

**THE HIGH COURT****2008 6497 P****BETWEEN:-****FRANCIS MCGUINNESS****PLAINTIFF****AND****THE COMMISSIONER OF AN GARDA SÍOCHÁNA,  
IRELAND AND THE ATTORNEY GENERAL****DEFENDANTS****JUDGMENT of Mr. Justice Herbert delivered the 7th day of December 2010**

In a statement of claim filed on the 1st August, 2008, the plaintiff pleads that on the 10th July, 2008, members of An Garda Síochána entered his dwelling house and business premises and seized the following items: a motor car, five mobile telephones, a telefax machine, credit cards, an international driving permit, a computer hard-drive and documents relating to a number of limited liability companies and to his financial affairs. Despite letters in that behalf dated, 11th July, 2008, and 22nd July, 2008, the defendants have retained these items without lawful excuse and without his consent. He has thereby been deprived of the use of these items in the conduct of his business affairs and, as a consequence, has suffered economic loss. He claims damages for conversion, trespass and/or detainment and an order directing the first named defendant to return these items to him.

In their Defence, delivered on the 7th October, 2008, the defendants plead that the aforementioned items were lawfully seized on the 10th July, 2007, on foot of search warrants issued pursuant to the provisions of s. 48 of the Criminal Justice (Theft and Fraud Offences) Act 2001, by a judge of the Dublin District Court on the 9th July, 2008, acting upon sworn informations. The first named defendant has refused to return certain of these items as they constitute evidence in the proper conduct of an investigation into the activities of Vehicle Tech Limited and the plaintiff in relation to certain possible criminal offences. It is pleaded that the items retained were therefore obtained and are retained in accordance with lawful authority. The defendants join issue with the plaintiff in his claims and deny that he has suffered the alleged or any economic loss or damage and, assert that in any event, the same is irrecoverable at law as a matter of public policy, being items seized and retained in the course of and for the purposes of a bona fide criminal investigation, including into why the plaintiff had two valid Irish passports each with different personal details.

The defendants claim that an oral agreement was reached between the parties on the 31st July, 2008, as to the return of certain of the seized items within agreed timeframes and the furnishing of a written response to the plaintiff's claim for the return of the remaining items. This agreement was reflected in correspondence from their solicitor dated the 5th August, 2008. Performance of this agreement took place on the 31st July 2008, and on the 13th October, 2008. In the premises the defendants plead that the plaintiff has acted prematurely in issuing these proceedings prior to the expiration of the agreed timeframes.

By Notice of Motion dated the 19th April, 2010, the plaintiff sought discovery upon oath of the documents specified hereunder for the reasons stated, voluntary discovery having been sought unsuccessfully from the defendants on the 7th October, 2009, 24th November, 2009, and, the 18th March, 2010.

(a) Any note, memorandum, documents, data or information in permanent form showing or tending to show that the items in possession of the Defendants constitute evidence for the purposes of a criminal investigation as alleged at para. 2 of the defence.

The defendants allege that the items, the subject matter of the proceedings are necessary for the investigation into activities of the plaintiff in relation to certain criminal offences. This claim is nowhere substantiated. The Plaintiff has not been charged with a criminal offence. Discovery is sought to establish whether there is any substance to the plea at para. 2 of the Defence. The status of the alleged criminal investigation and the material demonstrating that the scheduled items need to be retained are material to the questions in issue between the parties. If the items are not, in fact, evidence of criminal activity, their retention is wrongful. The defendants have specifically raised their evidential value and made the justification of that plea relevant to the plaintiff's claim.

(b) Any note or memorandum constituting an agreement allegedly made on the 31st of July, 2008, as referred to in para. 7 of the Defence.

The Defendants are aware that there was no agreement of the kind alleged by them at para. 7 of the Defence. There were negotiations which concluded without agreement. The Defendants specifically plead the existence of a note prepared by their Counsel by reference to a letter of August 5th 2008. The plaintiff is entitled to see a copy of that note. It cannot be privileged if, as contended by the Defendants, it represents the concluded agreement that was reached by the parties, as opposed to being a note made in contemplation of the purported agreement. The Defendants have made an issue of the existence of an agreement. Only the Defendants are in a position to establish its existence and the means it relies upon to do so is counsel's note. Its discovery is essential to the Plaintiff's addressing the claim that an agreement was reached.

This application to the Master of the High Court was grounded on the affidavit of Declan Fahy, solicitor in the firm of Fahy Bambury McGeever solicitors on behalf of the plaintiff, sworn on the 16th April, 2010. By order dated the 23rd July, 2010, the Master of the High Court ordered that the defendants do on or before the end of October, 2010, make discovery upon oath of the following documents which are or have been in their possession or power:-

(a) Counsel's note referred to in the Defendants' letter dated the 5th day of August, 2008.

(b) Documents recording the seizure of the plaintiff's property and any record of a decision taken to refer same for technical or other analysis together with in respect of each such item, documents describing same and allocating same to a particular crime or crimes under investigation (the names of all suspects redacted).

By Notice of the Motion filed on the 30th July, 2010, the defendants now seek an order of this Court setting aside the Order of the Master of the High Court made on the 23rd July, 2010, and such further or other order as this Court might deem fit.

It was submitted by Senior Counsel for the plaintiff that "without prejudice" negotiations had taken place on the 31st July, 2008, but that no agreement in the terms claimed by the defendants, or in any terms, had been reached. The defendants were insisting that an oral agreement in the terms alleged in para. 7 of their Defence had been concluded. If this were so, - which was denied, - there was a case to meet that the instant proceedings may have been issued prematurely. Counsel's note was clearly relevant to this issue. It was clearly a document which might advance the plaintiff's case or damage the case of the defendants on this issue. It is clearly a document of which discovery should be made on oath and, it was a matter for the defendants whether or not they claimed privilege in respect of this document in the affidavit of discovery.

It was submitted by Counsel for the defendants that the note referred to in the letter dated the 5th August, 2008, was a note made by him of what had occurred at a meeting held on a "without prejudice basis". An oral agreement had been reached and all those items agreed on that date to be returned to the plaintiff had been returned in accordance with the terms of the agreement. However, the plaintiff had issued the Plenary Summons on the 1st August, 2008, before the agreed date for the return of some of the items had arrived. The remaining items were being lawfully retained for use as evidence in criminal proceedings and would not be returned until the conclusion of those proceedings. The existence of the agreement was therefore only relevant to an issue of costs and the order for discovery of the note should not have been made by the Master of the High Court.

It was submitted by Senior Counsel for the plaintiff that the items were taken on the 10th July, 2008, and, two and a quarter years had elapsed without the plaintiff being charged with any offence. No evidence, he said, was put before the court from which it could reasonably conclude that the respondents, their servants or agents were conducting genuine ongoing investigations. Absent, an affidavit to that effect from the Director of Public Prosecutions, it was not open to Counsel for the respondents to seek to assure the court that proceedings were imminent. Where items are seized from an individual, who must be presumed to be innocent, and are thereafter withheld from that individual for over two and a quarter years without any charges being preferred or any prosecution taken, even though the loss of those items has caused and is continuing to cause that individual great inconvenience and difficulty in the conduct of his affairs, that individual must have a right to have those items returned to him unless the respondents can demonstrate lawful and reasonable grounds for continuing to retain them. The documents sought on discovery are, he said, relevant to the bona fides or otherwise of the reasons pleaded by the respondents at para. 2 of their Defence, as to why they continue to withhold these items from the plaintiff. If the respondents considered that the documents sought should be privileged from disclosure, they must nonetheless make discovery on oath of these documents but are entitled to claim public interest immunity or, such other form of privilege as they may be advised in respect of them. The Order of the Master of the High Court, which limited the scope of the discovery sought in favour of the respondents, should be upheld by this Court.

Counsel for the respondents submitted that the plaintiff and, Vehicle Tech Limited, a company owned or controlled by him, were the subject of an ongoing garda investigation. The plaintiff, by commencing a civil action for trespass, conversion and detainment was not entitled to obtain discovery of documents concerning the reasons why the respondents considered that retaining some of these items was necessary for the proper conduct of their investigation or, why they considered that these items might become evidence at a future trial. If there was to be no trial, the items would be returned to the plaintiff. If there was to be a trial the Director of Public Prosecutions alone, with the assistance of An Garda Síochána, would determine the contents of the Book of Evidence. An issue as to the probative value of any of these items included in the Book of Evidence might well arise during such a trial. However, the plaintiff was not entitled by commencing a civil action seeking the return of these retained items to attempt to extract details in advance of any such trial of the ongoing Garda investigation or of the considerations behind the preparation of a Book of Evidence.

In the opinion of this Court the plaintiff would appear to have given insufficient consideration to the terms s 9 of the Criminal Law Act 1976, which provides as follows:-

"(1) Where in the course of exercising any powers under this Act or in the course of a search carried out under any other power, a member of the Garda Síochána, a prison officer or a member of the Defence Forces finds or comes into possession of anything which he believes to be evidence of any offence or suspected offence, it may be seized and retained for use as evidence in any criminal proceedings, or in any proceedings in relation to a breach of prison discipline, for such period from the date of seizure as is reasonable or, if proceedings are commenced in which the thing so seized is required for use in evidence, until the conclusion of the proceedings, and thereafter the Police (Property) Act, 1897, shall apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act."

As proceedings have not been commenced against the plaintiff or against Vehicle Tech Limited by the respondents, the issue so far as the plaintiff's civil action for trespass, conversion and detainment is concerned, is therefore one of whether or not the period of retention of these items from the 10th July, 2008, to the 29th November, 2010, is reasonable. In *Rogers v. The Director of Public Prosecutions and Ors* [1992] I.L.R.M. 695 at 698, O'Hanlon J. held as follows:-

"I think that some consideration has to be given to the owner of a motor car which has been stolen or unlawfully taken: similarly in relation to other property the subject matter of criminal charges where deprivation of possession thereof will seriously prejudice or inconvenience the innocent owner thereof. In regard to such property I would hold that any forensic examination, whether by the gardaí or on behalf of an accused person, should be sought and should take place within a reasonable time having regard to all the circumstances of the case, so that the property can be returned as expeditiously as possible to its true owner."

In the instant case the plaintiff enjoys the benefit of the presumption of innocence. Subject to this restriction as to the reasonableness of the period of retention, the respondents, through their servants or agents the members of An Garda Síochána, have a statutory right to seize and to retain these items. No challenge has been made to the lawfulness of the search warrants or the lawfulness of the execution of those warrants. The mere belief of a member of the Garda Síochána that the items may be evidence of any offence or suspected offence is sufficient to authorise the seizure and retention of those items for use as evidence. This means that they are available to be so used, not that they must be so used. Whether or not they are in fact used is a matter solely for the Director of Public Prosecutions assisted by the Garda Síochána to determine. Documents recording the seizure of these items, or recording a decision to submit these items for technical or other analysis, or describing that analysis or allocating these items to a particular crime or crimes under investigation, if they in fact exist, are not relevant to any issue on the pleadings in this

civil action between the plaintiff and the respondents. Whether retaining these items for two and a quarter years is reasonable in the circumstances of the case, or amounts to conversion and/or detainee is the issue.

The court will therefore grant the relief sought in the Notice of Motion filed on the 30th July, 2010, to the extent of setting aside the Order of the Master of the High Court made on the 23rd July, 2010, insofar as it directed that the defendants/appellants make discovery on oath of documents recording the seizure of the plaintiff's property and any record of a decision taken to refer same for technical or other analysis together with, in respect of each such item, documents describing same and allocating same to a particular crime or crimes under investigation (the names of all suspects redacted), and insofar as the said Order directed that the defendants/appellants pay to the plaintiff/respondent the costs of the motion. This Court will confirm the said Order of the Master of the High Court insofar as it directed that the defendants/appellants make discovery on oath of Counsel's note referred to in the defendant's letter dated the 5th August, 2008. This Court will extend the time for the making of such discovery to on or before the 11th January, 2011, the affidavit on behalf of defendants/appellants be made by Detective Superintendent Eugene Gallagher. The court will hear the parties on the question of costs.