmatically, States must have an interest, or the capacity to have such an interest, in those who enter their borders. It is therefore not easy to conceive how a right to confidential international travel could

operate in practice. Nonetheless, even should such a right exist it would necessarily be extremely limited.

78. There may be greater force in the argument that there is a right to confidential travel within the State. However I have no doubt that, as with surveillance, such a right might be circumsribed in the interests, *inter alia*, of preventing crime. In any event, I am satisfied that neither of these rights may be invoked by the Plaintiff since, as stated, it is incorporeal and therefore lacks the ability to travel in the sense which is implicit in the right as recognised.

Actio Popularis:-

79. Despite the foregoing, it may nevertheless be possible for the Plaintiff to litigate matters which do not, or cannot, affect it personally and specially in limited circumtances. The seminal case in this regard is *Crotty v. An Taoiseach* [1987] 1 IR 713, which is referred to in detail at para. 31 *supra*. It is sufficient to recap that Mr. Crotty's inability to point to any prejudice specific to him personally, as distinct from him as a member of the public, did not deprive him of the necessary standing.

80. However, as noted above, different considerations may apply to limited companies. One of the primary concerns of rules relating to *locus standi* is to prevent those litigants who are meddlesome, frivolous or vexatious from unduly burdening the Court, and those parties whom are sued. Therefore, cases should be brought primarily by persons who have a particular interest in the subject matter. In striving to achieve this outcome, the Courts have available the deterrent to impose cost orders against the former group, which may include companies with limited liability. However, there can be concern if such litigants are in fact merely straw-men, or straw-companies, behind which the true litigants hide so as to evade any order for costs which might ultimately be made against them. In those circumstances the Court must examine the nature of the company and its purpose, lifting the veil if required, together with the surrounding circumstances of the case, and the rights which it seeks to vindicate.

81. The Supreme Court in *S.P.U.C. v. Coogan* [1989] 1 IR 734 recognised the right of the plaintiff company to litigate to prevent a breach of the Constitution where it had a *bona fide* concern and interest, with Finlay C.J. noting that:

> *"To ascertain whether such bona fide concern and interest exists in a particular case it is of special importance to consider the nature of the constitutional right sought to be protected."*

In that he noted that with regards to the right to life of the unborn there could never be a victim or potential victim who could sue. Thus given that *"there can be no question of the plaintiff being an officious or meddlesome intervenient in this matter"*, considering that the plaintiff in that case had taken proceedings, which had been succesfully brought to conclusion by the Attorney General, and *"the particular right which it seeks to protect with its importance to the whole nature of our society"*, these facts *"constitute sufficient grounds for holding that it is a person with a bona fide concern and interest and accordingly hass the necessarry legal standing to bring the action."* In this context the learned Chief Justice made it clear that a Company could not, by virtue only of its memorandum and articles of association, meet such criteria.

82. Similarly, Walsh J. therein noted at p. 744 of the report that:

> *"One of the fundamental political rights of the citizen under the Constitution, indeed one of the most valued of his rights, is that of access to the Court...*

He put it further at pp. 746 – 747 of the report:

> *"It is quite clear from [East Donegal Co-Operative Livestock Mart Ltd v. Attorney General [1970] IR 317, O'Brien v. Keogh [1972] IR 144, Cahill v. Sutton [1980] IR 269] and other decisions that even in cases where it is sought to invalidate a legislative provision the Court will, where the circumstances warrant it, permit a person whose personal interest is not directly or indirectly or in the future threatened to maintiain proceedings if the circumstances are such that the public interest warrants it. In this context the public interest must be taken in the widest sense."*

83. In *Blessington Heritage Trust Limited v. Wicklow County Council and Others* [1999] 4 IR 571, McGuinness J. considered the position of a limited company which sought to challenge a grant of planning permission:

> *"In cases like the instant case it may well be argued, as it was in Lancefort Ltd. v. An Bord Pleanála (Unreported, High Court, Morris., 6th June, 1997), that companies such as the Applicant company have been incorporated simply to afford the true Applicants 'a shield against an award of costs' to use the words of the learned Morris J. I have no doubt that this is a relevant factor and one which must cause concern to a developer such as the Notice Party. However, it could also be argued that in cases such as the present the individual member of the public may in practice be denied access to the Courts – or at least have that access made more difficult – by the danger of an award of costs against him in a case where his opponent is a large development company with resources which enable it to pursue lengthy and costly litigation with comparative impunity. Over-reliance on the incorporation of companies such as the Applicant in this case may tip the balance too far in favour of the objectors or concerned local persons; on the other hand, blanket refusal of locus standi to all such companies may tip the balance too far in favour of the large scale and well-resourced developer. It seems to me that the balance is best preserved by the course followed by the learned Morris J. The Court should look at the factual background in each case and, if necessary, maintain the balance by the making of an order for security for costs."* (*ibid.* at 595)

84. In *Lancefort Limited v. An Bord Pleanála and Others (No. 2)* [1999] 2 IR 270 at 308, Keane J. felt that:

> *"The authorities reflect a tension between two principles which the Courts have sought to uphold: ensuring on the one hand, that the enactment of invalid legislation or the adoption of unlawful practices by public bodies, do not escape scrutiny by the Courts because of the absence of indisputably qualified objectors, and, on the other hand, that the critically important remedies provided by the law in these areas are not abused.*

In the latter area, the courts have dwelt on occasions on the dangers of giving free rein to cranks and busybodies. But it is to be borne in mind that the citizen who is subsequently seen to have performed a valuable service in, for example, bringing proceedings to challenge the constitutionality of legislation, while exposing himself or herself to an order for costs, may at the outset be regarded by many of his or her fellow citizens as a meddlesome busybody. The need for a reasonably generous approach to the question of standing is particularly obvious in cases where the challenge relates to an enactment of the Oireachtas or an act of the executive which is such a nature as to affect all the citizens equally: see, for example, Crotty v. An Taoiseach [1987] IR 713. But it is also the case that severely restrictive approach to locus standi where the decision of a public body is challenged would defeat the public interest in ensuring that such bodies obey the law." (Emphasis added)

Keane J. further noted that:

"It is also the case that the requirements of national law as to standing may in some instances have to yield to the paramount obligation on national Courts to uphold the law of the European Union." (*ibid.* at 312)

85. Keane J. went on to conclude that a company could have *locus standi* to bring proceedings even if it was unable to point to any proprietary or economic interest in the impugned decision. He also concluded that a company may not be denied standing merely because it was not in existence at the time of the relevant decision, and that the law:

"[R]ecognises the right of persons associating together for non-profit making or charitable activities to incorporate themselves as limited companies and the fact that they have chosen so to do should not of itself deprive them in every case of locus standi." (*ibid.*at 318)

86. Given that the comments made in both *Blessington* and *Lancefort (No. 2)* related to planning decisions, it must be the case that they apply with equal, if not greater, force in circumstances where the impugned actions involve constitutional rights and acts of the

Oireachtas; indeed it can be seen from the underlined passage above that Keane J. in *Lancefort (No. 2)* was firmly of the view that a more generous approach to *locus standi* is meritted in such circumstances. I would respectfully agree. So too may the fact that Euroepan Union law is at issue be a consideration – in particular, I would note, the rules as to *locus standi* should not undly impede possible references to the ECJ; they should not be so restrictive as to effectively deny a plaintiff redress before the Court.

87. However, as was noted in *S.P.U.C. v. Coogan* the nature of the rights which the Plaintiff seeks to vindicate must, nonetheless, be taken into account. I would also reiterate the comments of Gilligan J. in *The Irish Penal Reform Trust Ltd. & Ors. v. The Governor of Mountjoy Prison & Ors.* [2005] IEHC 305 (see para. 40 *supra.*), where he said:

> *"The simple fact is that Cahill v. Sutton allows, in plain terms, for the relaxation of the personal standing rules where those prejudiced may not be in a position to adequately assert their constitutional rights."*

Conclusions on Locus Standi:-

88. Ultimately as Gilligan J. noted in *The Irish Penal Reform Trust Ltd.*:

> *"[T]he approach I take to this matter is primarily one of discretion. I take into account the nature of the I.P.R.T. and the extent of its interest in the issues raised and the remedies which it seeks to achieve and the nature of the relief as sought. I am satisfied that if I were to deny standing to I.P.R.T. those whose interests it represents may not have an effective way of bringing the issues that are involved in these proceedings before the court."*

I too am primarily dealing with the issue of *locus standi* as one of informed discretion. I have no doubt, given the concerns expressed by the Plaintiff in their submissions, that it is acting *bona fides* and is neither being a crank, meddlesome or vexious.

89. The Plaintiff is the owner of a mobile phone, and as such can be affected by issues relating to privacy and communications in relation thereto. Such privacy in the carrying out of business transactions, *etc.*, is important for any company. Indeed these rights are not merely important to businesses, but, it must be thought, of great importance

to the public at large. There is thus a significant element of public interest concern with regards to the retnetion of personal telecommunications data, and how this could affect persons' right of privacy and communication. Further, as will be considered in relation to security for costs, from a pragmatic point of view, were the Plaintiff debarred from continuing these proceedings it is unlikely that any given mobile communications user, although specifically affected by the impugned legislation, would bring the case; given the costs that would be associated with any such challenge. It is therefore clear that the impugned legislation does in fact have the potential to be, in the words of Finlay C.J. in *S.P.U.C. v. Coogan* [1989] 1 IR 743 (see paragraph 49 *supra.*), of *"importance to the whole nature of our society"*.

90. I would also add that that the Human Rights Commission has been joined as *amicus curiae*. It would seem to support the Plaintiff's contention that this case raises matters of fundamental public importance regarding persons' human rights. As an independent organisation which has no vested interest in the outcome of this matter, and which was established by statute to, *inter alia*, *"keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights"*, the fact that it sought to be included in this matter as a notice party, principally so that should the matter come before the European Courts it would be able to make submissions, to some extent affirms the position taken by the Plaintiff, its *bona fide* interest and concern in seeking to litigate the matter, and supports the proposition that this is a matter of fundamental public importance.

91. In coming to my conclusions, and in light of the case law considered above, I have taken into account:

i) The Plaintiff is a sincere and serious litigant – it is not a vexatious litigant or a crank;

ii) This case raises important constitutional questions;

iii) The impugned provisions affect almost all of the population;

iv) It would be an effective way to bring the action – individual owners of mobile phones would be unlikely to litigate the matter;

v) The Plaintiff's right of access to the Court, and the Court's duty to uphold the Constitution and ensure that suspect actions are scrutinised;

vi) The public good which is being sought to be protected.

92. Therefore, for the reasons given above, I grant *locus standi* to the Plaintiff in relation to alleged infringements, potential or otherwise, of rights to privacy and communication, and having regard to all of the circumstances of the case, including the nature of the Plaintiff company, the Plaintiff should be able to litigate these matters fully; that is both with regards to the infringement of the Plaintiff's rights as a legal person, and also with regards to natural persons. As stated, the level of interference between these two persons may not be the same. Natural persons may be afforded greater protection of these rights than companies. It would therefore seem to me, pragmatically speaking, that it would be sensible to allow the Plaintiff to advance these arguments in full. Were the Plaintiff only allowed to advance its arguments on the grounds that it would infringe a company's rights it could leave open the question of whether natural persons' rights were nevertheless infringed. It must be in the interests of justice and Court time, that such be litigated in circumstances where the Plaintiff is not in reality put at any disadvantage in pleading on behalf of citizens in general.

93. I would reiterate that it is clear that the Plaintiff has purely in its personal capacity *locus standi* with regards to infringements of its rights to privacy and communication. This I would hold even if there were no other greater interests in the matter. However, given that the impugned legislation could have a possible effect on all persons, I would also grant the Plaintiff *locus standi* to litigate these matters generally as what might be termed an *actio popularis*.

Security for Costs:

94. The Defendants' second application was for security for costs against the Plaintiff, under section 390 of the Companies Act 1963.

95. The Defendants state that it is not contested that were they successful in these proceedings the Plaintiff would be unable to discharge their costs. The Plaintiff, which is limited by guarantee, has only eight subscribers, each of whom has acknowledged a liability to contribute to the assets of the company in an amount limited to the sum of €1. Further, the accounts of the Plaintiff, from the most recent accounts, as presented to the Court, for period ended 31st December 2006, show that it had a gross income of €1,606 and administrative expenses of €6,421 resulting in a loss that year of €4,815. The sole asset of the company is cash totalling €435, against a total of €5,250 due to creditors, resulting in a deficit of €4,815.

96. The Defendants assert that they have a *bona fide* defence in that they deny retention of any mobile telecommunications data related to the Plaintiff, they deny the irrationality, unreasonableness and procedural defects claimed in respect of the directions alleged, and deny any alleged breaches of constitutional or Convention rights. Further, the Defendants invoke the common good, in particular considerations of public policy and public order, and the obligation under the Constitution to ensure that the authority of the State is not undermined. In the alternative, such restrictions as may exist are necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime and the protection of the rights and freedoms of others.

97. The Defendants further content that, on the basis of a *bona fide* defence, once the Court is satisfied as to the Plaintiff's financial incapacity, the burden shifts to Plaintiff to show that there are "special circumstances" which justify a refusal by the Court to order security for costs. The Defendants deny that such exist in this case.

98. Although not accepting that the onus lies upon it, instead stating that the burden is on the Defendants to persuade the Court than an order should be made, the Plaintiff argues that the Court should exercise its discretion and refuse the order so sought. In this regard it points to the nature of the proceedings, concerning as they do the validity of acts done and measures designed to ensure that data is retained in respect of mobile phone,

internet and e-mail communications of all persons who use such services, and thereafter is available for access and use by State Authorities, which in essence the Defendants are in these proceedings. It argues, therefore, that this is a matter of such gravity and importance as to transcend the interests of the parties before the Court and that clarification is required in the interests of the common good.

99. The Plaintiff also claims that, as with the issue of *locus standi*, national procedural rules should not frustrate a remedy under European law. Thus, given the fact that this case is seeking a Reference to the ECJ on matters relating to the validity of national and Community laws, the Court should be slow to order security for costs where that in itself would have the effect of preventing such a Reference.

100. Ultimately both parties accept that the question of ordering security for costs under section 390 of the Companies Act 1963 ("the 1963 Act") is a matter of Court discretion, with the Defendants relying on the impecuniousness of the Plaintiff as as raising the *bona fide* defence argument, whereas the Plaintiff heavily asserts the overriding public interest in allowing this case to proceed.

101. I would firstly say in this regard that s. 390 of the 1963 Act does not place an obligation on the Court to grant security for costs merely because the plaintiff company is impecunious and the defendant asserts a *bona fide* defence. Kingsmill Moore J., considering s. 278 of the Companies Act 1908 which is in almost identical terms as s. 390 of the 1963 Act, in *Peppard and Co. Ltd. v. Bogoff* [1962] IR 180 at 188, made it clear that:

> *"[T]he section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a discretion in the Court which may be exercised in special circumstances."*

In that case the Court found such special circumstances in that on the plaintiff's case any impecuiousness may have been due to the wrongs of the defendant, and secondly that

there was a co-plaintiff who was a natural person resident in the jurisdiction who could be fixed with costs in the event that the defendant won.

102. It now falls to consider what "circumstances" may be "special" as to entitle an impecunious plaintiff company to proceed without having to give security for costs.

103. Although pleaded in the parties submissions, no argument was advanced during the hearing in relation to the delay of the Defendants in bringing this application. Nonetheless I would briefly comment in this regard. I would agree with Kingsmill Moore J. in *Peppard & Co. v. Bogoff (ibid.)* that delay, unless it is inordinate and culpable, does not weigh greatly against the defendant in an application for security for costs (*S.E.E. Company Ltd. v. Pubic Lighting Services* [1987] ILRM 255 and *Beauross Ltd. v. Kennedy* (Unrep., High Court, Morris J. 18th October 1995) considered); although of course in some circumstances delay can be a significant factor in refusing such an application (see for example *Dublin International Arena Limited v. Campus Stadium Ireland Developments Ltd.* [2008] 1 ILRM 496). I feel that the former is the case here, and although it may be of some relevance, my decision is not based on any findings in relation to delay, given that it was not properly advanced at the hearing.

104. One of the recognised "special circumstances" which a Court may take into account in refusing an order for security for costs is that the case involves questions of fundamental public importance. Morris J. in *Lancefort Ltd. v. An Bord Pleanála & Ors* [1998] 2 IR 511 at 516 in this regard notes:

> *"I have considered the Supreme Court authorities in Midland Bank Ltd v. Crossley-Cooke [1969] IR 56 and Fallon v. An Bord Pleanála [1992] 2 IR 380. I consider in the context of the applicant's opposition to the application these are relevant authorities and in particular that part of the judgment of the Chief Justice where he says at p. 384:*
>
> > *'The second mandatory condition, as it were, laid down in the judgment [in Midland Bank Ltd. v. Crossley-Cooke][sic.] is that the Court should not ordinarily entertain an application for security for costs if it is*

satisfied that the question at issue in the case is a question of law of public importance...'"

Nonetheless Morris J. concluded that:

"I am of the view that while a challenge to the constitutionality of a section which permits An Bord Pleanála to materially contravene a development plan must be regraded as of importance, I am unable to conclude that the point is of such gravity and importance that it transcends the interest and considerations of the parties actually before the court."

105. The above decision of Morris J. was considered by Laffoy J. in *Villiage Residents Association Ltd. v. An Bord Pleanála (No. 2)* [2000] 2 IR 321 at 333 where she stated:

"It is well settled that the Supreme Court should not ordinarily entertain an application for security for costs on an appeal to that court if it is satisfied that the question at issue in the case is a question of law of public importance (per Finlay C.J. in Fallon v. An Bord Pleanála [1992] 2.I.R. 380 at p. 384)... I am of the view that it is appropriate in this case to consider whether a question of law of public importance exists, as Morris J., as he then was, did on the application for security in Lancefort Ltd. v. An Bord Pleanála [1998] 2 I.R. 511. However, for the reasons outlined earlier for rejecting the applicant's contention that this case raises an issue of general public importance, I consider that it does not raise a question of law of public importance. For the same reasons I am of the view that the criteria for determining whether a question of law of public importance exists which can be extrapolated from the judgment of Morris J. in Lancefort Ltd. v. An Bord Pleanála [1998] 2 I.R. 511 - whether the point is of such gravity and importance as to transcend the interests of the parties actually before the court and whether it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future cases also - are not met." (Emphasis added)

I would respectfully agree with both Morris and Laffoy JJ. in relation to the above statements of law, and with their conclusions in those cases.

106. It has been advanced, in a similar way as was advanced in relation to *locus standi* (see para. 29 *supra.*), that the European element of this case should weigh against the granting of security for costs in circumstances where the granting of such would deny the applicant effective redress. I agree with the Plantiff that this is a factor which I should take into account. However, I also concur with and note the statement of Denham J., in *Dublin International Arena Limited v. Campus Stadium Ireland Developments Ltd.* [2008] 1 ILRM 496 at paragraph 24, that the involvement of EC Directives *"[does] not preclude an application for security for costs."* It is therefore a relevant factor, to the extent that security for costs should not unduly restrict access to judicial remedy, but it could not in my opinion, in and of itself, constitute a "special circumstance", such that it would be determinative of the matter without more.

107. Finally, with regards to the onus of proof, I would endorse the views of Finlay C.J. in *Jack O'Toole Ltd. v. McEoin Kelly Associates* [1986] IR 277 where at 283 he held that:

> *"It is clear that there is no presumption, either in favour of the making of an order for security for costs or against it, but I am satisfied that where it is established or conceded ... that a limited liability company which is a plaintiff would be unable to meet the costs of a successful defendant, that if the plaintiff company seeks to avoid an order for security for costs it must, as a matter of onus of proof, establish to the satisfaction of the judge the special circumstances which would justify the refusal of an order."*

108. Although the Court *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 IR 270 considered that the granting of security for costs might be a way of redressing any imbalance between the parties where a company seeks to litigate rights, I do not consider that this should be the case here. Having regard to the foregoing, I am satisfied, as stated with regards to *locus standi*, that the matters pleaded in this case do raise issues of significant public importance, which are of *"such gravity and importance as to transcend the interests of the parties"* and *"it is in the interests of the common good that the law be clarified so as to enable it to be administered not only in the instant case but in future*

cases." Given the rapid advance of current technology it is of great importance to define the legitimate legal limits of modern surveillance techniques used by governments, in particular with regard to telecommunications data retention; without sufficient legal safegaurds the potential for abuse and unwarranted invasion of privacy is obvious. Its effect on persons, without their knowledge or consent, also raises important questions indicative of a *prima facie* interference with all citizens' rights to privacy and communication (*Copland v. United Kingdom* considered). That is not to say that this is the case here, but the potential is in my opinion so great that a closer scrutiny of the relevant legislation is certainly meritted with regards to its potential interference with important and fundamental rights of persons, both natural and legal.

109. I would therefore refuse the Defendants' application for security for costs on the above grounds.

Article 267 of TFEU Reference:

110. The Plaintiff has brought a motion calling for a Reference to the ECJ under Article 267 of TFEU. The questions to be asked all relate to the validity of Directive 2006/24/EC, in particular with rights under the EU and EC Treaties, the CFR and the ECHR. Questions relating to whether the Directive was issued under the appropriate Treaty heading were live matters at the time of the hearing as the Irish Government was then involved in ongoing litigation in the ECJ on this point. Since the hearing, the ECJ has ruled against the Irish government on the issue (*Ireland v. European Parliament and Council of the European Union* (Case C-301/06) (delivered on the 10th February 2009)). The Court found that Directive 2006/24/EC was properly enacted under Art. 95 TEC, since it was apparent that differences between national rules adopted for the retention of data were liable to have a foreseeable direct impact on the functioning of the internal market which would become more serious over time. Further, the provisions of the Directive are essentially limited to the activities of service providers and do no not govern access to data, or its use by police or judicial authorities. However, the ECJ expressly stated that the action related solely to the choice of legal basis for the Directive,

and *"not to any possible infringement of fundamental rights arising from interference with the exercise of the right to privacy..."* (para. 57).

111. The Plaintiff notes that there is a complete discretion, under Article 267(2), for a judge to refer a question when he considers that a decision on it is necessary to enable it to give judgment. However in this case the Plaintiff also seeks to ground its application under Article 267(3), which states:

> *"Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice"* (emphasis added)

The Plaintiff argues that where a question of the validity Community law is raised the national court must make a reference since there is no effective judicial remedy under national law because a national judge may not declare a Community instrument invalid (*Foto-Frost v. Hamptzollant Lübeck-Ost* (Case 314/85) [1987] ECR 4199).

112. Attention is drawn to the exceptions to the requirement to make a Reference. These are that, firstly, the matter is not required in order for the national court to rule on the matter case (see *Weinand Meilickev. ADV/ORGA F.A. Meyer AG* [1992] ECR I-4871; *Corsica Ferries Italia Slr v. Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783; *Monin Automobiles-Maison de Deux-Roues* [1994] ECR I-195). Secondly the Community law issue is governed by previous authority (see *CILFIT*; *Da Costa en Schaake NV v. Nederlandse Belastingadministratie* [1963] ECR 31; *Foglia v. Novello II* [1981] ECR 3045). Thirdly the application of Community law is so obvious as to leave no doubt to the national court (see *CILFIT v. The Minister for Health* [1982] ECR 3415). In the Plaintiff's opinion none of these operate in this case.

113. The Defendants admit that, in relation to the Article 267 Reference, it is a matter of discretion for the Court, but argues that at this point a Reference would be premature. They say that, in circumstances where the Plaintiff has elected to bring proceedings by way of plenary action, and must therefore provide evidence, including *viva voce*

evidence, to be examined in open court, and where this has yet to be done, there is therefore as of now, no way of evaluating what the final evidential framework will be. What evidence exists is, by definition, one-sided. In this regard reliance is placed upon *Irish Creamery Milk Suppliers Association v. Ireland* (Joined Cases 36 and 71/80) [1981] ECR 735, where the ECJ stated at paragraph 6 that:

> *"The need to provide an interpretation of Community law which will be of use to the national court makes it essential ... to define the legal context in which the interpretation requested should be placed. From that aspect it might be convenient, in certain circumstances, for the facts in the case to be established and for questions of purely national law to be settled at the time the reference is made to the Court of Justice so as to enable the latter to take cognisance of all the features of fact and of law which may be relevant to the interpretation of Community law which it is called to give."*

Thus where the legal and factual context in the case has yet to be properly defined a Reference at this stage should be refused. The Plaintiff, the Defendants submit, fails to acknowledge that significant factual and national law issues remain to be determined concerning the nature and extent of the fundamental rights directly affected by the provisions of the Directive, as well as the extent, if any, to which any such rights are capable of being enjoyed or invoked by an artificial legal entity.

114. In relation the Article 267 Reference, I am satisfied that there is sufficient information before me to make such a Reference to the ECJ. I do not think that the application is premature; it is possible to define the context of the Reference (*Irish creamery Milk Suppliers Association v. Ireland* [1981] ECR 735 considered). This is not a case which requries significant *viva voce* evidence to properly define the context or issues in the case. It is a chellenge to specific legislative provisions which speak for themselves. I am also satisfied that the Reference is required since I am unable to rule on the validity of Community law (see *Foto-Frost v. Hamptzollant Lübeck-Ost* (Case 314/85) [1987] ECR 4199). I would therefore grant the application for a Reference under Article 267 TFEU.

115. With regards to the questions to be referred I do not prepose to deal with those at this juncture. Instead I would invite the parties to submit suggestions, either individually or in the form of agreed questions between them, as to the content and wording of the questions to be referred, taking into account my findings in this decision.

Conclusion:

116. Thus in summary:

i) I grant the Plaintiff *locus standi* to bring an *actio popularis* in respect of whether the impugned provisions violate citizens' rights to privacy and communications, but not with regards to family and marital privacy or travel;

ii) I refuse the Defendants' motion for security for costs;

iii) I grant the Plaintiff's motion for a Reference to the ECJ under Article 267 TFEU.