

## THE HIGH COURT

[2006 No. 3340 P]

BETWEEN

NOEL O'CONNOR

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDÁ SÍOCHÁNA,

IRELAND AND

THE ATTORNEY GENERAL

DEFENDANTS

**JUDGMENT of Ms. Justice Baker delivered on the 9th day of November, 2016.**

1. This judgment is given in the motion to challenge the claim of privilege being maintained by the defendants over certain discovered documents.
2. An order for discovery was made on 5th July, 2012, on consent.
3. Discovery was made by the first defendant by affidavit sworn by Detective Inspector Gerard Lawless on 11th July, 2012, and two supplemental affidavits of Detective Inspector Lawless on 1st May, 2014 and 23rd June, 2015. Three further affidavits were sworn, by Chief Superintendent John Kerin on 21st October, 2014, by Thomas Bellew of the Department of Foreign Affairs on 23rd June, 2015, and by David Fennell of the Department of Justice and Equality on 23rd June, 2015.
4. A notice to produce was served on the defendants on 24th August, 2012 in respect of those documents.
5. The defendants claim public interest privilege over certain of the documents on the grounds that their disclosure would cause a risk to life, and constitute an operational security risk.

**Background**

6. The plaintiff claims damages against the defendants for negligence, breach of duty, breach of contract, in quasi-contract, misrepresentation and for breach of constitutional rights, and under the European Convention on Human Rights. The claim arises from the role engaged by the plaintiff at all material times as a garda informant. The plaintiff claims that he entered into an agreement with the first defendant in July, 1999 that he would so act as informant in relation to the activities of certain persons thought to be engaged in drug trafficking activities believed to be criminal in nature. The plaintiff claims that it was an express term of the agreement and/or that it was represented to him that the first defendant would take all necessary steps to safeguard his safety, keep his identity confidential and protect him from criminal prosecution in the State, or abroad.
7. The events in respect of which these proceedings are brought arose following the detention in custody of the plaintiff in France on 7th August, 2000 and his conviction and sentence in the courts of France for drug trafficking offences. The plaintiff claims that the first defendant failed to take such steps as were agreed, or which were reasonably to be expected, to protect his rights including direct intervention with state authorities of France.
8. It is not denied by the first defendant that the plaintiff did perform some surveillance role or role as a person providing information, nor is it denied that payments were made to him in consideration of information that he provided to the first defendant.
9. A large volume of documents have been discovered, and privilege claimed in respect of a number of them. In the course of the hearing, the list has now been reduced to 28 separate documents or classes of documents.

**The legal principles**

10. It is convenient to set out the legal principles before turning to review each of the documents in respect of which privilege is claimed.
11. The starting point for a consideration of whether a document is to be discovered is that it be relevant to the claim, or defence, as the case may be. The question of relevance is not central to the consideration before me, as the documents in respect of which privilege is claimed have been discovered, and are *ipso facto* relevant. Privilege has been claimed in respect of some of those documents, and in some cases, the discovery is made in a redacted form.
12. It is settled law that a party may refuse to make discovery on the grounds that the documents are privileged, and in the case of organs of the State an identified category of privilege exists when discovery would damage national security or operational interests. The relevant operational and security interests in the present case are those of public service enforcement agencies in general, and in particular of An Garda Síochána.
13. A further ground of privilege is claimed in respect of some documents, namely that privilege may be claimed in respect of documents the disclosure of which may endanger relations with other countries: *O'Mahony v. Minister for Defence* (unreported, High Court, Barrington J., 27th June, 1989).
14. In *Burke & Ors. v. Central Independent Television plc* [1994] 2 I.R. 61 the Supreme Court held that documents did not require to be disclosed if they would represent a threat to the life of a person.
15. In *Skeffington v. Rooney & Ors.* [1997] 1 I.R. 22 Keane J. identified that the exercise engaged by the Court is the balancing of the public interest in the production of documents or the administration of justice, and the public interest in protecting the security interest of the State.
16. That the matter is one in the discretion of the Court, and that the guiding principle is the balance of interests, is clear from the

judgment of Walsh J. in *Murphy v. Dublin Corporation* [1972] I.R. 215:

"It is clear that, when the vital interests of the State (such as the security of the State) may be adversely affected by disclosure or production of a document, greater harm may be caused by ordering rather than by refusing disclosure or production of the document. In such a case the courts would refuse the order but would do so on their own decision." (at p. 234)

17. The approach in the jurisprudence has been to place the onus on a party resisting discovery, and the defendants accept that they bear the burden of establishing that genuine public interest exists in respect of each of the documents considered separately.

18. A person refusing to make discovery does not meet the burden of displacing the right of the other to fairness in the administration of justice by asserting in a general way that a document or class of documents is privileged. This is clear from the judgment of Hamilton C.J. in *O'Brien v. Minister for Defence* [1998] 2 I.L.R.M. 156:

"The onus is on the defendants to specify in detail by number each of the documents in their possession relating to the matters the subject matter of the proceedings and to specify in detail the nature of the privilege claimed in respect of each document and the basis for such privilege." (at p. 160)

19. Fairness and a proportionate consideration of the interests of both parties can be met by the production of appropriately redacted documents. In *Nic Gibb v. Minister for Justice Equality and Law Reform & Ors.* [2013] IEHC 238 O'Malley J. permitted the redaction of the names of certain members of An Garda Síochána. In *Keating v. Radio Telefís Éireann* [2013] IESC 22, [2013] 2 I.L.R.M. 145 McKechnie J., giving the judgment of the Court, made it clear that "no presumption of priority exists as between conflicting interests." He dealt with the claim that "the safety of the State" was in peril, and said that the relevant public interest must be a current and actual one, and not hypothetical or remote.

20. As O'Malley J. said in *Nic Gibb v. Minister for Justice, Equality and Law Reform & Ors.*:

"that public interest must be evaluated by reference to the circumstances actually presenting and be judged against the public interest in ensuring that the rule of law affords meaningful protection to all". (para. 25)

21. I turn now to deal with the individual documents in the light of these established principles.

22. The documents in respect of which privilege is claimed fall into two categories, documents of An Garda Síochána and documents of the Department of Justice & Equality. I will deal with these in sequence.

#### **Documents in respect of which An Garda Síochána claims privilege**

23. Documents 1 to 5 inclusive are internal memoranda, four of which are headed with the rubric "secret", and which relate to the payment to garda informants. It is asserted that the identity of third party informants is privileged in the interests of current operational considerations and in the interests of the protection of those third parties.

24. The plaintiff asserts that these documents are necessary and relevant to enable him to establish the truth of his assertion that he was engaged to act as an informant for the first defendant, the fact and all particulars whereof are denied by the defendants, albeit that it is accepted that the plaintiff was paid a small sum of money having provided some of the information alleged to have been provided, and that persons were arrested on foot of the information.

25. I consider that these documents ought to be discovered, and that the names of the persons, the amount agreed to be paid to them and the city in which they operate, and the operational name of the project are to be redacted.

26. In coming to this decision I am conscious that the documents in question are over sixteen years old, and they disclose the operation of a fund, whether formal or informal, to assist in the production and recovery of information that might lead to the apprehension of crime. I do not consider that the production of these documents to the plaintiff will prejudice the current operation of a similar type.

27. Documents 6 to 10 relate to the arrest of two named individuals in France in regard to drug offences and include "requests for mutual assistance" and internal garda memoranda in regard to these.

28. The circumstances of the arrest of these persons mirror so closely the claim in respect of which these proceedings are brought that I consider in general that these documents ought to be discovered with the following redactions: the names of the individuals; the place or places where these persons were apprehended and where they were detained, as well as any information disclosing the route to those locations said to be have been taken by the transporting vehicle; the names of other persons identified in the body of the documents; the vehicle registration number and telephone numbers. The names of the investigating gardaí and foreign investigating officers are not to be redacted. The identity of those persons may be necessary to enable the plaintiff to prepare his proofs for trial. Their phone numbers and other contact details are to be redacted.

29. Document 11 also relates to the French authorities and relates to bank account details only. The name of the person not connected to this case should be redacted and the document then is to be discovered.

30. Document 12 also relates to request for assistance from the French authorities in respect of three persons, one the plaintiff, and two others unconnected with the present proceedings. This document is highly relevant to the plaintiff's claim and it contains a narrative of what the plaintiff told French authorities when arrested. The names of the two unrelated persons should be redacted and the balance of the document disclosed.

31. Documents 15, 16 and 17 are part of a rogatory request from the French authorities. These documents should be disclosed, save that the mobile phone numbers, and the names of unconnected persons should be redacted.

32. Documents 19 and 20 are the statements of witnesses from a local authority whose area of operation is the licensing and taxation of vehicles. These ought not in my view to be disclosed. They are both documents which identify a person, a vehicle registration number and an address. They do not appear to me to be probative of the claim made by the plaintiff.

33. Document 21 is also a witness statement of an individual of whose identity the plaintiff is also aware. I do not consider that this document should be discovered. There is some risk to the safety of this witness. It is not in my view disproportionate to refuse

disclosure of this record. The evidence given in this statement, which might be of assistance to the plaintiff, is within his own procurement. The statement itself is not evidence that would be admissible at trial.

34. Document 22 is a rogatory request from the French authorities and should be disclosed. No security issues arise.

35. Document 23 could be described as a very sensitive document. It is a statement of a garda witness and contains sensitive information with regard to operational matters. It also discloses the identity of other persons believed to be involved in criminal activity, and contains an assessment of the view of the gardaí of those persons. I consider that this document contains sensitive information of an operational nature, and the probative value of that information is limited, and at best is tangential to the claim the plaintiff makes. Discovery of this category should be refused for reasons of privilege.

36. Document 24 is also part of a rogatory request from the French government. It contains highly significant detail with regard to the claim of the plaintiff. This document does not disclose operational or procedural matters of which this plaintiff would not be generally aware. It should be disclosed save for the redaction of the entire of the second last paragraph on p. 2, and personal details in regard to the other person named in the memo who is not connected with this case.

37. No claim of privilege is now made in respect of Documents 25, 26, or 27.

38. Document 28 contains advice from the Office of the Attorney General and ought not to be disclosed for reasons of legal privilege.

39. Privilege is no longer claimed in respect of Document 29.

40. Document 30 relates to circumstances pertaining to the plaintiff after he was released from prison in France. It does not appear to me to contain any matter of a sensitive, and is to be disclosed.

41. The second document identified is Document 17, dated 8th June, 2012, is entitled "legal privilege". It is not to be disclosed.

#### **Documents in respect of which the Department of Justice & Equality claims privilege**

42. The Department of Justice & Equality claims privilege in respect of one document only – the entire of the rogatory request in relation to the plaintiff and another person not connected with this inquiry.

43. The claim of public interest privilege is being maintained due to an assertion that certain obligations arising under "mutual assistant legislation", including but not limited to, communications or references to communications between a department of government and a diplomatic mission or consular post in the State, or communications or reference to communications between government or a person acting on behalf of the government and another government or a person acting on behalf of that other government. Privilege is being maintained in order to protect the identity of individuals who are not a party to these proceedings and/or considerations of the protection of life.

44. Some of the documents under this head are partially comprised of the request against An Garda Síochána and have been dealt with there. The balance of the document relates to persons not connected with this inquiry and certain activity of those persons within their employment. All of this documentation is subject to public interest privilege in my view. It also is privileged because it identifies persons not relevant to this investigation. It mostly consists of documentation and information not relevant to the plaintiff's claim in these proceedings.

45. The bank statement included in this bundle of documents is within the procurement of the plaintiff himself.

#### **The proposed redactions on other documents**

46. In addition to the bundle of documents in respect of which privilege is claimed, the State bodies have provided four booklets of documents in respect of which privilege is not claimed, but which have been redacted. I have been furnished with clean unredacted copies of these documents and I turn now to consider whether the redactions are justified.

#### **Category 1: Garda Síochána non-privilege redacted documents**

47. I consider it appropriate to redact the names and other identifying details of persons not associated with this litigation, as well as the telephone numbers of the gardaí and French officials dealing with the matter. A document behind Tab 11 contains the car registration details of a motor vehicle which I consider should be redacted, albeit it is not redacted in the documents furnished to me. It seems to me to be little point in redacting the name of the owner of that vehicle if the vehicle registration details remain visible, as a search in the relevant motor tax office is likely to reveal the relevant redacted information if the vehicle registration details are included.

48. The names of some of the gardaí who are involved in the investigation have been redacted in some but not all cases. I do not consider it appropriate that the names of those persons be redacted. Information with regard to those persons is highly relevant to the plaintiff, who ought to be given sufficient documentation to enable him to consider whether the attendance of those persons ought to be secured by a sub poena. Further, I see no reason why the names of some garda personnel involved in the investigation should be redacted and others not. I do consider however, that the names of civil servants involved in the relevant departments of government ought not to be released, and it is appropriate to redact their names. That means that Document 8 has been appropriately redacted as it has deleted the identifying details of the relevant civil servant. I make a similar observation concerning Document 41.

#### **Non-privileged redacted documents of the Department of Foreign Affairs**

49. The document at (1) has been appropriately redacted as it identifies a third party the name of whom is evidently a matter of operational importance. Document 13 contains legal advice and is not discoverable.

50. Documents 20 and 23 have been suitably redacted to remove identifying features of third parties.

51. The document identified as "GLS" has been appropriately redacted also for reasons of the identity of non-parties.

#### **Department of Justice & Equality non-privileged redacted documents**

52. The handwritten note at the end of the document at 4 has been fully redacted. That memo is appropriately redacted as it relates to the procedures for obtaining internal advice.

53. The handwritten note at the end of the document at 9 is also appropriately redacted for the same reason.

54. Redactions in other documents to protect the identities of third parties are appropriate.

**An Garda Síochána non-privileged redacted documents**

55. All of the redactions relate to the protection of third parties and are not objectionable.

**Decision**

56. I therefore direct that the relevant affidavits of discovery to take account of this ruling now be furnished by the relevant State authorities.