THE COURT OF APPEAL

CIVIL

Birmingham J
Mahon J
Edwards J.

Neutral Citation Number: [2017] IECA 330

Record No : 552/2016

FRANCIS MCGUINNESS

Plaintiff/Appellant

V

THE COMMISSIONER OF AN GARDA SIOCHANA,

IRELAND and THE ATTORNEY GENERAL

Defendants/Respondents

JUDGMENT of Mr Justice Edwards delivered on the 18th of December 2017.

Introduction

1. For ease of reference the plaintiff/appellant will be referred to in this judgment as "the plaintiff" and the defendants/respondents will be referred to as "the defendants".

2. This appeal arises in respect of a motion, in effect a motion for discovery, brought by the plaintiff in the context of his action for damages and injunctive and other relief against the defendants, and each of them, which he commenced by Plenary Summons on the 2nd of September 2014. The claim arises out of the search of plaintiff's business premises at Pinnock Hill, Swords, Co Dublin by members of An Garda Siochána on Saturday the 23rd of August 2014 on foot of a search warrant issued to them by a judge of the District Court pursuant to s.10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 as substituted by s.6 of the Criminal Justice Act 2006.

3. The appeal before this court is against the decisions and judgments of the High Court (Keane J) delivered on the 7th of October 2016, and the 28th of October 2016, respectively, refusing the reliefs sought by the plaintiff in a Notice of Motion in these proceedings dated the 10th of March 2015 in which he had sought:

> a. An Order compelling the first named defendant to furnish the plaintiff with a copy of the sworn information grounding the application for the search warrant of the plaintiff's premises at Pinnock Hill, Swords, Co Dublin;
>
> b. If necessary, an Order compelling the first named defendant to furnish the plaintiff with a legible copy of the said search warrant;
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> c. Further or other Order; and
>
> d. Costs.

The judgments of the High Court

4. The reason that there are two judgments and orders appealed against is that the High Court judge, correctly in our view, dealt with the matter in two stages.

5. The High Court judge noted that the procedure being adopted by the plaintiff was somewhat irregular, in that he was seeking on an interlocutory basis a mandatory order *"compelling the first named defendant to furnish the plaintiff with a copy of the sworn information grounding the application for the search warrant".* He made the following fully justified observation in his judgment of the 7th of October 2016:

> *"10. The legal basis for the application has not been made clear. It is trite to observe that, in civil proceedings generally, where one side seeks disclosure of a document in the possession of the other, the appropriate course is to bring an application for discovery in accordance with the applicable rules of court, and thereafter to seek inspection of that document in accordance with those rules. Thus, one would not normally expect the issue of discovery to arise until the pleadings have closed; one would expect any application to court for an order for discovery to be preceded by a preliminary letter in the prescribed form seeking voluntary discovery, and so forth. The pleadings in this action are not closed, the relevant procedural rules have not been complied with, and the present application is not couched as one for discovery or inspection of the relevant document."*

6. Moreover, the High Court judge was far from impressed with various explanations put forward on the plaintiff's behalf for proceeding in this manner, but decided, though not without some misgivings, to allow the plaintiff to proceed in circumstances where the plaintiff had cited an observation of Fennelly J., in *Creaven & Ors v. Criminal Assets Bureau & Ors* [2004] 4 I.R. 434 (at 467), deploring the refusal of the relevant respondent in that case to provide the applicants with *'copies of the essential documents which had been used to ground the applications for the warrants'*; and also in circumstances where the defendants were not objecting to the motion being dealt with on the merits.

7. The trial judge then heard the plaintiff's counsel on the merits, based on the plaintiff's grounding affidavit sworn on the 2nd of

September 2014, and the documents therein exhibited, in which he asserted (*inter alia*) that *"a citizen"* is entitled *"to see any information sworn by a member of An Garda Siochána concerning them and proffered in open court subject to such claims of confidentiality or security that the Gardaí may choose to assert."*

8. The High Court judge then considered two affidavits sworn on behalf of the defendants by Detective Inspector Fergus Treanor on the 8th of October 2014, and on the 28th of April 2015, respectively.

9. In the first of these affidavits the Detective Inspector set forth the background to the obtaining of the search warrant at issue, and his evidence in that regard is summarized in paragraphs 19 to 24 inclusive of the High Court judge's judgment of the 7th of October 2016.

10. In the second of these affidavits the Detective Inspector makes a number of assertions to support claims of public interest privilege and informer privilege respectively. He deposed, *inter alia*, to the following:

> *"6. I further say and believe that the fundamental sworn information used to ground the application for the warrant is privileged and confidential. I say that Gardaí have relied upon the evidence and information supplied by a number of confidential informants whose lives would be at risk if their identity was made known. I further say and believe that a number of members of An Garda Siochána are in the process of conducting an investigation both in Ireland and in Europe which at this moment in time is at a particularly sensitive stage. I say that if the information used to ground the application for the warrant was made public the identities of the informers and the individual members of the Gardaí would become known and their lives could be at risk. I further say and believe that the information currently being gathered for the purpose of this investigation is not yet fully complete and were it to become known it could jeopardise the full extent of the ongoing operation.*
>
> *7. I say and believe that An Garda Siochána, like any other police force, must have an ability to investigate matters fully and it is not in the public interest for incomplete investigation information to become widely known.*
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> *8. I further say and believe that the only reason that [the plaintiffs solicitor] asserts that [the plaintiff] is entitled to see the information used to ground the warrant is that he is a citizen of Ireland. I further say that [the plaintiffs solicitor] accepts at paragraph 3 of his affidavit that An Garda Siochána are entitled to claim confidentiality over the information sworn for security purposes. I say and believe that, in the circumstances, there are matters of security, confidentiality and indeed there may be lives at risk which give the [defendants] herein strong grounds to assert privilege over this information.'*

11. At this point in his judgment the High Court judge reviewed the authorities and case law concerning both public interest privilege and informer privilege cited to him by the parties, including *McLaughlin v. Aviva Insurance (Europe) plc* [2012] 1 ILRM 487; *D v. N.S.P.C.C* [1978] A.C. 171; *DPP v. Special Criminal Court* [1999] 1 I.R. 60; *Ambiorix v. Minister for Environment (No 1)* [1992] 1 I.R. 277 and *Keating v. RTE* [2013] 2 ILRM 145.

12. The High Court judge observed with respect to the claim of informer privilege, in particular, that:

> *"30. It seems to me to be an unusual feature of this case that the court is invited to accept that the sworn information at issue either directly identifies an informer or informers or that it includes such facts as would permit the identification of the confidential informant(s) concerned on a circumstantial or 'jigsaw' basis. Such sworn documents as the court has seen previously in cases where informer privilege is at issue, tend to describe the relevant ground of suspicion as deriving from 'information received from a confidential informant who has proved reliable in the past' or some broadly equivalent formulation. Further, I had always understood that the essential art or science of the preparation of such documents lies in the presentation of sufficient evidence to satisfy the court of the existence of reasonable grounds for suspicion that the relevant evidence may be found at the place concerned without disclosing specific facts that might compromise the relevant investigation if more widely known or, worse still, permit the identification of a confidential informant. Of course, this may be an unusual case where the former could not be accomplished without risking the latter. Alternatively, the practice may have altered since the enactment of s. 26 of the Criminal Justice (Amendment) Act 2009, whereby applications for search warrants are now heard otherwise than in public."*

13. The High Court, having reviewed the law, then decided that he would view the document in controversy *"in order to identify and weigh the competing interests in compelling or withholding its production".* The decision that he would proceed in this way was the subject of the judgment and order dated the 7th of October 2016.

14. The High Court then duly examined the text of the sworn information at issue, and having done so issued his second judgment and order dated the 28th of October 2016. In the curial part of his second judgment, which is succinct and to the point, he states:

> *"5. I am satisfied that the document concerned is material to an ongoing criminal investigation, namely the investigation described in my earlier judgment.*
>
> *6. I am further satisfied that there is a risk that the range and detail of the information contained in the document at issue could result in the identification of a confidential informant or informants.*
>
> *7. Accordingly, I am satisfied that both public interest privilege and informant privilege are properly invoked.*
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> *8. I have considered the question of the possible redaction of the document to disclose so much of it as does not give rise to the risk that an informant or informants may be identified thereby, but I have decided against redaction for two reasons. First, it seems to me that the entire document is covered by the dictum of Denham C.J. in McLaughlin v. Aviva Insurance (Europe) plc [2012] 1 ILRM 487 at 492 that 'in general, documents material to an ongoing criminal investigation by An Garda Síochána should not be required to be disclosed in civil proceedings.'*
>
> *9. Second, it seems to me that, even if it were appropriate instead to disclose some part of a document material to an ongoing criminal investigation for the purpose of the present proceedings, the practical difficulties in attempting to calibrate the redaction of the document so as to disclose some meaningful part of it without inadvertently undermining or destroying the privilege are simply too great. In that regard, it must be remembered that this Court – unlike, in certain circumstances, a court of trial – has only limited information available to it that might enable it to assess risk in context. Further, it cannot be forgotten that the risk invoked in this case is not merely the potential compromise of an*

ongoing criminal investigation but also a potential risk to the life of an informant (or informants) and, hence, cannot be lightly weighed.

Decision

10. For the reasons I have stated, I must refuse the plaintiff's application."

The Appeal

15. In a Notice of Appeal to this Court filed on the 14th of December 2016 the plaintiff indicated that he was appealing on six discrete grounds, namely that the trial judge erred in:

> "1. By inference, holding that there was no entitlement at common law to be furnished with a copy of the sworn information, albeit appropriately redacted to exclude truly privileged material.
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> 2. Treating the application as one for discovery in which the courts have a wider discretionary jurisdiction.
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> 3. Addressing the question of privilege when that was not an issue that was before him in the motion, which was whether there was any entitlement to a copy of the sworn information, with privilege to be dealt with later if he held that such entitlement existed.
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> 4. Deciding the privilege question on the basis of unspecified sweeping assertions in DJ Treanor's affidavit, lacking particularity of any kind: these assertions are not even admissible evidence, being more in the nature of conclusions that might be drawn from a stated set of facts and even the source or means of the deponent's knowledge is not given, as required by the rules.
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> 5. Holding that no part of the information may be furnished, not even the title thereto, its jurat, any recitals in it or the details of its swearing e.g. the identity of the deponent and when, where and before whom it was sworn.
>
> 6. Awarding the costs of the application to the respondents on the mistaken recollection that the only issue before the court was one of privilege when, in fact, the respondents had argued that the appellant was not entitled to a copy of the sworn information under any circumstances."

16. Written submissions in support of these grounds of appeal were subsequently filed.

17. Notwithstanding the terms of the Notice of Appeal, and the said submissions, counsel for the plaintiff, who had not been in the case when it was before the court below, sought leave at the oral hearing before us to argue the appeal on what he characterised as *"a single net point"*, namely that the judge's ruling had been premature. He was permitted to do so, and confirmed to the Court that he was no longer intending to rely on the six original grounds of appeal in the Notice of Appeal that had been filed, and that he was in effect abandoning them.

18. The prematurity argument was then advanced in the following way. Counsel for the plaintiff did not dispute that the High Court judge had followed a procedure that is well established in law in deciding to approach the matter in two stages, and in deciding to view the contentious document before ruling on the issues of both public interest privilege and informer privilege. However, he contended, the judge had been premature in embarking on that process. He submitted that there may have been a digital audio recording (DAR) potentially available to assist the High Court judge, which the judge did not bespeak or consult. It is presumed that this was an allusion to a possible digital audio recording of the hearing before the District Judge at which the warrant was applied for. Moreover, it is by no means clear what any digital audio record might have added that was not contained in the sworn information that was available to be viewed by the judge, as he proposed to do, and in fact proceeded to do.

19. Counsel's suggestion prompted an intervention from the bench pointing out to him that the proceedings before the High Court were adversarial and it was incumbent on the moving party to put before the court all evidence on which he intended to rely, and it was not for the High Court judge to go off and do his own investigation. Counsel's response to this intervention was to say that he agreed with the court but that *"if there was DAR that could have been put before the court, and should have been put before the court, and wasn't, then that did not assist the court".* He could put the matter no further.

20. I would observe that no application was made to the High Court judge or, as far as this Court is aware, to the District Court judge for access to any DAR recording or to have a transcript provided of any DAR recording. Indeed, no evidence has been adduced that any such exists. There may well be no recording if the application was heard in chambers rather than in open court.

21. Although counsel had contended that he was relying on a single net point, he in fact sought to advance a further ground, or quasi ground, namely that in the light of Fennelly J's remarks in *Creaven & Ors v. Criminal Assets Bureau & Ors* cited earlier in this judgment, deploring the refusal of the relevant respondent in that case to provide the applicants with copies of the essential documents which had been used to ground the applications for the warrants, the High Court judge had erred in failing to regard the defendants as displaying what he described as "the same mentality", and counsel appeared to be suggesting that this was a circumstance which the High Court judge should have taken into account, but failed to take into account, in deciding on whether or not to uphold the claims of privilege being asserted.

22. I have no hesitation in rejecting in rejecting any such complaint in circumstances where the *Creaven* case was not concerned in any way with a claim of privilege, be it public interest privilege, or informer privilege, but rather was concerned with whether search warrants issued under s.14 of the Criminal Assets Bureau Act 1996 by a District Judge, assigned to more than one District, in respect of a District other than the one in which he/she was physically present at the time of issuing the warrants, were lawful. It had nothing to do with any claim of privilege.

23. In a brief oral submission in reply, counsel for the defendants contended that it was unnecessary to engage with the issues around the claims of privilege in the circumstances of the case. It was submitted that the High Court judge's order should be upheld because the most critical matter that must be demonstrated by any applicant for discovery was relevance, and the plaintiff in this case had failed to establish the relevance of the sworn information that he was seeking discovery of to the claim he was advancing in his Statement of Claim. We were referred to the recent decision of this Court in *O'Brien v. Red Flag Consulting Limited* [2017] IECA 258 in support of this argument.

24. Counsel submitted that if this Court felt it was necessary for him to engage with the privilege issues, he would be contending that the trial judge had followed the correct procedure, that his decisions on these issues were made within jurisdiction, that they were unassailable in so far as they involved findings of fact, and that they were correct in law.

Decision

25. I am satisfied that the plaintiff has failed to demonstrate any infirmity in the High Court judge's decision. The plaintiff has failed to demonstrate the relevance of the document in respect of which he seeks discovery to the claim that he has pleaded. Moreover, even if the plaintiff had been entitled in principle to discovery of the document at issue, and I am satisfied that he was not, there were asserted claims of public interest privilege and informer privilege, which the High Court judge had been disposed to uphold, following a viewing of the document in accordance with established and proper procedure. I have heard nothing from, or on behalf of, the plaintiff to persuade me that the High Court judge erred in any way.

26. In the circumstances I would dismiss the appeal.