

## THE HIGH COURT

Record No. 1999/7414 P

Between/

GRAINNE NIC GIBB

Plaintiff

-and-

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

Defendants

Judgment of Ms. Justice Iseult O'Malley delivered the 16th day of May, 2013.

## Introduction

1. This is the plaintiffs motion for an order requiring the defendants to produce for inspection certain documents listed in an affidavit of discovery over which a claim of privilege has been asserted.
2. The plaintiff was the partner of the late Ronan MacLochlainn, who was shot dead by members of An Garda Síochána on the 1st May, 1998. It is apparent that the shooting took place in the immediate aftermath of a failed attempt by Mr. MacLochlainn and five others to carry out an armed robbery on a Securicor van near Ashford in County Wicklow. The five other men were arrested, charged and convicted in relation to the matter.
3. In the substantive action the plaintiff claims damages on her own behalf and on behalf of the other statutory dependants of the deceased on foot of a claim that his death was caused by the wrongful acts of servants or agents of the defendants. It is pleaded that the defendants' servants or agents assaulted the deceased and/or were negligent and in breach of their duty in causing his death. Broadly speaking, the particulars of negligence and breach of duty can be categorised under two headings- failure to arrest the deceased before the robbery could be attempted and shooting him without adequate justification.
4. The history of the discovery process has been lengthy but for present purposes it suffices to say that an order for discovery made on the 7th March, 2006 was eventually complied with by way of an affidavit sworn on the 22nd December, 2011 and filed on the 3rd January, 2012.
5. The order required the defendants to make discovery under ten headings as follows:
  - (i) Documents including memoranda written communications minutes of meetings and briefings held in advance of the intended operation the subject matter of these proceedings
  - (ii) Minutes of meetings and de-briefings which took place in the aftermath of the operation memoranda in connection with the said meetings and de-briefings and any other relevant or material documentation arising in connection with same
  - (iii) All documentation arising in connection with the discharge of firearms by members of An Garda Síochána on the relevant date
  - (iv) All documentation which arose in connection with the prosecution of those individuals who were arrested at the scene, to include copy books of evidence and the usual disclosure documentation arising in connection with criminal proceedings
  - (v) All ballistic reports and in particular copy notes, reports, memoranda and any other documentation in the possession of the Defendants and each of them, their respective servants or agents arising out of the analysis of ballistic material emanating as a result of the actions taken by members of An Garda Síochána on 1 May 1998, referred to in the proceedings herein
  - (vi) Documentation in the form of guidelines training manuals instructions or rules and regulations issued to or circulated within An Garda Síochána in connection with the use of firearms and in particular the use of firearms in engagement/arrest situations
  - (vii) Documentation arising in connection with internal investigations carried out by An Garda Síochána into the circumstances of the shooting of Ronan McLoughlin [sic]
  - (viii) All documentation arising in connection with disciplinary proceedings taken as a result of the shooting of the said Ronan McLoughlin [sic] or documentation arising in connection with the decision not to institute such proceedings
  - (ix) Any photographs maps diagrams scene of crime photographs and post mortem photographs taken in connection with the incident the subject matter of these proceedings
  - (x) All documentation memoranda or material arising in connection with the training in the use of firearms by Gardaí who actually discharged firearms during the incident the subject matter of these proceedings.
6. The affidavit of discovery was sworn by Detective Chief Superintendent Kevin Donohoe. In it he objects to produce documents described as satisfying Category (i) above "on the grounds that the said documents are the subject of public interest privilege". The documents are listed as "Operational Plan" (6 pages); Garda Duty Rosters" (8 pages) and "Covering report of Garda Investigation File:

D/Chief Superintendent Sean Camon" (106 pages). These documents are the subject of the instant application.

7. Mr. Donohoe also refers to the fact that the identities of three members of An Garda Síochána, in relation to whom there is material in Categories (vii) and (x), have been redacted on the grounds of public interest privilege and/or confidentiality. They are instead described as Garda X, Garda Y and Garda Z. No issue appears to be taken with this.

8. The other categories referred to in the order are dealt with as follows:

(ii) No such documents

(iii) No such documents

(iv) Book of Evidence People (DPP) v. Saoirse Breathnach, Pascal Burke, Philip Forsythe, Stephen Carney & Daniel McAlister

(v) Statements of D/Inspector Edwin Hancock and D/Sergeant Seamus Quinn

(vi) Various Garda Síochána manuals and circulars and an extract from An Garda Síochána Code

(vii) Statements from 220 named witnesses including Garda X, Garda Y and Garda Z.

(viii) No such documents

(ix) Various photographs and a map

(x) Training records pertaining to Garda X, Garda Y and Garda Z.

9. In the course of correspondence it was made clear by the solicitor for the plaintiff that she was not satisfied that specific grounds of privilege had been adequately set out in the affidavit. By letter dated the 13th March, 2012 the defendants responded that the claim had been set out in sufficient detail. They went on to say:

*"The privilege being claimed is public interest privilege and all documents coming within the scope of that privilege are manifestly related to the operational systems of An Garda Síochána and with the detection and prevention of criminal activity.*

*The exchange of further detail or information in relation to this claim of privilege would be a matter for any substantive hearing on the question of privilege which might be granted by the Court. "*

10. On the 3rd of April, 2012 the plaintiff served a Notice to Produce Documents seeking the production for inspection of all documents in Categories (ii) to (vi) plus the documents in respect of which privilege was claimed. Subsequently this motion was issued.

#### **Submissions on behalf of the plaintiff**

11. The plaintiff points out that the justification for the claim of privilege has not been put on affidavit but has, rather, simply been asserted. Since the burden of satisfying the court that the documents should not be produced rests with the party resisting production, it is therefore argued that the claim has not been made out. In the alternative, if there is a proper claim, the Court must engage in the exercise of balancing the public interest in disclosure (being the public interest in the administration of justice) and the public interest in non-disclosure (being the public interest in the confidentiality of the documents concerned).

12. The argument in favour of disclosure is made in a particular context. It is contended that the circumstances of the case make it obvious that the Gardaí were aware that a crime had been planned and yet they allowed the situation to develop rather than making arrests. In so doing they failed to have adequate regard for the safety of the deceased and failed to follow proper procedures. In the dangerous situation that was thus brought about they failed to have regard to regulations relating to the use of firearms and permitted Ronan MacLochlainn to be shot unnecessarily.

13. In arguing the necessity to obtain the disputed documents, counsel for the plaintiff says that, despite having already been given a large volume of disclosure, the plaintiff still does not know how many Gardaí were involved; whether every Garda made a statement; what senior officers were present; how roles were assigned; the number of units present; what the chain of command was and what connection, if any, there was between the local and specialist Gardaí. These, it is argued, are all relevant matters for the purpose of getting expert opinion on the propriety of the handling of the situation by the Gardaí. Emphasis is placed on this latter aspect because, it is said, this will be a case that will very much depend on expert evidence, which will require a detailed examination of how the Garda investigation unfolded.

14. In relation to the operational plan and the duty roster, the plaintiff submits that they will enable her to establish who was working that day, where they were and what sort of operation was in contemplation.

15. Counsel refers to the interest of the family of the deceased in the administration of justice. He concedes that there may be some element of public interest attaching to the covering report with the investigation file but says that it is an "after the event" document. He makes the further point that all prosecutions arising from the incident have long since been concluded.

#### **Submissions on behalf of the defendants**

16. Counsel for the defendants says, in relation to the procedural objection, that the documents themselves were sufficiently particularised in the affidavit. He argues that the obligation to give details of the claim of privilege on affidavit would only arise if a "class" claim was being made for the documents. It is, however, accepted that the burden is, in this instance, on the defendants.

17. While the written submissions made the case that the documents were manifestly privileged and there was, therefore, no need to examine them the Court was told at the hearing that there was no objection to inspection.

18. On the substantive point, privilege is claimed in relation to the operational plan and the duty roster on the basis that they relate to the operations of An Garda Síochána in the detection and prevention of a serious crime and that their disclosure would be inimical to the public interest in the safety and security of citizens generally and members of An Garda Síochána in particular. Disclosure could

be of assistance to criminals insofar as the documents would demonstrate Garda methodologies.

19. The covering report to the Director of Public Prosecutions is described in submissions as

*"a confidential communication containing intelligence regarding the activities of members of the criminal gang involved in the said armed robbery, analysis of the circumstances of that crime, and recommendations on foot of that"*

which, it is said, should equally be privileged in the public interest. However it is also argued that the report is not relevant, on the basis that it simply contains the Chief Superintendent's analysis of material that has already been made available.

#### **Authorities**

20. There is no disagreement between the parties as to the applicable law. The principles established by the Supreme Court in *Murphy v Dublin Corporation* [1972] 1 I.R. 215 and restated in *Ambiorix Ltd. v Minister for Environment (No.1)* [1992] 1 I.R. 277 are clearly set out at p.238 of *Ambiorix* by Finlay C.J. as follows:

*"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.*

*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.*

*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.*

*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.*

*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.*

21. It is also accepted that there may be cases where the documents are of such a nature that the court can hold, without inspection, that they should not be disclosed- per Keane J in *Breathnach v Ireland (No.3)* [1993] 2 I.R. 458.

22. More recently, during the period while this judgment was reserved, the Supreme Court gave judgment in the case of *Keating v Radio Telefis Eireann* (unrep., Supreme Court, 9th May 2013). This involved an application for non-party discovery by the defendants against the Revenue Commissioners and An Garda Síochána. In particular, documentation was sought from the Revenue Commissioners concerning the detention or questioning of the plaintiff by an officer of Customs and Excise in 1998. The Revenue Commissioners appealed against the making of the discovery order, arguing, *inter alia*, that insufficient regard had been had to the fact that the documents would be subject to a privilege plea and that they were of a sensitive and confidential nature.

23. In the appeal submissions, it appears that emphasis was placed on the necessity for trust, confidence and cooperation between the Revenue's Customs Service and An Garda Síochána given their shared competence in the area of anti-drugs legislation. Any forced disclosure, it was said, would seriously impact on the free flow of information between them and would thereby gravely prejudice the success of both agencies. It was therefore argued that the trial judge should have assigned greater weight than he did to the public interest in the prevention, investigation and prosecution of serious crime, including the agency's methodology, tactics and procedures.

24. After setting out the *Ambiorix* principles, McKechnie J. (giving the judgment of the Court) said at paragraph 36:

*"In the implementation of these principles the following practice has developed:*

*(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);*

*(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.*

25. At pp.21-22 of the judgment McKechnie J deals with the reference in both *Murphy* and *Ambiorix* to the considerations that might arise where the "safety of the State" was in question. While stating that the issue did not arise for determination in the case, he observes that where a threat is identified to the public interest in

*"our institutional structures and their functioning, in the integrity of citizens, as individual persons and as a collective body, in the security of homes, property and other possessions, or in whatever particular area should immediately be under peril"*

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.

26. In the Supreme Court's consideration of the relevant factors in that case, two matters were identified which are particularly pertinent to this one. The first is the fact that the events in question took place almost 15 years ago making it "at least arguable, or perhaps even likely, that the expressed concerns regarding the exchange of information may be overstated". The other is the statement that it is established law that the furnishing of documents in confidence does not of itself make them privileged- reference

in that regard being made to *In re Kevin O'Kelly* [1974] 108 I.L.T.R. 97 and *Burke & Ors. v. Central Independent Television plc* [1994] 2 I.R. 261.

27. It is the case that in *Keating* the Court was concerned with the first stage of a two stage process - the making of the order of discovery as opposed to production - but it seems to me that the analysis is equally applicable to the claim of privilege made in the instant case.

28. Finally, there is the issue of relevance and, again, it is agreed that the test is that set out in *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Company* (1882) 11 Q.B.D. 55. The question is whether the document contains information which may directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. It will fulfil the test for relevance if it may fairly lead to a train of inquiry which may have either of these consequences.

### **Conclusions**

In order to preserve the interests of the parties I will not describe the documents in any detail. Having examined them in the light of the established principles, and in particular the consideration that the plea of public interest privilege must be evaluated by reference to the circumstances actually presenting, I have reached the following conclusions.

#### **1. The Operational Plan**

29. This is undoubtedly a confidential document. However, I am satisfied that it is relevant. I am also satisfied that, subject to some minor redaction, there is at this stage no discernable risk that disclosure of the information contained in it will assist criminals, disclose methodologies or otherwise damage the operations of An Garda Síochána. These events occurred in 1998.

30. Lest there be any current relevance, the information under the headings "Communications" and "Call signs" should be redacted, as should the telephone numbers (but not the names) of members of An Garda Síochána.

31. However, where the names of any of the three Gardaí referred to as X, Y and Z occur those letters may be used instead.

#### **2. The Duty Roster**

32. Again, this is a confidential document but it is difficult to see how privilege could attach to the information that particular Gardaí were on duty at a particular time on a particular day 15 years ago. It is relevant for the purpose contended for.

33. Parts of the document are not relevant, as where individuals were detailed to carry out duties not related to this matter. Where what are described as "VIP escorts" of named individuals are mentioned the names of such individuals should be redacted.

34. The names of the Gardaí referred to as X, Y and Z may be redacted and those letters used instead.

#### **3. D/Chief Superintendent Camon's Covering Report to the Director of Public Prosecutions**

35. I am not clear why this has been listed as relating to Category (i) since, obviously, it post-dates the event and more properly seems to fall into Category (iv).

36. A report such as this, from officers of An Garda Síochána to the Director of Public Prosecutions, is, in general, undoubtedly confidential although not necessarily privileged. However, I have compared the contents of the report with the list of witness statements already made available and I am satisfied that by reason of that disclosure the great bulk of the report is no longer confidential vis a vis the plaintiff. It is relevant to the action.

37. Part of the document consists of the communication of general intelligence to the Director. I consider that there is a public interest in maintaining the confidentiality of that information and that it is not relevant to the plaintiff's action. I therefore direct the redaction of paragraphs 43, 44, 45, 46 and 47.

38. Where any of the three Gardaí referred to as X, Y and Z are mentioned those letters may be used instead of their names.