

THE HIGH COURT

[2007 3424 P]

BETWEEN

IAN BAILEY

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SIOCHANA, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

DECISION of Mr. Justice Hedigan delivered the 12th of May 2015

1. The defendants who successfully defended these proceedings have applied for the full costs thereof together with all reserve costs including discovery costs and for extra travel costs of a jury member incurred by reason of the unpredicted length of the trial.

2. The plaintiff argues primarily that not all these costs should be awarded against him because an application made by the defendant at the end of the case to withdraw a substantial part of the plaintiff's case from the jury on the basis it was statute barred could have been made at a preliminary stage. The plaintiff estimates that about 33 and a half days were wasted because of this. In the result the plaintiff seeks the costs of these days on the basis of a so called "wasted costs" order. The plaintiff also seeks the costs of discovery because when the order was made following numerous adjournments all that had been sought was granted.

3. The defendants argued that it was open to them to make an application to withdraw on the statute of limitations point at any point during the proceedings. This defence they say was pleaded and the plaintiff was aware of it and even sought particulars of it at an early stage in the proceedings. They argue that in fact the central plank of the plaintiff's case was in fact left to the jury. They say it is not realistic or even possible to disentangle those parts of the evidence that related to the withdrawn parts from the remainder. They also argue that had to deal with a vast range of serious allegations made against the gardaí. Each had to be given their opportunity to confront and deny the allegations in open court both in their own and in the public interest.

4. The principles applicable to an application such as this are well established. In *Dunne v. Minister for the Environment* [2008] 2nd Irish reports page 755 Murray C.J. writing for a unanimous Supreme Court stated as follows:

"Where a court considers that it should exercise its discretion to depart from the normal rule as to costs it is not completely at large but must do so on a reasoned basis indicating the factors which in circumstances of the case warrant such a departure. It would neither be possible or desirable to attempt to list or define what all those factors are. It is invariably a combination of factors which is involved. An issue such as this is decided on a case by case by case basis and decided cases indicate the nature of the factors which may be relevant but it is the factors or combination of factors in the context of the individual case which determine the issue."

And later on

"The general rule is that costs follow the event subject to the court having discretion for a special reason to make a different order. It is discretion to be exercised in the circumstances and context of each case and is one which is so exercised from time to time."

If short, the successful party is to be awarded the costs of the proceedings save for exceptional reasons which must be identified and articulated by the court.

5. The central argument made by the plaintiff is that 33 and a half days of the evidence would not have been necessary had the statute of limitations point been decided at a preliminary stage. He argues that most of the case was found to be statute barred after 64 days of hearing. I find this argument to be unreal. From when I first dealt with this case about two years ago in discovery proceedings it was clear to all concerned i.e. the plaintiff, the defendant and the court, that the allegations made against the gardaí were so grave that the fullest possible ventilation of the evidence was required in open court and before a jury. I expressed the view on more than one occasion that I was unreceptive to any argument that anything other than the fullest discovery of documents by both parties but particularly by the defending gardaí should be made.

Thus emerged the Bandon tapes *inter alia*. Had there been an application for the statute of limitations matter to be determined at a preliminary stage I have no doubt it would have been vigorously resisted by the plaintiff who always wanted his case to be heard in open court. There would also have likely been a public outcry that the defendants were attempting to cover up by closing down the case on a technicality. From the defendant's point of view it is clear from the hearing that a substantial number of the gardaí involved not just Jim Fitzgerald and Maurice Walsh came forward to vigorously deny the allegations made against them. All of those persons were entitled to their day in court. As for the court, the application would have been made to me as I was effectively case managing the proceedings. No such application was made and so I cannot state what would have been my decision. I would, however have approached such an application with the firmest view that, save for some exceptional argument, this case had to be heard in full, in open court where the search light of forensic examination could be brought fully to bear upon allegations of so grave a nature. The public interest deserved nothing less. That is exactly what happened. I should note in passing that it is incorrect to state that most of the plaintiff's case was withdrawn from the jury. The opposite is the case. The central plank of the plaintiff's case was that the gardaí conspired to suborn false statements from Marie Farrell in order to implicate the plaintiff in murder and also intimidate her. This central plank or core of the plaintiff's case is what went to the jury for their decision.

6. Thus on the central argument made by the plaintiff in this cross application, I consider that in the real world in which this case unfolded, it was unrealistic to think that a preliminary application could be allowed to dispose of the plaintiff's case. No one wanted that to happen. It is unfortunate that the case took so long, however I am satisfied that the breadth, and depth and gravity of the allegations made, required that all of the relevant and admissible evidence be given and be subjected to a full cross examination. There will be thus an order for the costs of the full proceedings in favour of the defendants. This will include all reserve costs including the costs of 50% of the travel reimbursement to a juror made therein together with the costs of discovery.

