Neutral Citation: [2013] IEHC 393

**THE HIGH COURT**

**[2003 No. 11249 P]**

**BETWEEN**

**EDWARD KEATING**

**PLAINTIFF**

**AND**

**RADIO TELEFIS EIREANN**

**DEFENDANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA & THE REVENUE COMMISSIONERS**

**NON-PARTIES**

**JUDGMENT of Kearns P. delivered on the 29th day of July, 2013**

This is the defendant's motion for inspection of discovery against the first named non-party, the Commissioner of An Garda Síochána, arising out of proceedings initiated against the defendant by the plaintiff seeking damages for defamation, negligence, breach of duty and breach of both Constitution and Convention rights on foot of a Prime Time programme broadcast on the 19th July, 2001, investigating the importation of drugs into this jurisdiction and their subsequent possession for sale and supply, in which the plaintiff asserts, *inter alia*, that he was clearly identifiable.

**BACKGROUND FACTS**

On the 19th July, 2001, the defendant broadcast an episode of the current affairs programme, "Prime Time", investigating the importation of drugs into this jurisdiction in the years 1995 and 1996, their subsequent possession for sale and supply and the persons allegedly involved in such criminal activities.

As the plaintiff's identity was clearly visible in the promotional "trailers" publicising the programme which were aired prior to the programme's transmission, An Garda Síochána requested the defendant to remove images and references to the name of the plaintiff. Consequently, on the night the programme was broadcast, the following announcement was made immediately prior to its airing:

> "[f]or reasons of security it has been deemed necessary to remove at late notice images and references to the name of one of the key individuals named in tonight's programme".

Arising from this broadcast, the plaintiff initiated proceedings against the defendant seeking damages for alleging that the programme had inferred that, not only was he a Garda informer and "criminal insider", but also participated in unlawful criminal activities for his own benefit and, therefore, had "served two masters". The plaintiff further alleged that the programme had identified him by name, with his image partially visible, notwithstanding the fact that the defendant had received a request from the first non-party to remove images of and references to the name of the plaintiff.

The defendant has admitted the broadcast in question, but has pleaded, *inter alia*, justification for the aforementioned allegations.

By notice of motion dated the 22nd October, 2007, the defendant sought non-party discovery pursuant to O. 31, r, 29, from both non-parties, but specifically from An Garda Síochána of the following documents:

> "(i) All documents in the possession of An Garda Síochána concerning the plaintiff's involvement in the unlawful importation of controlled drugs into the State, or his possession for sale, distribution or supply of such controlled drugs."

On the 23rd July, 2008, the High Court (McCarthy J.) made an order for discovery (following an appeal against the refusal of the Master of the High Court, dated the 18th December, 2007, to grant discovery in the terms sought) against the Commissioner of An Garda Síochána in the above terms but limited its scope to documents created prior to but not after, the 19th July, 2001, the date the Prime Time programme was broadcast. The second named non-party appealed the order as it pertained to them to the Supreme Court, in which McKechnie J. gave judgment of the court on the 9th May, 2013. In *Keating v. Radio Telefis Eireann* [2013] IESC 22, the court held that the contention that disclosure would be detrimental to public policy and the public interest was a matter for the judiciary to evaluate, only they alone could weigh up the tension which may arise between the public interest in the administration of justice and any other competing public interests. The court ultimately dismissed the appeal, finding that the disclosure granted was not oppressive and rejected the argument for non-disclosure based futility as the motion for privilege was bound to succeed as the court was not convinced that such an argument would inevitably succeed and held that should an issue of privilege arise, it could be dealt with in the normal way.

The Assistant Commissioner of An Garda Síochána, Kevin Ludlow, swore an affidavit of discovery on the 22nd December, 2008, in which he listed six categories of documents over which privilege is asserted, two of which on the grounds of legal professional privilege and the remaining four categories of documents over which privilege is claimed as follows:

> 1) Letter from Deputy Commissioner Conroy to the Assistant Commissioner Eastern Region dated the 26th March, 1999 enclosing a 1 page report of Deputy Commissioner Conroy dated the 18th March, 1999 in respect of a fact finding mission concerning allegations of serious improprieties in the course of drugs and firearms cases in Cork and a 4-page Report of Assistant Commissioner T.A. Hickey dated the 4th January, 1999 to Deputy Commissioner, Operations also in respect of a fact finding mission concerning allegations of serious improprieties in the course of drugs and firearms cases in Cork.
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> 2) 1 page printout from Cor_Reg (computerised correspondence register) from Private Secretary, Commissioners Office in

respect of a fact finding mission concerning allegations of serious improprieties in the course of drugs and firearms cases in Cork.

3) 12 pages of diary entries from Detective Chief Superintendent T.A. Quilter.

4) 13 pages of notebook entries from Detective Chief Superintendent T.A. Quilter.

Public interest privilege is claimed in respect of each category of documents and is in the following identical terms:

> "Public Interest Privilege is claimed in respect of this document on the basis that it concerns sensitive and confidential activities and practices of An Garda Síochána in the prevention and detection of crime and its disclosure would disclose key Garda intelligence and the sources of same potentially putting at risk the lives and wellbeing of the individuals referred to therein."

The defendant served a notice to produce documents, pursuant to O. 31, r 18, dated the 28th April, 2009, to produce for inspection the four categories of documents referred to above. The first named non-party replied by letter dated the 1st May, 2009, stating that it was not prepared to waive its claim of privilege over the said documents. Consequently, by notice of motion, dated the 24th September, 2009, the defendant issued a motion for inspection of the above categories of documents.

In the affidavit grounding the above motion, Ms. Anne McManus, solicitor for the defendant, submitted that the following factors were relevant to the balancing exercise now facing the court. Firstly, that as the events, the subject of which the documents relate, occurred over a period of two years in 1995 and 1996, some thirteen years prior to the issuing of the motion for inspection, "both the confidentially and sensitivity of any given activities or practices of An Garda Síochána in the prevention and detection of crime must decrease as the conduct of those activities or practices recedes further into the past".

Secondly, she contended that no person was ever charged or tried with any offence arising out of the investigation of those events and questioned whether any investigation of same remained open.

Thirdly, she submitted that, in the absence of any reprisal against the plaintiff in the intervening period, the possibility of disclosure of documents from 1995 and 1996 leading to such recourse must be regarded as non-existent.

Fourthly, she further contended that the only suggested source of Garda intelligence was the plaintiff himself who had already publicly identified himself as a Garda informant for the purpose of these proceedings, thereby no other Garda sources or other other individuals could be put at risk. Furthermore, by revealing his identity as a Garda informant, it was submitted, the plaintiff had waived the informer privilege that might have otherwise attached to any such document.

The solicitor for the plaintiff, Mr Tom Griffith, replied by affidavit, dated the 15th February, 2010, in which he averred that shortly after the Prime Time programme was broadcast, the plaintiff had been admitted to the State's Witness Protection Programme and stating his belief that the threat to the plaintiff continued to be "very real, grave and ongoing" from a criminal gang in Cork about whose drug-importation and distribution operations he had informed on to An Garda Síochána.

On the 12th April, 2010, the solicitor for the defendant, Ms. McManus, replied, pointing out that since the events in question, in 1995 and 1996, and the transmission of the Prime Time programme in 2001, there had been no evidence of any threat being made to the plaintiff. She further maintained that an order for inspection of the documents sought could not disclose the plaintiff or his family's whereabouts since they pre-dated the plaintiff's admission to the Witness Protection Programme.

By affidavit dated the 6th May, 2010, Chief Superintendent Brendan Cloonan, on behalf of the first named non-party, expanded upon the first named non-party's claim of public interest privilege, asserting that not only the trust and confidence of all participants in the Witness Protection Programme would be affected if the documents sought for inspection were disclosed, but inter-agency co-operation between the first non-party and second non-party could also be affected by such disclosure.

He further stated that the plaintiff and his family were in fact no longer participants in the Witness Protection Programme, but that the threat to his life was being addressed by "certain future commitments" from the Gardai, including the facilitation of his return to the State on two instances in 2004 and 2007.

There followed a number of lengthy and detailed affidavits between the solicitors for the plaintiff, defendant and first named non-party, including affidavits from the plaintiff and his wife, as to the precise status of the plaintiff under the Witness Protection Programme.

On the 17th July, 2012, in an affidavit in response to the above affidavits, Ms. Trish Whelan, a solicitor for the defendant, asserted that, irrespective of the exact status of the plaintiff under the Witness Protection Programme, there could be no viable threat to his life created by making the order of inspection sought by the defendants, as there was no evidence in the pleadings or affidavits to provide any basis for his assertion that any of the documents sought could reveal his location.

On the 16th November, 2012, Detective Superintendent Liam King swore an affidavit on behalf of the first named non-party in reply, averring that the plaintiff was, in fact, no longer a participant on the Witness Protection Programme, having signed what is described as an "exit document" on the 25th September, 2003 (which the plaintiff maintains was a receipt for the €20,000 loaned to him by An Garda Síochána). Despite this, the plaintiff remained the subject of ongoing security arrangements which were put in place for him on each of his return visits to the State, and therefore his exit from the Witness Protection Programme could not be taken to mean that his life was no longer at risk.

Detective Superintendent King further averred that notwithstanding the above, his primary objection to the disclosure sought was that it would undermine the confidentiality of the Witness Protection Programme in general.

**DECISION**

The issue which arises for determination on the facts of this case is whether the first named non-party's claim for public interest privilege in respect of the said documents can be upheld. It is settled law that where a conflict between public interests arises, it is for the court to decide which public interest is to prevail.

In *Ambiorix Ltd. v. Minster for the Environment (No. 1),* [1992] 1 I.R. 277, Finlay C.J. reiterated the principles that had been laid down in *Murphy v. Dublin Corporation* [1972] I.R. 215 as follows, at p. 283:-

> "1. Under the Constitution the administration of justice is committed solely to the judiciary by the exercise of their powers in the courts set up under the Constitution.
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> 2. Power to compel the production of evidence (which, of course, includes a power to compel the production of documents) is an inherent part of the judicial power and is part of the ultimate safeguard of justice in the State.
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> 3. Where a conflict arises during the exercise of the judicial power between the aspect of public interest involved in the production of evidence and the aspect of public interest involved in the confidentiality or exemption from production of documents pertaining to the exercise of the executive powers of the State, it is the judicial power which will decide which public interest shall prevail.
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> 4. The duty of the judicial power to make that decision does not mean that there is any priority or preference for the production of evidence over other public interests, such as the security of the State or the efficient discharge of the functions of the executive organ of the Government.
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> 5. It is for the judicial power to choose the evidence upon which it might act in any individual case in order to reach that decision."

This test was applied by Keane J. (as he then was) in *Breathnach v. Ireland (No.3)* [1993] 2 I.R. 458, a case in which a claim of public interest privilege was relied on by the Director of Public Prosecutions to avoid discovery of communications from An Garda Síochána pertaining to the plaintiff's arrest and detention. These communications had been made in circumstances where the investigating Gardai had believed such communications would be confidential. It was argued that it was in the public interest not to discover these documents as it was imperative that the confidentiality of such communications be maintained in order to ensure full disclosure by An Garda Síochána. Therefore, it was in the public interest not to discover these documents. Keane J. (as he then was) described the process the court should engage in, at p. 469:-

> "[T]he court, as I understand the law, is required to balance the public interest in the proper administration of justice against the public interest reflected in the grounds put forward for non-disclosure in the present case. The public interest in the prevention and prosecution of crime must be put in the scales on the one side. It is only where the first public interest outweighs the second public interest that an inspection should be undertaken or disclosure should be ordered. In considering the first public interest, it is necessary to determine to what extent, if any, the relevant documents may advance the plaintiff's case or damage the defendants' case or fairly lead to an enquiry which may have either of those consequences. In the case of the second public interest, the various factors set out by Mr. Liddy must be given due weight. Again, as has been pointed out in the earlier decisions, there may be documents the very nature of which is such that inspection is not necessary to determine on which side the scales come down. Thus, information supplied in confidence to the gardai should not in general be disclosed, or at least not in cases like the present where the innocence of an accused person is not in issue, and authorities to that effect, notably *Marks v. Beyfus* (1890) 25 Q.B.D. 494, remain unaffected by the more recent decisions, as was made clear by Costello J. in *Director of Consumer Affairs v. Sugar Distributors Ltd.* [1991] 1 I.R. 225. Again, there may be material the disclosure of which would be of assistance to criminals by revealing methods of detection or combatting crime, a consideration of particular importance today when criminal activity tends to be highly organised and professional ..."

On the subject of free communication between An Garda Síochána and the DPP, Keane J. stated at p. 472 that this was an important factor. He continued that:

> "The extent to which that freedom might be inhibited by the knowledge that the documents furnished to the Director of Public Prosecutions may subsequently be disclosed in court proceedings is clearly a matter which has to be taken into consideration in determining whether the public interest in the particular case requires its production."

While he noted that executive privilege had been eroded to some extent Keane J. observed that the position was different in respect of communications passing between An Garda Síochána and the DPP in light of the due weight that had to be given to the public interest in the prevention and detection of crime. He concluded in this regard at p. 472 that:

> "The circumstances of the particular case must determine, in the light of the constitutional principles to which I have referred, whether an inspection should be undertaken by the court and whether, as a result of that inspection, production of any of the documents should be ordered."

Although Keane J. (as he then was) ultimately refused the claim of public interest privilege in *Breathnach* on the facts pertaining to that case, the principles he endorsed were followed by Murphy J. in *Livingstone v. Minister for Justice* (Unreported, High Court, 2nd April, 2004). Rather than accepting a blanket claim of privilege based on the prevention of crime, Murphy J. considered the relevance of each category of documents sought and balanced the above competing interests on the facts of the case before him. He ultimately ordered discovery of some of the documents sought, noting that there was no "blanket ban" on ordering disclosure of the garda files and that (at p. 14), "police communications are not, as a class, privileged."

Another decision, that of *Foley v. Bowden* [2003] 2 I.R. 607, concerned a plaintiff who sought to examine a garda witness as to payments made to the defendant in the course of his participation on the Witness Protection Programme. However, the Commissoner of An Garda Síochána resisted the application asserting that it would undermine the operation of the programme. The High Court upheld the objection, but, Keane C.J. allowed the appeal, and, following a close examination of the reality of the fears that had been expressed by the Commissioner concluded at p. 612 that:

> "if it were the case that requiring the notice party, or whoever the appropriate officer may be, to attend before the High Court for the purpose of being orally examined as to any sums which may be owing the judgment debtor under that scheme and producing any documents relevant thereto, of itself would imperil the successful implementation of the scheme in the future, I would agree with the conclusions of the High Court Judge that the order should not be granted. It is not clear, however, that that would necessarily be the case. It does not follow that, because the relevant documents will be available at the hearing in the High Court, they must, in every instance, be produced for the inspection of the plaintiff or his legal advisors. On the contrary, if the officer objects to the production of any document on the grounds that its disclosure would not be in the public interest, the judge before whom the examination is being held can rule on the validity of that objection and, if necessary, can inspect the document himself or herself without its being furnished for inspection to anyone else. It may be that such an inspection may not be necessary and the very nature of the document may be such that the judge will be able to rule that its production would not be in the public interest and that the public

> interest in question is not outweighed by any legitimate interest of the plaintiff. Similarly, there should be no essential difficulty in the examination being conducted in a manner that does not disclose either the new identity or the new location of the defendant."

The *Ambiorix* principles were referred to more recently by McKechnie J. in the appeal in this case referred to earlier (*Keating v. Radio Telefis Eireann* [2013] IESC 22), in which, noting that the following practice has developed, he stated at para. 36 that:

> "(i) In general, where competing interests conflict the court will examine the text of the disputed document and determine where the superior interest rests: it will carry out this enquiry on a case-by-case basis;
>
> (ii) this exercise may not always be necessary. On rare occasions, it may be possible for the court to come to a decision solely by reference to the description of the document as set out in the affidavit; that is, without recourse to an examination of the particular text of the document itself (*Breathnach* p. 469);
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> (iii) in all cases however (and this is the crucial point) it will be for the examining court to both make the decision and to decide on what material is necessary for that purpose; and finally
>
> (iv) in performing this exercise, no presumption of priority exists as between conflicting interests."

As noted above, there is a public interest in the prevention and detection and prosecution of crime. In this regard, it is necessary to determine to what extent, if any, the relevant documents may advance a party's claim/defence or fairly lead to an inquiry which may have either of these consequences, when considering the public interest in the administration of justice.

The onus is on the party claiming privilege, in this case being An Garda Síochána, to prove that such privilege exists, and this burden of proof is not discharged by claiming that privilege attaches to a document by virtue of it being disclosed in confidence. Nor is it discharged by simply asserting a general public interest in withholding the relevant document. Any such plea of public interest privilege, as held by O'Malley J. in *Gibb v. Minister for Justice* [2013] IEHC 238 "must be evaluated by reference to the circumstances actually presenting". However, once proven, the onus of proof shifts to the party challenging that privilege, in this case being RTE. Consequently, in determining whether privilege attaches to a document, the court will closely scrutinise any such assertion and decide whether any such claim will be upheld.

Therefore, taking the facts of the present case into consideration to determine whether the public interest privilege asserted by the Commissioner of An Garda Síochána should be upheld, this Court is obliged to have regard to the fact that the Commissioner is a non-party to these proceedings, and inspection is sought of these documents by the defendant to aid its defence of justification of allegations that are not connected with any act or omission on the part of the Commissioner. Moreover, it was the Commissioner who, in fact, requested the defendant to remove images and references to the name of the plaintiff in the interest of his safety and security. Furthermore, the categories of documents which have already been discovered, only came into existence in the course of the exercise by An Garda Síochána of its function in the prevention and detection of crime, a crucial function in the public interest.

In determining where the balance between competing public interests should lie, I am satisfied that it is not in the public interest to grant the relief sought in the defendant's motion herein as to do so would undermine the protection, preservation and integrity of the State's Witness Protection Programme. This was attested to by Chief Superintendent Brendan Cloonan in his affidavit dated the 6th May, 2010, on behalf of the first named non-party, in which he averred that the concerns of the first named non-party pertaining to the proper and effective functioning of the Witness Protection Programme do not diminish with the passage of time and are

> "as relevant now as they were in 1995 or in 2001, going to the very heart of the work and methods of An Garda Síochána in the prevention and prosecution of crime. If the integrity of the programme is to be maintained it is essential that details of investigations and information provided in the course of such investigations remain completely confidential and this must be so whether or not a prosecution ultimately follows."

Whilst I accept that neither the plaintiff nor his family are still participating in the Witness Protection Programme, there remains a considerable risk to the plaintiff's safety, as highlighted by the efforts to which An Garda Síochána have gone to safeguard the plaintiff when within this jurisdiction. This was attested to, firstly by Chief Superintendent Cloonan, in his affidavit dated the 6th May, 2010, on behalf of the first named non-party, in which he averred that the threat to the plaintiff's life was being catered for by "certain future commitments" from the Gardai, which included the facilitation of his return to this jurisdiction on two instances in 2004 and 2007, and more recently in February 2012, when the plaintiff returned to this jurisdiction for consultations with his legal advisors, as averred to by Chief Superintendent Liam King in his affidavit dated the 16th November, 2012.

I am equally satisfied that all aspects of the operation of the Witness Protection Programme need to remain confidential due to its ongoing nature, and adverse consequences would undoubtedly arise following disclosure of any confidential information pertaining to the programme itself and/or current and future participants on it.

I am further satified that to grant inspection of the documents already discovered would not be in the public interest as it would result in the disclosure of information of a confidential, sensitive nature relating to the practices of An Garda Síochána in the prevention and detection and prosecution of crime and potentially put at risk the lives and wellbeing of the individuals referred to therein.

I therefore refuse the relief sought in the defendant's notice of motion.