THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 277

Record No. 2016/251

Ryan P.
Peart J.
Hogan J.

BETWEEN/

DAVID MOONEY

PLAINTIFF /

APPELLANT

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND

AND THE ATTORNEY GENERAL

DEFENDANTS /

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th day of October 2017

1. This is an appeal with an unusual background. The plaintiff, David Mooney, was admitted to the Witness Security Programme ("WSP") operated by An Garda Síochána in November 2002. He was later to exit the programme at some stage in 2005.

2. In these proceedings he has sought damages and compensation in respect of the manner he was treated by members of the Gardaí in respect of his admission to the WSP and his treatment while a member of the programme. While the cause or causes of action on which the plaintiff relies have at times remained somewhat elusive, the gist of the plaintiff's action appears to be principally in negligence. Specifically, it is contended that the defendants were obliged to treat the plaintiff fairly, that they failed to do so and that their failure to do so gives to actionable liability on the part of the State defendants.

3. This appeal is from the decision of Gilligan J. in the High Court: see *Mooney v. Garda Commissioner (No.2)* [2016] IEHC 252. While I will address in due course the factual findings and the conclusions reached by the trial judge, it is sufficient for present purposes to record at the outset that the plaintiff also contends that those findings and conclusions are insufficiently reasoned such as would warrant the non-application of the traditional *Hay v. O'Grady* rule (*Hay v. O'Grady* [1992] 1 I.R. 210) and a direction for a fresh trial.

4. Gilligan J. had earlier ruled that this matter would be heard in camera: see *Mooney v. Garda Commissioner (No.1)* [2014] IEHC 155. This appeal was likewise heard *in camera*. While this judgment is being handed down in unredacted form, it is also appropriate to state that I have endeavoured to be circumspect in setting out certain details (which, in any event, are well known to the parties), save to the extent that this is strictly necessary.

The background to the present proceedings

5. Sometime in the early summer of 2002 the plaintiff, along with some other business acquaintances, proposed to open a nightclub in Dublin. He was approached by two named individuals who purported to represent an illegal organisation. They said that unless the plaintiff paid what amounted to protection money to that illegal organisation, the club premises would be destroyed and the business would never get off the ground.

6. It is accepted – and, indeed, Gilligan J. so found – that the plaintiff paid a substantial sum of money to the two individuals in question. A few nights after the premises opened, there was a disturbance at the premises. It appeared that the principals of the illegal organisation in question maintained that the two individuals to whom the money had been paid had used the money for their own purposes and not for the benefit of the organisation, so that fresh sums were being demanded.

7. In the wake of these incidents the plaintiff made contact with An Garda Siochána, and he agreed to provide a written statement in which he very clearly implicated the two individuals in illegal criminal activity. He further identified them following an identification parade.

8. By this stage the Gardaí involved in the case accepted that the plaintiff's life was in danger and this threat would be increased if he were to give evidence against the two individuals. On 30th August 2002, an application was made by the Special Detective Unit of An Garda Síochána to have the plaintiff admitted to the WSP. On the 19th December 2002, a meeting took place within An Garda Síochána at which it was agreed to admit the plaintiff into the programme, and the plaintiff was relocated within this jurisdiction. On the 10th February 2003, the plaintiff signed a protocol document ("the Entry Document") whereby he was formally inducted into the programme.

9. It is important to record at the outset that at this stage the WSP was in its relative infancy. Many of the persons who had heretofore been admitted to the programme had come from a criminal background and had decided to give evidence to An Garda Síochána implicating their former comrades. Mr. Mooney was unusual in that he was a person of good character. He was also prepared to give evidence in the Special Criminal Court implicating senior members of an illegal organisation in respect of their involvement in organised crime.

10. It is not really disputed but that participation in the WSP involves the protected person not only being re-located and assuming a

new identity, but also that such person must then adopt a low and discreet social profile. The evidence suggests that not everyone is temperamentally suited for this type of subdued lifestyle and, indeed, for this reason, potential inductees into the WSP are generally subjected to some form of psychological screening in advance in order to gauge their suitability for this purpose.

11. In his judgment Gilligan J. summed up the difficulties which confronted the plaintiff thus:

> "Throughout 2003, there were difficulties with the plaintiff's participation in the Witness Security Programme which is best explained by the plaintiff's particular personality, the type of lifestyle he had been used to living, the fact that he appears to have been a very outward going person who enjoyed a very full social life, the fact that there was clearly a personality clash between the plaintiff and his handlers within the Witness Security Programme, the fact that the plaintiff, to a significant extent, appears to have been out and about in public, and, on at least one occasion, indicated to a person he had just met that he was part of the Witness Security Programme. He indicated further to a number of people that he was a member of An Garda Síochána, a Detective Sergeant, and a member of certain other specialist divisions of An Garda Síochána. He indicated at times that he would not give evidence at the trial of the two individuals in the Special Criminal Court, and provided information to certain persons and sections of the media, all of which led to very strained relations between the plaintiff and his handlers leading into the trial of the two individuals which commenced in the Special Criminal Court."

12. Despite these considerable difficulties, the plaintiff did in fact give evidence in the Special Criminal Court and this was a vital factor in the convictions of the two individuals in question. As Gilligan J. put it:

> "The plaintiff gave his evidence during the course of the trial and was highly commended by the Court and described as a truthful and reliable witness. This aspect was heavily relied on in the Court of Criminal Appeal and, subsequently, in the Supreme Court, and again in the European Court [of Human Rights], and there is no doubt but that the plaintiff's evidence was the vital factor leading to the conviction of the two individuals who were each sentenced to four years imprisonment."

13. The plaintiff found his participation in the WSP challenging and it would appear that he could not adjust to the social and other constraints of the programme. In the aftermath of the trial in the Special Criminal Court, a meeting was held in December 2003 with the plaintiff and the Gardaí. Gilligan J. found that the Gardaí were of the view that at this stage that:

> "… there should be a final agreement with him, whereby he would be paid a relatively substantial sum of money at the time bearing in mind the plaintiff's own financial circumstances, and that would be a conclusion to the matter save only that, if he had any apprehension or the relevant members of An Garda Síochána had any apprehension that he was at a continuing risk, further arrangements for his security would be made for him. In any event, on the 3rd February 2004, the plaintiff signed a memorandum of understanding (the "Exit document") with An Garda Síochána and on or about the 4th February 2004, he received the first payment pursuant to that memorandum of understanding and a year later, in early 2005, he received the second and final payment."

14. In the High Court the plaintiff's case was, in essence, that members of the WSP had discussions with him both prior to signing the initial agreement and subsequent thereto, leading into the trial in the Special Criminal Court and subsequent thereto, to the effect that the plaintiff would be provided with sufficient funds to commence a new business abroad, the necessary funds to purchase a house, that he would be provided with a new identity and, *inter alia*, the necessary documentation to enable him to reside and work in a specified country. The plaintiff contended that it was on the basis of this representation that he entered the programme, gave evidence, placed his life at risk and that having done so, those members of An Garda Síochána responsible for the Witness Security Programme failed to honour their representations to him and, effectively, in early 2004, "duped" him into signing an agreement, and that they failed to honour their legal commitments to him.

15. Before this Court, however, the submission was rather more nuanced, as it was to the effect that the Gardaí had acted unfairly. Counsel for the plaintiff noted that he not given sufficient time to consider what had become known in the High Court as the "Entry Document" and to understand its relevance and nor did he receive legal advice in relation to the Entry Document. The focus of the submission regarding the potential unfairness before this Court was, however, that the plaintiff had never been properly assessed or screened prior to admission to the WSP. The plaintiff was only introduced to a psychotherapist after his admission to the WSP. He was never offered psychological or psychiatric counselling, either in relation to his ongoing situation prior to the trial or, in particular, in relation to relocating abroad.

16. For their part, the State defendants maintain that the arrangement as between An Garda Síochána and the person taken into the WSP is at the discretion of An Garda Síochána, and, in the particular circumstances of this case, the plaintiff failed to adhere in a material way to the obligations that were placed upon him when admitted into the programme. Counsel for the defendants drew attention to the fact that Gilligan J. had in effect found that the plaintiff had from time to time "blown" his cover and that he (falsely) represented himself as a member of An Garda Síochána on several occasion and, in general terms, brought about a situation whereby no host country could be asked to accept him, and even if asked, would not accept him, and even if they did accept him and he behaved in a like manner, he would be disowned by the authorities in the host country and returned to Ireland because they would not wish that their witness security system in any way would be exposed or compromised by conduct of this kind.

17. A further difficulty which the plaintiff's conduct presented was that it was accepted during the course of the hearing in the High Court that he had given interviews to senior journalists who specialised in crime reportage. This conduct seriously compromised the integrity of the programme and had again "blown" the cover of specialist security operatives who were working on or with the WSP. It was in these circumstances that the Gardaí took the view that, in the words of Gilligan J., "the most appropriate course of action was that a final arrangement should be entered into which let the plaintiff remain in Ireland subject to certain ongoing arrangements for his security, and he was compensated for his cooperation."

The judgment of the High Court

18. All of this culminated in a lengthy and detailed judgment on the part of Gilligan J. in which he ruled against the plaintiff. Having summarised the evidence and the submissions, the judge concluded as follows:

> "51. I am satisfied to find, on the balance of probabilities, that the plaintiff cooperated with the Garda authorities in their investigation of the allegation of extortion as against the two individuals, members of the I.R.A, provided a statement to be used in evidence against them, attended at an identity parade where he identified both of them, agreed to give evidence on behalf of the Director of Public Prosecutions against them and that he was accepted into the Witness Security Programme. I am satisfied, on the balance of probabilities, that there was no meaningful assessment carried out

by the Garda authorities in accordance with the provisions of the Witness Security Programme, and that such assessment as there was, was only carried out after the plaintiff's admission. I am further satisfied that it was a significant feature in the fight against organised crime and subversive organisations that the plaintiff made a statement, attended the ID parade, and agreed to give evidence at the trial of the action of the two accused men. I am satisfied that the plaintiff was unique at the time of his admission into the Witness Security Programme by reason of the fact that he was an ordinary citizen and a member of society with no previous criminal convictions. I am satisfied that there was unfortunately a very serious breakdown in the inter-personal relationship as between certain members of An Garda Siochána, and the plaintiff, which is fuelled by allegations and counter allegations and that this in turn led to tension as between the Garda investigation team and the Witness Security Programme team, which culminated in the plaintiff advising a member of An Garda Siochána that he would not give evidence at the trial, but subsequently agreeing with another member of An Garda Siochána that he would give evidence.

52. I am satisfied, on the balance of probabilities, that this inter-personal breakdown between the plaintiff and the Witness Security Programme team came about as a result of the plaintiff's failure to comprehend that, in simple terms, he had to have regard to the terms of the entry protocol and greatly change his lifestyle and lie low while remaining within Ireland, pending the criminal trial. The plaintiff's position was clearly set out in the entry document as signed and he, as the person maintaining these proceedings, failed to comply with the terms in accordance with the understanding as set out in the document, and this is the position notwithstanding that the Entry Document was not intended to create legal relations.

53. I am not satisfied, on the balance of probabilities, that the defendants made a statement or maintained a position amounting to a promise or representation, express or implied, that following the trial the plaintiff would be going to a specified country with all the necessary paperwork and a very substantial sum of money running to several hundred thousand euro. Any conversations that took place before the trial could not be construed on any reasonable interpretation as being a basis for a transaction definitively entered into and could not, in the view of this Court, on the balance of probabilities, be found to be such that would constitute a representation, express or implied, to be relied on. I do not accept that the plaintiff was allowed operate under any assumption as a result of conversations he had with members of An Garda Siochána. The Entry Document adequately summarises the position and it is clear that there were ongoing discussions about a specified country, not going to a particular country, and the possibility of other countries. Insofar as the plaintiff alleges that he understood and was never disabused of the notion of going to a specified country, he never had a representation that he was going, either express or implied, and the Entry Document and continuing discussions could not have given rise to any form of a representation that he was going.

54. I do not accept that the entry protocol was a ruse concocted by An Garda Siochána for the purpose of misleading the plaintiff as regards the trial before the Special Criminal Court and I am satisfied on the evidence that if the plaintiff wanted legal advice prior to signing the entry and exit protocols, he was a capable adult male and could have indicated, which I do not accept that he did, that he wished to obtain legal advice and he could have declined to sign both the entry and exit protocols until he obtained independent legal advice.

55. I find on the evidence, on the balance of probabilities, that the plaintiff divulged details of his situation to persons contrary to the agreed provisions of the entry protocol, that the plaintiff made contact with members of An Garda Siochána other than the members of the Witness Security Programme, that the plaintiff gave interviews and passed information to the media, and further, that it was necessary for the plaintiff to be spoken to by members of An Garda Siochána about a number of incidents, that the plaintiff failed to pay back a credit card bill which he agreed to do, and further that the plaintiff represented himself to members of the public as being a Garda. I do not accept that any member of An Garda Siochána told the plaintiff to say he was a member of An Garda Siochána.

56. The plaintiff was introduced to a psychotherapist, and it is accepted that he was not offered or provided with psychological or psychiatric counselling in relation to his ongoing situation prior to the trial. By the time of the trial and having regard to the events which followed, it is quite clear to this Court that the plaintiff simply was totally unsuitable for relocation to any host country and the fact that he was not given any assistance other than by the psychotherapist, does not in itself render the procedure that was adopted unfair as claimed on the plaintiff's behalf.

57. The decision as regards the plaintiff's exit from the Witness Security Programme was on the evidence on the balance of probabilities taken by a member of An Garda Siochána and that decision was conveyed to the relevant member of An Garda Siochána. The final meeting in respect of the plaintiff's exit did come about in unusual circumstances and the frisking of the plaintiff prior to entry to the final meeting serves to demonstrate the complete breakdown in the relationship as between the plaintiff and certain members of An Garda Siochána. The events surrounding the Exit Document are clouded by the plaintiff's allegation that he signed the document in a different manner to that as presented to the Court and this Court is of the view that, on the balance of probabilities, the plaintiff's recollection in this regard is not correct and it was always open to him to walk away from signing the Exit Document on the day in question and to obtain legal advice and this Court does not accept that he was placed under duress although quite clearly there was a significant amount of money on offer to him in two tranches and he agreed to the proposition as put forward at that point in time. In many ways, most tellingly, is the fact that the plaintiff had a year to consider his position and obtain legal advice or raise many of the contentions which he has raised in these proceedings after accepting the first instalment of money which he did not do and then proceeded to accept the second instalment without demur. His explanation that he had to accept the money because of his financial standing does not find favour with this Court having regard to the case he now makes out. Insofar as an allegation is raised that the plaintiff was never given the opportunity to respond to the allegations which were in essence being made about him, together with adverse conclusions being drawn allegedly behind his back, there is no dispute by the plaintiff as regards a variety of the incidents that occurred. It is only necessary in this regard to refer to the content of the entry agreement as signed by the plaintiff which set out a reasoned description of the understanding that lay ahead for the plaintiff on his entry into the scheme and which simply does not correspond to the plaintiff's ongoing behaviour. ……

60. The position in relation to an alleged duty of care to act fairly in the particular instance has to take into account that the Witness Security Programme is a non-statutory scheme. What is involved here is a Garda operational decision in the course of a Garda investigation arising from a complaint made by the plaintiff which resulted in the successful prosecution and conviction of two accused persons. Clearly the negligent disclosure of sensitive or confidential information by Gardai to journalists may give rise to a cause of action for damages for negligence if the disclosure resulted in reasonably foreseeable loss, damage or injury to a person affected by the disclosure. Likewise, if a person acted mala fides or with a view to gain in a case involving the disclosure of the identity of a person within the Witness Security Programme then it

may be that the person affected by the disclosure would be entitled to damages for reasonably foreseeable loss, damage or injury caused by the disclosure. As Mr. McCullough S.C. submitted to the Court it is a vexed question both in this jurisdiction and in England as to whether the State owes a duty of care to victims of crime but, as submitted by Mr. McCullough, this question has nothing to do with the present case.

61. Taking an overview of the evidence and the findings as set out herein, I do not accept that the plaintiff was dealt with unfairly."

19. I have set out the trial judge's reasoning at some length because the plaintiff submits that the conclusions in relation to the lack of fairness are inadequate (at para 61 in particular) and that a fresh trial is inevitable as a result.

Whether the trial judge's reasons were adequate

20. In the wake of the Supreme Court's decision in *Hay v. O'Grady* [1992] 1 I.R. 270 it was often assumed that findings of fact made by a trial judge were more or less inviolable. The subsequent case-law has shown, however, that this assumption is not entirely correct. In some instances a finding of fact may not be supportable if the judge has given inadequate reasons for his conclusion in respect of that finding of fact.

21. This point is illustrated by the Supreme Court's decision in *Doyle v. Banville* [2012] IESC 52. That was a case involving a serious motor accident which turned on key and minute findings of fact. In his judgment, Clarke J. first noted the context in which *Hay v. O'Grady* had been decided:

"It does need to be recalled that the context in which the issues which came to be decided in *Hay v. O'Grady* were before the Supreme Court was the then recent abolition of jury trials in most personal injury actions brought about by s.1 of the Courts Act 1988. There was a well established jurisprudence as to the circumstances in which it was possible for an appellate court to review and, if appropriate, overturn, what amounted to factual decisions by juries. This Court, in *Hay v. O'Grady*, was concerned with whether there had been any change to that position brought about by the move to trial by judge sitting alone. As noted by McCarthy J. the established jurisprudence in respect of jury trials was that issues of fact and the inferences to be drawn from the facts as found should not be disturbed by this Court if there was evidence to support such findings and inferences. The position, in respect of a trial by a judge alone, deriving from *Hay v. O'Grady* is somewhat different in that it is clear that this Court may, at least in certain circumstances, be in a position to review an inference of fact drawn by a trial judge (at least where such inference does not depend on oral evidence or recollection of fact and where the trial judge had an opportunity to assess the relevant witness(es)). It is also important to note that McCarthy J. emphasised the importance of a clear statement by the trial judge of his findings of primary fact, the inferences to be drawn, and the conclusion that follows."

22. Clarke J. then continued:

"In addition it does need to be said that there are other consequences of the move to trial by judge alone. Any party to any litigation is entitled to a sufficient ruling or judgment so as to enable that party to know why the party concerned won or lost. Where a jury decides facts, an appellate court will only have the submissions and evidence of the parties, the judge's direction and the answers given by the jury to the questions submitted to them, to go on. Where a judge decides the facts there will be a judgment or ruling whether orally given immediately after the trial, or in writing after a period. *To that end it is important that the judgment engages with the key elements of the case made by both sides and explains why one or other side is preferred. Where, as here, a case turns on very minute questions of fact as to the precise way in which the accident in question occurred, then clearly the judgment must analyse the case made for the competing versions of those facts and come to a reasoned conclusion as to why one version of those facts is to be preferred*. The obligation of the trial judge, as identified by McCarthy J. in *Hay v. O'Grady,* to set out conclusions of fact in clear terms needs to be seen against that background. …Finally,….it is also important to note that part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error, on the one hand, and a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of this Court to seek to second guess the trial judge's view." (emphasis supplied)

23. These important passages at once clarify and illustrate the proper scope of *Hay v. O'Grady*. One other aspect of *Doyle* deserves attention at this juncture. This was a case was a personal injuries action arising out of a road traffic accident with very serious consequences for the plaintiff. A key issue in the case was whether the plaintiff's motorcycle had collided with a car at a time when that car was stationary or whether the car was still moving at the time of the collision, dragging back the plaintiff for some 10m.

24. Although the trial judge had stated that he accepted "in full" the evidence of two "important, independent witnesses", Clarke J. pointed out that they had each given different accounts as to whether the car was stationery or not. Clarke J. held that the judge could not, accordingly, have stated that he accepted the evidence "in full" of *both* witnesses when their evidence so plainly diverged on this vital point. In these circumstances, Clarke J. held that this "was not a mere tangential error, but one which related to a point of some significance in the case." The Court ruled that this error was one of two errors on the part of the trial judge which justified the Court setting aside the ruling of the trial judge and directing a fresh trial.

Does the present case come within *Doyle v. Banville*

25. Can it be said that the present case comes within the parameters of *Doyle v. Banville*? It is necessary first to detail the actual findings of the trial judge prior to any examination of this question. The key factual findings may be summarised as follows:

26. First, Gilligan J. found that the plaintiff had co-operated with the Gardaí and had given evidence against the two individuals in question.

27. Second, the judge found that there had been " no meaningful assessment carried out by the Garda authorities in accordance with the provisions of the Witness Security Programme, and that such assessment as there was, was only carried out after the plaintiff's admission."

28. Third, Gilligan J. found that there had been a breakdown of the inter-personal breakdown between the plaintiff and the WSP team and that this had come about as a result of the plaintiff's failure to comprehend that, in simple terms, he had to have regard to the terms of the entry protocol and greatly change his lifestyle and lie low while remaining within Ireland, pending the criminal trial.

29. Fourth, Gilligan J. was not satisfied that the defendants made a statement or maintained a position amounting to a promise or representation, express or implied, that following the trial the plaintiff would be going to a specified country with all the necessary paperwork and a very substantial sum of money running to several hundred thousand euro.

30. Fifth, Gilligan J. did not accept that the entry protocol was a ruse concocted by An Garda Síochána for the purpose of misleading the plaintiff as regards the trial before the Special Criminal Court.

31. Sixth, the judge found that the plaintiff divulged details of his situation to persons contrary to the agreed provisions of the entry protocol, that the plaintiff made contact with members of An Garda Siochána other than the members of the WSP. Gilligan J. further found that the plaintiff represented himself to members of the public as being a Garda.

32. Seventh, the judge found that plaintiff was introduced to a psychotherapist and it is accepted that he was not offered or provided with psychological or psychiatric counselling in relation to his ongoing situation prior to the trial. Gilligan J. found that "the plaintiff simply was totally unsuitable for relocation to any host country "and the fact that he was not given any assistance other than by the psychotherapist, "not in itself render the procedure that was adopted unfair as claimed on the plaintiff's behalf."

33. Eight, the decision as regards the plaintiff's exit from the WSP was found to have been taken by a member of An Garda Siochána.

34. Finally, Gilligan J. rejected the plaintiff's recollection regarding the execution of the Exit Document and he also found, furthermore, that it was always open to him to walk away from signing the Exit Document on the day in question and to have obtained legal advice prior to having done so.

35. None of these findings of fact were seriously challenged in the course of the appeal before this Court. Nor can it be said that these findings contained, for example, an internal contradiction on a material point such as might form the basis for a setting aside of these findings (such as happened in *Doyle v. Banville*). While, moreover, the pithy nature of the judge's conclusions at para 61 were the subject of adverse submission by counsel for the plaintiff, these conclusions must, of course, be viewed in the context of a very full analysis of this difficult case which had taken place in the paragraphs leading up to that overall conclusion. It could not in any realistic sense be said that the trial judge had failed to engage with the facts in the manner required by Clarke J. in *Doyle v. Banville*.

36. The present case is, accordingly, a world away from cases such as *Bank of Ireland Mortgage Bank v. Heron* [2015] IECA 66 where no reasons had been given by the trial judge for her decision to adjourn an application for summary judgment to plenary hearing. In the present case the judge gave very full and ample reasons for his factual findings and his conclusions. Although counsel for the plaintiff forcefully submitted that the plaintiff came away from the High Court unclear and unsure as to the reason why he had lost, I find myself quite unable to accept that submission. Quite the contrary: I consider that Gilligan J. made key findings of fact which were adverse to the plaintiff and that he fully explained his reasons, both for those findings and in respect of his overall conclusions.

37. I would accordingly reject the plaintiff's arguments based on the inadequacy of the judge's fact finding or subsequent reasoning in his judgment. I now propose to turn to the liability question.

Whether the operation of the WSP gives rise to a justicable controversy

38. The first objection of the defendants is that the operation of the WSP is peculiarly one for the Gardaí and that the operation by them of a specialist, necessarily highly confidential programme of this nature does not give rise to any justiciable controversy. Like Gilligan J. I do not find it necessary to determine this question. I will therefore assume (without deciding) in the plaintiff's favour that the operation of the WSP does give rise to a justiciable controversy. Nor, for reasons I am about to state, do I think that the rather vexed question of the extent (if at all) to which the Gardaí fall outside the ordinary parameters of the duty of care imposed by the law of negligence need to be considered.

Whether the Gardaí were under a duty of care to ensure that the plaintiff was treated fairly

39. Counsel for the plaintiff contends that there is no doubt but that as An Garda Síochána were administering a public scheme and, as such, were and are required to observe fair procedures. More specifically, counsel referred to the decision of Denham J. in *The People (DPP) v Gilligan* [2006] 1 I.R. 107 where various submissions were made as to how a programme such as the WSP should be properly operated. On this point Denham J. said:

> "Submissions were made on behalf of the accused as to the necessity for rules and a structure for the management of a Witness Protection Programme. The establishment of a Witness Protection Programme is a matter for the Executive and/or the legislature. It falls to the courts to ensure fair procedures."

40. The first thing to say about the reliance on this *dictum* of Denham J. is that it is, with respect, taken out of context. The decision in Gilligan concerned the question of fairness in a criminal trial. One could readily envisage circumstances where the treatment of a witness in the WSP might present issues of fairness in the administration of a criminal trial, especially where, for example, it was suggested that the integrity of such a witness's evidence had been compromised by reason of promises made by or on behalf of the Gardaí. But this *dictum* should not be understood as mandating a general duty on the part of An Garda Síochána to act fairly in all aspects of the WSP and it was clearly never intended to be such.

41. A further consideration is that even if the Gardaí were under some East Donegal style-duty to act fairly in respect of the discharge of discretionary powers arising from the operation of the WSP (*East Donegal Co-Operative Mart Ltd. v. Attorney General* [1970] I.R. 317) and there had been a breach of that duty, this would not necessarily give rise to an action in damages. Absent a claim for breach of constitutional rights – which claim was not strongly pressed before us – the liability of the State defendants in a case of this kind is confined essentially to two recognised torts, namely, an action for misfeasance of public office or for negligence. There are, after all, many cases where the courts have ruled that a particular plaintiff was not treated fairly – in the sense that he suffered loss or was affected by an ultra vires decision or a decision taken in breach of fair procedures – yet as the Supreme Court stressed in *Pine Valley Developments Ltd. v. Minister for the Environment* [1987] I.R. 23, such a plaintiff must nonetheless bring his case within the parameters of a recognised tort.

42. It is perhaps unnecessary for present purposes to explore the parameters of the tort of misfeasance which, in any event, have been carefully articulated by the Supreme Court in a series of decisions from *Pine Valley* onwards. Malice is, of course, a key element of that tort, so that the actions of the State body or public official in question must either have been prompted by malice in the colloquial sense of that term (*i.e.*, something akin to animus) or a knowledge that they were acting ultra vires or were indifferent as to whether they had such a power. Put another way: the *bona fide* exercise of public powers defeats a claim in misfeasance.

43. In my view, the evidence tendered in the High Court is at odds with such a potential finding of misfeasance. Gilligan J. rejected

such a conclusion and I consider that he was entitled to reach this conclusion. While it is true that by the date of the execution of the exit document the inter-personal relationship between the parties had by this stage almost totally broken down, the actions of the Gardaí were driven by exasperation rather than by malice. The Gardaí were frustrated by what they saw as the reckless and improvident conduct on the part of the plaintiff, not least his insistence on telling third parties that he was himself a Garda, his contacts with the media and his "blowing" the cover of security operatives associated with the WSP. By this stage the Gardaí had become to realise that the plaintiff was, by temperament, outlook and lifestyle, totally unsuited to participation on the programme. His conduct, moreover, was such that the Gardaí could not proceed with any plans they had to re-locate him outside the State.

44. The decision to bring about the exit of the plaintiff from the WSP was prompted by the realisation that the plaintiff was unsuitable and that his continued participation in the programme would simply serve to undermine its general efficaciousness.

45. It is for these reasons, therefore, that I would reject the contention that the defendants were guilty of the tort of misfeasance and I would uphold the findings of Gilligan J. in this respect.

Whether there was any breach of a duty of care on the part of the defendants

46. It is next necessary to consider the question of whether the Gardaí owed the plaintiff a duty of care and, if so, whether there was a breach of that duty. I recognise, of course, that the current law regarding the extent to which (if at all) the Gardaí may be said to owe a duty of care to members of the general public or, for that matter, to victims of crime is currently in a state of flux: see, *e.g.*, the comments of O'Donnell J. in Supreme Court in *LM v. Garda Commissioner* [2015] IESC 81.

47. For my part I not propose to delve into this vexed question so far as the present appeal is concerned. It is true that the Gardaí failed to have the plaintiff psychologically assessed prior to his entry into the WSP. It may well be that had this occurred the plaintiff's personal unsuitability for induction into the programme would have been manifest. With hindsight, one may agree that it would, perhaps, have been wiser had this step been taken.

48. This, however, does not necessarily mean that the Gardaí owed the plaintiff a duty of care in this respect or that, even if they did, they were in breach of it. Insofar as there was an obligation on the part of the Gardaí to screen the plaintiff in advance it was fundamentally to protect the integrity and security of the WSP. It is evident that at least some of the Gardaí dealing with the plaintiff came to regret their own decision to admit him to the WSP because – as they saw it – his reckless, exasperating conduct and indisciplined lifestyle had undermined the programme. The plaintiff was not prepared to lie low, remain discreet and to blend unnoticed into the area into which he had been relocated. That is why the decision was taken in 2005 that he should exit the programme, having received the second instalment of a substantial sum of money.

49. Any such screening obligation, therefore, was designed for the benefit of and effective operation of the WSP itself rather than for the plaintiff as such. The key point here, however, was that admission to the WSP did not, in itself, have irreversible consequences, at least for this plaintiff. He remained free to leave it at any time, as indeed he did. Insofar as he suffered loss – and it is not clear that he did – it was not the type of reasonably foreseeable loss which is cognisable by the law under this heading. (I appreciate, of course, that the plaintiff maintained that the Gardaí had unequivocally promised him that he would be relocated to a foreign jurisdiction and that he would receive larger sums of compensation than he fact did, but Gilligan J. made findings of fact adverse to the plaintiff on these points and, as I have already explained, these findings bind this Court.)

50. The plaintiff's position cannot, therefore be compared with the person who, for example, is admitted without a proper screening by medical professionals to a clinical programme and who suffers a personal injury as a result. It might possibly be different if admission to the WSP was permanent such that the plaintiff could not elect to opt of a programme for which he was not suitable or which was not compatible with this chosen lifestyle. But, as we have seen, this is not what actually happened to the plaintiff, since he was always free to leave the programme.

51. To sum up, therefore, I do not think for these reasons that the fact that the plaintiff was not properly screened for the programme did not in the circumstances amount to a breach of any duty of care, even if – which I am not deciding – the State defendants owed the plaintiff such a duty in the first place.

Conclusions

52. In summary, therefore, for the reasons stated, I consider that Gilligan J. was correct in respect of the conclusions which he reached. I would accordingly dismiss the appeal.