THE HIGH COURT

[2005 No. 4481P]

BETWEEN

STEPHEN COSTELLO AND KAREN COSTELLO

PLAINTIFFS

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

DEFENDANT

JUDGMENT of Mr. Justice Keane delivered on the 17th February 2017

Introduction
1. The plaintiffs move for interlocutory orders directing that this action be tried by judge and jury; that it be transferred into the jury list for that purpose; and that time be extended to permit the application to be made.

The plaintiffs' claim
2. The plaintiffs delivered their statement of claim on the 13th January 2006. In it, they seek a wide range of reliefs against the defendant. Those reliefs include four separate permanent injunctions restraining any member of An Garda Síochána from: 1) attending at the plaintiffs' home; 2) watching or besetting the plaintiffs at their home; 3) driving up to or alighting from a vehicle at or near the plaintiffs' home; and 4) watching, besetting or following the first plaintiff wherever he may go. The plaintiffs further seek damages for trespass to the person by harassment, watching and besetting, intimidation and the intentional infliction of emotional suffering; damages for repeated wrongful arrest; and damages for criminal slander.

Procedural history
3. These proceedings commenced as long ago as the 21st December 2005, when a plenary summons issued on behalf of the plaintiffs. On the same date, Laffoy J granted interim injunctions in the same terms as the permanent injunctions already described. On the 29th December 2005, on consent between the parties, Finlay Geoghegan J. granted a narrower interlocutory injunction, pending the trial of the action, restraining members of An Garda Síochána from entering the plaintiffs' property except under authority of a warrant or at the request of a member of the household.

4. A defence was delivered on the 23rd March 2006. Since then, progress towards the trial of the action has been slow. On the 3rd October 2007, pursuant to the terms of O. 19, r. 27 of the Rules of the Superior Courts 1986, as amended ('the RSC'), Laffoy J struck out certain parts of the plaintiffs' statement of claim that alleged various incidents of watching and besetting, or harassment and intimidation, as tending to prejudice the fair trial of the action, because the incidents concerned had not been dated even by reference to the year in which each was alleged to have occurred. The plaintiffs appealed that decision to the Supreme Court, which dismissed the appeal on the 5th February 2010.

5. A reply to defence was delivered on the 26th February 2010. Having joined issue with the defence, it pleads, in response to the defendant's denial of watching and besetting, intimidation or harassment, and further denial that any such cause of action as 'watching and besetting' is known to law, that the relevant plea in the statement of claim 'amounts to and constitutes a claim for misfeasance of public office.'

6. On the 14th October 2014, White J refused the defendant's application for an order dismissing the proceedings on the ground of the plaintiffs' inordinate and inexcusable delay in prosecuting them, but awarded the defendant his legal costs of that application and, perhaps more significantly, discharged the interlocutory injunction that Finlay Geoghegan J had granted almost nine years before.

Mode of trial
7. The plaintiffs' then solicitors served four separate notices of trial in 2011. They were dated the 26th February, the 19th March, the 21st June, and the 6th July respectively. Each gave notice of the trial of the action 'before a Judge and Jury.'

8. On the 12th July 2011, just less than a week after the last such notice of trial was served, the defendant issued a motion seeking orders striking it out and directing the transfer of the proceedings into the non-jury list for trial before a judge sitting alone.

9. By fax dated the 21st July 2011, the plaintiffs' then solicitors notified the defendant's solicitors that the matter had been set down and assigned a number in the non-jury list on the 18th July 2011, and requested confirmation that the defendant's motion to strike out the plaintiffs' notice of trial could be struck out on that basis with no order for costs.

10. When the defendant's motion came before the Court shortly afterwards it was struck out on consent. On behalf of the defendant, Inspector Jeremiah Keohane of An Garda Síochána has averred that, in opposing the defendant's application for his legal costs of the motion, Counsel for the plaintiffs submitted to the court that it had been the plaintiffs' intention at all times to set the matter down before a judge sitting alone but a notice of trial before a judge and jury had issued in error. Murphy J awarded the defendant his costs of that motion.

The present application
11. The plaintiff now moves for an Order directing that these proceedings should be tried by a judge and jury, pursuant to O. 36, r. 6 of the RSC, and an Order extending the time for bringing the application for that Order, pursuant to the same rule or, alternatively, O. 122, r.7.

12. Order, 36, rule 6 of the RSC provides, in substance, that in all cases in which the parties are entitled to a jury trial, the party serving a notice of trial shall state in it whether he requires a jury trial or not, and the case shall be tried in accordance with that election, unless it is for trial by a judge sitting alone and another party to the action then elects for a jury trial in writing within 14 days of the service of the notice or within such further time as the court may allow. Order 122, rule 7 of the RSC provides in material part that, subject to any relevant provision of statute, the Court shall have power to extend or abridge the time permitted for doing any act under the Rules, even where an application to extend time is made outside the time permitted.

13. The application is grounded on the affidavit of John Geary, the plaintiffs' solicitor, sworn on the 27th November 2015.

14. Mr Geary avers, in relevant part, as follows. He took over carriage of the proceedings from the plaintiffs' previous solicitors on the 13th October 2013. He wrote to the defendants' solicitors on the 12th May 2015, enclosing a copy of the notice of trial dated the 6th July 2011 and stating that he had been informed, on inquiry at the Central Office, that the said notice was still 'live and current.' In that letter, he went on to express the belief that, in consequence, the case must have been incorrectly set down for trial in the Chancery list. The defendant's solicitors wrote back on the 12th May 2015, summarising the position as already described and insisting that there had been no mistake.

15. The present motion issued on the 30th November 2015. At paragraph 5 of his affidavit, Mr Geary avers:

> 'I say and believe that having reviewed the files and without wishing to cast any aspersions of fault or blame on any party that the issue has come about as a result of human error on the part of the then solicitors for the plaintiff (sic) and am satisfied that this matter has been wrongly listed in the non-jury list….'

16. Mr Geary does not explain the nature of the error that he believes was made by the plaintiffs' former solicitors, nor does he engage with the averments made, and documents exhibited, on behalf of the defendant, which are fundamentally inconsistent with that belief. The plaintiffs' position appears to be that, once their solicitor has satisfied himself that an undisclosed and unspecified error was made by their former solicitors, no further evidence – indeed, no evidence at all – is necessary to satisfy the Court that it is appropriate to grant the relief now sought. Beyond that, it is difficult to know quite what to make of Mr Geary's averment that, in squarely blaming the plaintiffs' former solicitors in this unsatisfactory way, he does not wish 'to cast any aspersions of fault or blame on any party.'

17. Order 36, rule 18 of the RSC provides that unless an action is set down for trial within 14 days after a notice of trial is given, the notice shall no longer be in force. Thus, it seems to me that, if the plaintiffs' notice of trial of the 6th July 2011 is still in force, it is because the matter was set down for trial in the non-jury list on the plaintiffs' behalf on the 18th July 2011. There is no suggestion that there is any other notice of trial extant.

The right to jury trial in civil proceedings

18. There is no constitutional right to a jury trial in civil proceedings; *D.F. v Garda Commissioner* [2015] IESC 44 (at §12). Any such right derives from statute or the common law; *Lennon v HSE* [2015] IEHC 92 (§§ 13-24).

19. Section 48 of the Judicature Act (Ireland) 1877 ('the 1877 Act') provides in relevant part that:

> '…nothing in this Act, or in any Rule made under its provisions, shall take away or prejudice the right of any party to any action to have questions of fact tried by a jury in such case as he might heretofore of right have so required….'

20. *Wylie, The Judicature Acts (Ireland)* (Dublin, 1906) notes (at p. 528) that, in the Common Law Courts, a party had a right to trial by jury in all cases, except in a limited class involving substantially only matters of account, and, in the Court of Chancery, a party had no right to a jury, except in a very few cases.

21. Section 94 of the Courts of Justice Act 1924, substantially replicates s. 48 of the 1877 Act. However, as Hogan J. noted in *Lennon v HSE*, already cited (at §21), through various statutory changes made over the last 150 years, the right to jury trial in civil matters has been gradually whittled away.

22. The statutory encroachment upon that right at the core of the present application is the one effected by s. 1 of the Courts Act 1988 ('the 1988 Act'). It provides, in material part:

> '(1) Notwithstanding section 94 of the Courts of Justice Act, 1924, or any other provision made by or under statute, or any rule of law, an action in the High Court-
>
> (a) Claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under statute or independently of any such provision)…
>
> or a question of fact or an issue arising in such an action, shall not be tried with a jury.
>
> …
>
> (3) Subsection (1) of this section does not apply in relation to-
>
> (a) an action where the damages claimed consist only of damages for false imprisonment or intentional trespass to the person or both,
>
> (b) an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and damages (whether claimed in addition, or as an alternative, to the other damages claimed) for another cause of action in respect of the same act or omission….
>
> …
>
> (7) In this section "personal injuries" includes any disease and any impairment of a person's physical or mental condition.'

Discussion

23. At paragraph 12 of the statement of claim, the plaintiffs plead that they have each suffered severe personal injury, emotional trauma, loss, damage, inconvenience and expense in consequence of the tortious conduct they allege.

24. In describing that tortious conduct, at paragraphs 6 and 8 of the statement of claim, the plaintiffs particularise multiple instances of what they plead amounted to 'watching and besetting, harassment and intimidation' of them on various dates between 1996 and 2005. Several of those allegations, if made out at trial, would amount to false imprisonment or intentional trespass to the person, or both, arising from what the plaintiffs contend was the wrongful detention for the purpose of search of the first plaintiff on a number of occasions and, on at least one occasion, of the second plaintiff. As s. 1(3) of the 1988 Act provides and as the Supreme Court

confirmed in *D.F. v Garda Commissioner*, already cited, (at § 18), such actions remain within the province of a jury trial.

25. However, several of the allegations in those two paragraphs of the statement of claim involve conduct comprising quite separate acts that cannot be characterised as involving either the false imprisonment, or trespass to the person, of the plaintiffs. Examples of such alleged acts include: the seizure from another person of a vehicle that belonged to the first plaintiff; the search of the workplace of the first plaintiff's father; an accusation directed by a member of An Garda Síochána to the first plaintiff that he was 'engaging in tricks'; a disparaging remark made by a member of An Garda Síochána to the first plaintiff when the latter attended at a garda station to produce his insurance; an occasion when a member or members of An Garda Síochána followed the plaintiffs' children who were walking to a local football match; approximately one hundred and eighty separate occasions on which garda vehicles drove into and out of, or parked in, the *cul de sac* where the plaintiffs' home is located; and another occasion on which the plaintiffs' son was followed in the vicinity of their home by two members of An Garda Síochána in an unmarked garda car.

26. While the point was not directly addressed on behalf of the plaintiffs, Counsel for the defendant pointed out that, in *O'C. v K.L.H.* [2007] 1 I.R. 802 (at 811-812), Dunne J. found that certain matters complained of there as amounting to intimidation, harassment and victimisation could not come within the definition of intentional trespass to the person. In reaching that conclusion, Dunne J. had considered, amongst other authorities, the decision of the House of Lords in *Wainwright v Home Office* [2003] 3 W.L.R. 1137, including a passage from the judgment of Lord Hoffman LJ in which, considering the decision in *Wilkinson v Downton* [1897] 2 Q.B. 57, the leading decision on the intentional infliction of emotional suffering, he concluded (at § 47):

> 'I am also in complete agreement with Buxton L.J. [2002] QB 1334, 1355-1356, paras. 67 – 62, that *Wilkinson v Downton* has nothing to do with trespass to the person.'

27. It may be, as Counsel for the defendant suggests, that the relevant aspects of what is complained of in this case as 'watching and besetting' (which do not amount to false imprisonment or trespass to the person) might more properly be characterised as falling within the tort of private nuisance; see McMahon and Binchy, *Law of Torts* (4th edn) (Dublin, 2013) (at § 27.23). Alternatively, it may be that the particular conduct alleged comes within the tort of misfeasance in public office (*ibid* at § 19.84 *et seq*.), as the plaintiffs contend in their 'reply to defence'. The key point is that those aspects of that conduct plainly do not come within the definition of either the tort of false imprisonment or that of trespass to the person and do not arise out of the same acts or omissions as those alleged that may constitute one or other, or both, of those torts.

28. As with the facts in O'C., the facts in this case go beyond what was considered by the Supreme Court in *Sheridan v. Kelly* [2006] 1 I.R. 314 and, indeed, in *D.F. v Garda Commissioner*, already cited. The decision in *Sheridan* cannot assist the plaintiffs because, in contrast to the position in that case, the damages for personal injuries claimed here for false imprisonment or intentional trespass, or both, do not arise in respect of the same acts or omissions for which damages for personal injuries are claimed in respect of other causes of action. The same distinction can be drawn between the facts of this case and those that were at issue in *D.F.*

Conclusion

29. Applying the legislation and authorities I have considered to the matters pleaded in the statement of claim in this case, I conclude as follows:

> (a) This is an action falling within the terms of s. 1(1)(a) of the 1988 Act, which cannot be tried with a jury.
>
> (b) This is not an action falling within the terms of s. 1(3)(a) of the 1988 Act, whereby s. 1(1)(a) does not apply; which is to say, it is not an action where the damages claimed consist *only* of damages for false imprisonment or intentional trespass to the person, or both.
>
> (c) This is not an action within the terms of s. 1(3)(b) of the 1988 Act, whereby s. 1(1)(a) does not apply; which is to say, it is not an action where the damages claimed consist of damages for false imprisonment or intentional trespass to the person or both and damages for another cause of action *in respect of the same act or omission*.
>
> (d) Accordingly, the pre-existing right to jury trial in common law actions, otherwise preserved under s. 94 of the Courts of Justice Act 1924, is expressly removed from the plaintiffs in this case by operation of s. 1 of the Courts Act 1988.

30. Lest I am mistaken in those conclusions, it is necessary to consider what the position would be if there was an entitlement, in principle, to a jury trial in the present action.

31. The plaintiffs have failed to establish on the balance of probabilities that the decision to set the matter down for trial in the non-jury list was an error on the part of their former solicitors. While I have no difficulty in accepting that, at the time, the plaintiffs left that procedural decision in the hands of their solicitors, as most litigants would, and that, based on the advice of their current legal representatives, they would now wish that a different decision had been taken on their behalf, that is not at all the same thing as accepting that the original decision was made in error. And even if there was satisfactory evidence that an error had been made by the plaintiffs' former solicitors, there is no satisfactory evidence to explain the delay in bringing the present application between the 13th October 2013, when the plaintiffs' current solicitor took over carriage of the proceedings, and the 30th November 2015, when the present motion issued.

32. Accordingly, even if the plaintiffs were entitled to a jury trial in principle, they have failed to establish that there is any just or reasonable basis for exercising any discretion the Court might have to set aside the decision made on their behalf to set the present action down for trial in the non-jury list on the 18th July 2011.

33. For those reasons, the plaintiffs' application is refused.