

BETWEEN**NIAMH O'MALLEY****PLAINTIFF****AND****COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE MINISTER FOR JUSTICE AND EQUALITY****DEFENDANTS****JUDGMENT of Mr. Justice Binchy delivered on the 24th day of July, 2018.**

1. These proceedings come before the Court by way of an appeal brought by the defendants from an order of the President of the Circuit Court, whereby he awarded the plaintiff the sum of €5,700.00 together with the costs of the proceedings in respect of damages claimed by the plaintiff arising out of the malicious destruction of her vehicle, which was parked at the time within the precincts of the Garda Station at Clara, Co. Offaly. During the course of this hearing, I was informed that there are a number of similar claims pending, which await the determination of the issues raised in these proceedings.

2. The plaintiff joined An Garda Síochána in July of 2003. In September of 2004, she was stationed in Tullamore. In mid-2006, she took up residence in the garda station in Clara, Co. Offaly. Clara Garda Station was not, at the relevant time, staffed by gardaí on a full-time basis and, outside normal hours, members of the public were required to use the intercom system known as the "green man" to call gardaí. As is normal in such garda stations, this intercom system is located at the front door of the garda station and callers are then put through to the nearest manned garda station, which, in this case, is Tullamore. In 2009, the plaintiff was seconded to the Drugs Unit of the gardaí based in Tullamore. The plaintiff gave evidence that she was one of four gardaí assigned to this Unit, the other three gardaí being a plain clothes detective, a Sergeant and an Inspector Murray.

3. The plaintiff gave evidence that the Drugs Unit targeted a particular drugs dealer operating in the Midlands and that this operation had enjoyed some success. A number of weeks prior to the event that gave rise to these proceedings, the gardaí had made a substantial seizure of both drugs and cash in the possession of this particular criminal gang.

4. The plaintiff gave evidence that she encountered members of this gang on a daily basis. She said that they knew who she was, knew her movements and knew that she lived in the residential quarters in Clara Garda Station. They also knew her car, which, like many others in the force, the plaintiff sometimes used in the course of her official duties. She said that she had permission from her superiors to do this and she would have used the car in particular when travelling to court for prosecutions. She said that one member of this gang was observed recording the registration number of her vehicle.

5. Approximately a week or a little more before the events giving rise to these proceedings occurred, the plaintiff said that she was involved in the search of a suspect's vehicle at a petrol station. The occupants, who were members of the drugs gang being targeted by the plaintiff and her colleagues, were agitated and abusive. The plaintiff said she believed that they behaved this way because they had suffered a significant loss by reason of the seizure of drugs and cash that took place a number of weeks previously.

6. On the night of 23rd July, the plaintiff was "at home" in Clara Garda Station with her colleague, Stephen Bell, who is now her husband. She agreed that she was not on official duty but made the point that a garda is never really off duty, and indeed members of the public frequently called to the residence at Clara Garda Station in error. The plaintiff said that, at approximately 3AM, she and her colleague heard an alarm sounding in the vicinity of the garda station. Upon looking out the window, Garda Bell observed that the plaintiff's car had been set alight. The car was totally destroyed as a result, together with some contents. Garda Bell's car was also damaged in the incident.

7. CCTV footage of the incident was available and the plaintiff viewed this the following day with Inspector Murray. She was able to identify the perpetrator of the incident, who she said could clearly be seen setting the plaintiff's vehicle alight. Unfortunately, through error, this CCTV footage was not preserved and, as a result, no prosecutions followed. It was the plaintiff's evidence, however, that there is no doubt that her car was targeted as a result of her involvement in the drugs operation referred to above. She said that intelligence to this effect was given to one of her colleagues, a Detective Garda Declan Geraghty. Det. Garda Geraghty did not give evidence himself to this effect and so it is fair to observe that the plaintiff's evidence in this respect is hearsay. But she said in her evidence that she was in no doubt at all that she was deliberately targeted as a result of her involvement in this special Drugs Unit and she felt that she was targeted in particular because of the success that the Unit had enjoyed in previous weeks. The defendants offered no evidence to the contrary. They did not dispute the fact of the event itself, nor the background thereto as described by the plaintiff.

8. As a result of this incident, the plaintiff was taken out of the Drugs Unit and placed in an office position in Tullamore Garda Station for her own safety. She says that she was on night duty in Tullamore Garda Station three weeks later when there was an alarm activation at Clara Garda Station. It transpired that all of the windows in the residential quarters of Clara Garda Station had been broken. The culprit was apprehended and brought to Tullamore Garda Station, where he threatened both the plaintiff and her colleague, Garda Bell. The individual concerned said that he was going to burn both the plaintiff and her colleague out of Clara Garda Station. These events caused the plaintiff great stress and she applied for a transfer to Co. Clare. This request took approximately twelve months to come through. In the meantime, the plaintiff said that she and her colleague were regularly followed by members of the drugs gang. Their dogs were let out of their garden. Some individuals were charged with harassing the plaintiff.

9. The plaintiff gave evidence that, at the time, her vehicle, which was a BMW 318D, had a market value of €22,000.00 and there were items of personal property in the vehicle having a value of €1,000.00. These values were not disputed by the defendants. The plaintiff said that she submitted a claim to her insurers, who initially resisted the claim altogether, informing her that this was a claim that should be submitted to her employers. Eventually, however, she reached a compromise with her insurers and they agreed to pay her €17,595.00, or approximately 80% of the value of her vehicle. They would not make any payment to her in respect of the damage to her goods because they informed her that these would have had to be insured with an associated household policy. The insurers reduced the amount of the claim by €5,000.00 in respect of the salvage value of the plaintiff's vehicle, and a further €250.00 in respect of excess which the plaintiff was obliged to bear under her policy, all of which resulted in a payment to the plaintiff of €12,345.00. The plaintiff confirmed in her evidence that she succeeded in selling her vehicle at the salvage value of €5,000.00. Therefore, the plaintiff received the sum of €17,345.00 between the claim on her own insurance and the amount received by her in respect of salvage. This left her with a shortfall of €5,905.00. The plaintiff also suffered the loss of her no claims bonus, which she estimated has cost her in the order of €500. Her combined losses therefore come to €6,405. In the proceedings as originally issued,

the plaintiff claimed the sum of €23,000.00, in the belief that her insurers required her to issue proceedings to recover the amount paid out by them to her pursuant to her claim under her policy. However, the Court was informed that this did not transpire to be necessary and so the amount claimed by the plaintiff in these proceedings was adjusted accordingly to the sum of €6,405.

10. The plaintiff initially submitted a claim to the defendants pursuant to Chapter F of the Garda Síochána Code ("the Code"). The Code is promulgated and published by An Garda Síochána. The Court received evidence from a Garda Frank Thornton, a member of the Garda Representative Association, who informed the Court that, while he does not know the provenance of the Code, it is distributed to trainee gardaí during their training in Templemore. Although the Court was not given a complete copy of it (since this was unnecessary for the purposes of these proceedings), the Court was informed that it is a substantial two volume publication containing policies and procedures applicable to the duties of the gardaí. The relevant section of it for the purposes of this claim is Chapter (F) (12), entitled "Finance Regulations (Miscellaneous)".

11. The plaintiff prepared a claim addressed to the Sergeant in charge in Tullamore Garda Station, which is date stamped 23rd September, 2009. The claim sets out a brief history of the incident, the value of the plaintiff's vehicle before the incident and the amount received by her from her insurers. She also refers to the goods which she had in the car at the time, which were destroyed in the fire and comprised sailing jackets and wet gear, a portable DVD player and a Garmin sat-nav, all of which she says had a value of approximately €1,000.00.

12. The plaintiff's claim, together with other statements, was sent by the Superintendent of Tullamore Garda Station to the Chief Superintendent in Portlaoise on 2nd November, 2009. However, by letter dated 29th June, 2010, the Chief Superintendent was informed by the head of legal affairs of An Garda Síochána that the State Claims Agency had rejected the claim on the simple grounds that, in its view, the State has no liability to the claimant in the matter.

13. Before turning to the legal issue that requires determination, I should mention two further matters arising out of the evidence given in the proceedings. The first is that Garda O'Malley gave evidence that she was aware that a trainee garda had previously claimed and been paid in or about €3,500 in respect of damage caused to her car as result of her duties as a trainee Garda. Secondly, one of the documents disclosed to the plaintiff upon discovery being made by the defendants was a report prepared by a Crime Prevention Officer, Sergeant Padraig Farrelly, following upon the attack on the plaintiff's vehicle. This report identified a number of security deficiencies and made a number of recommendations to improve the physical and electronic security at Clara Garda Station.

The Code

14. In these proceedings, the plaintiff relied upon Chapter (F) 12.2 of the Code. Since the provisions of that section of the Code are so essential to these proceedings, it is necessary to set them out in full as follows:-

“(F) 12.2 Compensation for loss or damage to the private property of members

(1) Where claims are forwarded by members for loss of, or damage to, personal property sustained by reason of their duties, the following information will be given;

- (a) Date of purchase and cost of each article claimed for, together with a receipt for the cost, if available;
- (b) How long each article was in use;
- (c) The condition the article was in when lost or damaged and its present value;
- (d) If the District Officer has any reason to doubt that the articles claimed for were actually the personal property of the claimant;
- (e) The amount claimed by the applicant;
- (f) If the District Officer considers the amount claimed for each article to be equitable, and if not, what he/she considers the just value;
- (g) If there is any carelessness or negligence shown which will justify the reduction or rejection of the claim;
- (h) Completed form FMS2.

(2) A checklist (appendix "A") will be completed and attached to each report outlining the circumstances in which the property was lost or damaged. Sections 1 to 10 will be completed by the claimant, and sections 11 to 13 by the District Officer. Claims for compensation for loss of property will not be considered when there is any evidence of carelessness or negligence of the part of the owner.

(3) The State assumes no liability for the loss of or damage to members' private property in stations or official quarters. Members should, therefore, insure their private property against the usual risks.

(4) Delegated sanction has been granted by the Commissioner for payment of such claims up to the amount of €317.43 subject to the following conditions:

- (a) That the terms of this section will be complied with in each case;
- (b) That the maximum amount payable is the original cost of the property;
- (c) That depreciation be deducted, at the rate of 20% of the purchase price per annum (or at the appropriate figure for periods of less than one year), from all claims except (i) claims involving watches or jewellery, where the rate shall be 5% per annum, and (ii) claims for the vouched costs of repairs to personal property where the full claim may be paid;
- (d) That claims will only be payable where the member was acting in the course of his/her duty. The compensation figure arrived at following deductions of the appropriate amount for depreciation (at the rate of 20% or 5% as

appropriate) may be adjusted to allow for price increases between date of purchase and loss. The price increase factor to be based on the consumer price clothing and footwear index (in the case of these items) and the all items index (in the case of all other items including jewellery and watches). Information on increases in the consumer price index for any particular period can be obtained from the Prices Section, Central Statistics Office.”

15. In her evidence, the plaintiff confirmed that she had read chapter (F) 12 of the Code before submitting her claim. She said that it was her understanding of the Code that, if the property of a member of An Garda Síochána was damaged as a result of his/her duties, the member would be compensated to the value of the damage. She said that she was not aware of any limit applicable to such compensation and she mentioned the trainee garda who she said had received €3,500 in respect of damage to her car. She did not understand that clause 12.2(4) operated as a limit on indemnity to the effect that the defendants would not reimburse a claimant any more than €317.43 per claim.

The Pleadings

16. In her Civil Bill, the plaintiff claims that her vehicle bearing Registration No. 06-D-86647 was destroyed by an unidentified male outside the residence side of Clara Garda Station on 23rd July, 2009. She also claims that various items of personal property owned by her were also destroyed. The value of all of the goods destroyed is claimed in the sum of €23,000.00. The plaintiff claims that she submitted a claim for compensation to the first named defendant in accordance with the provisions of sub-clause (F) 12.2(2) of the Code and also completed the checklists requiring completion in accordance with Appendix “A” of the Code. At paras. 12-14 of the indorsement of claim, the plaintiff claims as follows:-

“12. By virtue of the provisions of the Code, there was a contract and/or a collateral contract between the defendants and the plaintiff, whereby the defendants agreed to compensate the plaintiff for any loss or damage to her private property sustained by reason of her duties as a member of An Garda Síochána.

13. Further or in the alternative, the plaintiff had and has a legitimate expectation arising from the provisions of the Code that the defendants would fairly apply the provisions of the Code and would compensate her for any loss or damage to her private property sustained by reason of her duties as a member of An Garda Síochána. The plaintiff, as a member of An Garda Síochána, relied upon the representations contained in the Code and has a legitimate expectation that the defendants would abide by it.

14. Wrongfully and in breach of the provisions of the Garda Síochána Code and the plaintiff’s legitimate expectations thereunder, the defendants, their servants and/or agents, have, to date, failed and/or refused and/or neglected to compensate the plaintiff for the damage caused to her motor vehicle and for loss of other personal property.”

17. In their defence, the defendants plead, *inter alia*, as follows:-

“2. It is denied that any damage was caused to the plaintiff’s vehicle by reason of her duties as a member of An Garda Síochána, either directly or at all, and the plaintiff will be required to prove same at trial.

4. Paragraph 12 is accepted only insofar as the plaintiff can establish that any loss or damage to her private property was sustained by reason of her duties as a member of An Garda Síochána.

5. It is not accepted, in para. 13, that the plaintiff had a legitimate expectation that the defendants would compensate her, either for any damage to her personal property simply because she was a member of An Garda Síochána or for damage that she cannot establish was sustained by reason of her duties as a member of An Garda Síochána.

6. Paragraphs 14 and 15 are not accepted.”

Plaintiff’s submissions

18. Firstly, it should be noted that the case as pleaded by the plaintiff is, in essence, one of breach of contract. The plaintiff pleads that, by the provisions of the Code, the defendants agreed to compensate the plaintiff for any loss or damage to her private property sustained by reason of her duties as a member of An Garda Síochána.

19. Alternatively, it is submitted that the plaintiff had and has a legitimate expectation to receive compensation arising out of the provisions of the Code. It is submitted that she relied upon the Code as a member of An Garda Síochána and had a legitimate expectation that the defendants would abide by the Code.

20. In their submissions on behalf of the plaintiff, however, counsel purported to expand on the case as pleaded. Counsel submitted that the defendants have a clear contractual duty of care to provide the plaintiff with a safe system of work and to minimise or eliminate any foreseeable risks. In this instance, it is argued that what occurred to the plaintiff’s vehicle was foreseeable, as there had been incidents at Clara Garda Station in the past, and this is borne out by the report of Mr. Farrelly referred to above. It is argued that the defendants had a particular duty of care to the plaintiff, working as she was in drugs enforcement, a line of work that exposed her to particular risks from certain quarters of the public.

21. Counsel for the plaintiff further submit that the following issues arise for a determination in this appeal:-

1. Was the damage to the plaintiff’s vehicle sustained by reason of her duties as a member of An Garda Síochána?
2. Is there a contractual obligation under the Code to compensate the plaintiff for any loss or damage to her private property sustained by reason of her duties as a member and, if so, is it negated by any other sections of the Code?
3. Does the plaintiff have a legitimate expectation by reason of the provisions of the Code to be compensated for any loss or damage caused to her property by reason of her duties as a member of An Garda Síochána?
4. Did the first named defendant *qua* employer negligently fall short of the standard of care owing to the plaintiff and thereby breach implied terms of the contract between the plaintiff and the first named defendant to provide some form of protection for her and her private property in circumstances where Clara Garda Station had been targeted by criminals in the past?

22. It is also submitted that by para. 4 of the defence, the defendants have accepted:-

1. That there is a contract or collateral contract between the defendant and plaintiff; and,
2. That it is a term of that contract that the defendant is obliged to compensate the plaintiff for any loss or damage to her private property sustained by reason of her duties as a member of An Garda Síochána.

If, therefore, the Court is satisfied that the plaintiff sustained damage to her private property by reason of her duties as a member of An Garda Síochána, then the plaintiff is entitled to succeed with her claim in these proceedings.

23. It is submitted that the words "by reason of their duties" as appearing in the opening paragraph of clause (F) 12.2 of the Code must be interpreted in accordance with their ordinary meaning. If, therefore, the plaintiff satisfies the Court that, on the balance of probabilities, her vehicle would not have been damaged in the manner that it was but for her undertaking her duties as a member of An Garda Síochána, then it follows that her property was damaged by reason of the plaintiff carrying out her duties. Moreover, if there is any ambiguity in the interpretation of the phrase "by reason of their duties", that ambiguity should be resolved in favour of the plaintiff. In other words, the phrase should be construed *contra proferentem*. It is submitted that this is particularly so where there is an unequal bargaining power between the parties, one example of which is an employment relationship. The plaintiff relies upon the case of *ESL Consulting Services Ltd. v. Verizon (Ireland) Ltd.* [2010] 2 I.R. 426. It is also submitted that the maxim of *noscitur a sociis* applies: that words should be interpreted consistent with the company they keep, meaning therefore that the first sentence in sub-clause (F) 12.3 must be interpreted by reference to the advice given in the second sentence to "insure against the usual risks."

24. Further, it is submitted that, in instances of inconsistency between a broader promise and an exemption, the broader promise must apply in construing the meaning and ambit of the exemption clause. The plaintiff relies upon the decision of Roskill L.J. in the case of *J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.* [1976] 1 W.L.R. 1078.

25. It is submitted that sub-clause (F) 12.2(1) sets out a general rule providing for compensation for damage to members' personal property sustained by reason of their duties and that it sets out the procedure whereby claims will be forwarded and paid by the first named defendant, where such damage is proven. Insofar as the defendants contend that the damage must be sustained by the member acting in the course of his/her duties, and rely upon sub-clause (F) 12.2(4)(d) to support this argument, the plaintiff effectively argues that her claim is not governed by sub-clause (F) 12.2(4). The language of sub-clause (F) 12.2(1) is more general. Insofar as the defendants argue that the interpretation of sub-clause (F) 12.2(1) contended for by the plaintiff would result in an overly broad interpretation of the Code, which would expose the defendants to claims for compensation for damage to property simply because a claimant is a member of An Garda Síochána, the plaintiff submits that this is not so. The plaintiff submits that sub-clause (F) 12.2(1) makes it clear that, to obtain compensation, a claimant will have to prove that the damage was caused by reason of duties undertaken by a claimant.

26. Insofar as the defendants argue that sub-clause (F) 12.2(4) sets out a limit on all claims of up to €317.43, the plaintiff contends that this clause is clearly intended to be an administrative expedience for the Commissioner, enabling him/her to delegate the administration of small claims to local level, and it is not intended to operate as a maximum indemnity on claims. Accordingly, it is submitted that this clause has no relevance to the plaintiff's claim.

27. As regards sub-clause (F) 12.2(3), the plaintiff firstly submits that the damage to her property took place outside Clara Garda Station and the plaintiff's official quarters and not inside either of those areas, and therefore sub-clause (F) 12.2(3) does not apply.

28. Insofar as the clause is an exemption clause, it is submitted that it is well established that such clauses must be strictly interpreted and construed. The *contra proferentem* rule applies with particular force to such clauses. The plaintiff relies upon the case of *ICDL v. European Computer Driving Licence Foundation Limited* [2012] 3 I.R. 327, where the Supreme Court held in respect of a limitation clause in a licensing agreement that:-

"To the extent, therefore, that, in this case, there is any ambiguity in the relevant clauses of the agreement, or any lack of clarity in their meaning, interpretation *contra proferentem* will lead to adoption of the meaning most favourable to the licensee, in this case the first plaintiff." (para. 74)

29. It is further submitted that, in a case of inconsistency between a broader promise and an exemption, the authorities establish that the broader promise will prevail. Counsel for the plaintiff relies on the decision of the Court of Appeal in the United Kingdom, in the case of *J. Evans and Sons (Portsmouth) v. Andrea Merzario Limited* where Roskill L.J. held that, in interpreting an exemption which was inconsistent with a broad promise given not to place cargo on the deck of a ship:-

"Interpreting the contract as I find it to have been, I feel driven to the conclusion that none of these exemption clauses can be applied, because one has to treat the promise that no container will be shipped on deck as overriding any question of exempting conditions. Otherwise, as I have already said, the promise would be an illusory." (p. 1084)

30. Relying on those authorities, it is submitted on behalf of the plaintiff that sub-clause (F) 12.2(3) should be interpreted to limit the exclusion of liability set out therein to the kind of accidental damage or theft which may occur in the ordinary course at garda stations, such as, for example, loss or accidental damage to property occasioned by water damage or accidental fire caused by electrical fault. This interpretation, it is submitted, is consistent with the second sentence of sub-clause (F) 12.2(3), which advises members to insure against "the usual risks". It is submitted that the damage occasioned to the plaintiff's vehicle was not a "usual risk". It was a risk that arose solely because of her membership of An Garda Síochána and the plaintiff's duties as a member of the force. Moreover, it is argued that the exemption from liability in the first sentence of the sub-clause, if interpreted as the defendants contend for, is inconsistent with the more general contractual obligation to compensate for damage caused by reason of a member's duties. Not only that, if the defendants are correct in their interpretation of the sub-clause, it gives rise to an absurdity because a member whose property is damaged in the way that the plaintiff's property was damaged but at a different location, such as on the street or in the precincts of their own dwelling house, would be entitled to compensation, whereas a person such as the plaintiff would be excluded from a similar entitlement.

31. It is further submitted that the plaintiff has a legitimate expectation for compensation for damage to her property (in the circumstances arising) by reason of the Code and the operation thereof. The plaintiff relies upon the decision of the Supreme Court in *Cromane Seafoods Ltd. v. Minister for Agriculture* [2017] 1 I.R. 119. It is submitted that sub-clause (F) 12.2(1) of the Code contains a clear and unequivocal promise to members of An Garda Síochána that they will receive compensation for any of their personal property that is damaged by reason of their duties as members of the force. It is submitted that the Code is intended to affect legal

relations between the parties and that sub-clause 12.2(3) does no more than exempt the State from liability for damage caused to property in the ordinary course of events. In reliance on the Code, the plaintiff fearlessly performed her duties and was at the forefront of tackling drug crime in the district, believing that, in doing so, she would be compensated for any injury or damage to property she suffered as a result. It would therefore be inequitable to permit the defendants to resile from this promise.

32. Finally, it is submitted that the first named defendant was negligent and in breach of his/her duty of care to the plaintiff in failing to provide the plaintiff with a safe system and place of work. The plaintiff places reliance upon the report of Sergeant Farrelly, which identified serious shortcomings in the security provided to members of the force and their property at Clara Garda Station. It is submitted that it was foreseeable that local criminals might target what was obviously garda property, particularly in circumstances where the plaintiff was involved in a high profile fight against drugs and local organised crime. It should be observed that the defendants argued strongly that the plaintiff is not entitled to argue any case based on negligence or breach of duty of care on the part of the defendants, not having pleaded such a case.

Submissions of defendants

33. The defendants submit that the plaintiff is not entitled to recover under the Code for the following reasons:-

1. The damage to her personal property was not "sustained by reason of [her] duties" and, at the time that her property was damaged, she was not "acting in the course of her duty". It is submitted that the first and broader of these two phrases is used in the Code only in the context of setting out when a claim may be submitted. Entitlement to compensation, it is submitted, only arises in the context of sub-clause (F) 12.2(4), which clearly requires the damage to property to have been occasioned when the garda was acting in the course of his/her duty. A claimant must meet both criteria to be entitled to payment of compensation. It would be an implausibly broad interpretation of the Code to interpret it as entitling a member to payment of compensation in circumstances where damage to property was occasioned "by reason of their duties". Such an interpretation would, it is submitted, enable a garda to make a claim in respect of loss or damage to property as long as he or she could suggest that there was a connection between that person's membership of An Garda Síochána and the damage or loss caused.
2. The damage to the plaintiff's property occurred within the precincts of Clara Garda Station and is thereby expressly excluded pursuant to sub-clause (F) 12.2(3) of the Code. The plaintiff's car was parked in the Garda Station of Clara when it was damaged. There can be no dispute that the reference to "stations or official quarters" in sub-clause (F) 12.2(3) of the Code would include the curtilage of the building.
3. The maximum amount payable under the Code is €317.43. This is clear from sub-clause (F) 12.2(4). This applies to any claim under the Code, whether presented as a claim in contract, collateral contract or legitimate expectation based on the Code. If that limit is not enforced, then there is no limit, which is clearly contrary to the intention of the Code. Sub-clause 12.2(1) of the Code sets out the preliminary steps that are necessary to make a claim. Sub-clause 12.2(3) makes it clear that damage to property in garda stations or official quarters is not covered and sub-clause 12.2(4) sets a limit on the amount of any claim. Insofar as the plaintiff argues that sub-clause 12.2(4) is in some way intended to apply only to small claims which are delegated to local gardaí, reliance is placed on the reference to "such claims" in the sub-clause, which makes it clear that it applies to all claims submitted under clause (F) 12. Otherwise, why is there no provision for depreciation of items in sub-clause (F) 12.2(1), as there is in sub-clause (F) 12.2(4)?
4. It is clear from the provisions of the Code that it was never intended to cover damage to personal property to the extent of the value claimed in this case.
5. No legitimate expectation arises, other than that the defendants will apply the Code properly to the plaintiff's claim, and it is submitted that the defendants did so.
6. The plaintiff's plea of breach of contract and collateral contract is expressly confined to the application of the Code and no claim in negligence is pleaded.

34. It should be observed at this juncture that the plaintiff submits that the defendants did not plead points 1-4 above in their defence as filed and served and, therefore, it is not open to the defendants to rely upon these points in their defence of these proceedings.

35. It is submitted by the defendants that the limitation of €317.43 in sub-clause (F) 12.2.4 indicates that the Code was drafted in contemplation of compensation for small losses suffered by gardaí in the course of their duties, such as torn clothing, damaged footwear, broken glasses or mobile phones etc. It was never envisaged that the Code would become a mechanism for very substantial recompense for expensive high-end items, such as those now claimed by the plaintiff.

36. It is further submitted by the defendants that no question of legitimate expectation arises in respect of the plaintiff's claim. The only legitimate expectation that she could have had is that the defendants would apply the Code properly to her claim. The defendants contend that the Code was so applied. The defendants argue that any expectation that the plaintiff might have had in this case could not be said to be legitimate because she does not come within the definition of a person covered by clause (F)12.2 of the Code, for two reasons. Firstly, because of the exclusion contained in sub-clause (F) 12.2(3) of the Code, and secondly, she was not acting in the course of her duty when the damage occurred, as required by sub-clause (F) 12.2(4) of the Code.

Discussion and decision

Pleadings issues

37. As is apparent from the above, both parties have made arguments based on the case as pleaded by the other. I will deal first with the plaintiff's argument regarding the pleadings of the defendants.

38. It is the plaintiff's contention that, by reason of the admission contained in para. 4 of the defence, the defendants have accepted that:-

- b. There is a contract or collateral contract between the defendant and the plaintiff; and,
- c. That it is a term of that contract that the defendant is obliged to compensate the plaintiff for any loss or damage to her private property sustained by reason of her duties as a member of An Garda Síochána.

39. At no time did the defendants seek to amend their defence and, accordingly, the plaintiff submits the defendant is contractually bound to compensate the plaintiff if, on the facts, the Court is satisfied that the damage to the plaintiff's car and property was sustained by reason of her duties as a Garda. In reply to this argument, the defendant submits that para. 4 of the defence should be seen in the context of it being a reply to para. 12 of the Civil Bill. The defendants contend that all para. 4 of the defence admits is that the Code will be applied, as the defendants consider it should be applied, to the plaintiff's claim, assuming that the plaintiff can satisfy the defendants in the first place that the damage that she is claiming for was damage occasioned in the course of her duties.

Damage by reason of her duties

40. It follows, therefore, that the issue that I should next address is whether the plaintiff's property was damaged by reason of her duties as a member of An Garda Síochána. I am fully satisfied, on the evidence, that that is so. The evidence of the plaintiff, which was not disputed, was that she was a member of a special drug enforcement unit which, in the weeks leading up to the incident giving rise to this claim, had enjoyed substantial success in its operations involving a local drug gang. The plaintiff had had an encounter with an individual member of that gang the week before, who exhibited intimidatory behaviour towards her. The plaintiff had observed a gang member taking the details of her car registration number. The plaintiff and Inspector Murray had observed the entire incident on CCTV and the plaintiff herself said that she was able to identify the individual gang member. Even after this incident, the plaintiff was subjected to further intimidation, as a result of which she was initially allocated different duties in Tullamore and ultimately transferred to Clare. There could not, in my view, be the slightest doubt that the plaintiff sustained the loss of her vehicle and the property in it as a direct result of her duties as a member of An Garda Síochána. It is equally clear, however, that the plaintiff was off duty, and indeed in bed, when the incident occurred and, therefore, the damage was not occasioned when the plaintiff was *acting* in the course of her duty. That phrase, of course, appears in sub-clause (F) 12.2(4) and I will return to this in due course.

41. Having thus found, does it follow, as the plaintiff contends, that the defendants are now bound to compensate the plaintiff for the loss and damage sustained by her as a result of her duties by reason of the admission on the part of the defendants in para. 4 of their defence? I do not believe that it does so follow. The admission contained in para. 4 of the defence goes no further than to agree that the Code is a contract whereby the defendants have agreed to compensate members of An Garda Síochána for loss or damage to property sustained by reason of their duties as members of An Garda Síochána. It does not constitute an admission that there is an unqualified obligation to do so; it merely admits that the Code is a contract which makes provision for such compensation. In order to determine whether or not an obligation to pay compensation has been triggered, it is necessary to look at the Code to see if the conditions set forth in the Code for payment of compensation have been met by the plaintiff. Paragraph 4 of the defence does no more than to save the plaintiff the trouble of proving that the Code constitutes an enforceable contract between the parties, should the plaintiff satisfy the Court that she has suffered loss or damage to her property as a result of her duties as a member of An Garda Síochána.

Interpretation of the Code

42. Having found that the plaintiff's property was destroyed as result of her duties, and that the defendants accept that the Code is a contract which makes provision for compensation for such damage, subject to the conditions of the Code, it is next necessary to consider the conditions applicable to payment of compensation, as set out in clause (F) 12.2 thereof.

43. It is not unfair to observe that there is a significant lack of clarity about the clause. For example, the clause does not expressly state that members will be paid any compensation at all for loss or damage to property, although it is absolutely clear that that is the purpose of the clause. Sub-clause 12.2(1) is procedural in nature and sets out the information that members must provide if they wish to make a claim in respect of loss or damage to property. Sub-clauses (D) and (F) require the District Officer to consider the claim and express an opinion as to ownership (if he considers that there is a doubt about that) and value.

44. Sub-clause 12.2(2) requires a specified form to be completed, as set out at Appendix A attached to the chapter. There is a certain degree of overlap between the information to be provided in Appendix A and that which is to be provided under sub-clause 12.2(1). However, additional information is required by Appendix A. This includes a calculation of depreciation of items, in accordance with the form. In any case, the defendants have not contended that the plaintiff failed to comply with the procedural requirements of sub-clauses (F) 12.2(1) and (2) and so no controversy arises in this respect.

45. The first sentence of sub-clause 12.2(3) is, by itself, open to no ambiguity. Members are clearly informed that the State assumes no liability for the loss of or damage to the members' private property in stations or official quarters. I am in no doubt at all that the plaintiff's car was located within the precincts of Clara Garda Station when it was damaged. By itself, that sentence would appear to rule out clearly any entitlement to compensation to the plaintiff in this case. However, it is argued on behalf of the plaintiff that the second sentence operates to qualify the first sentence, insofar as members are advised by the second sentence to insure their own property against "the usual risks". This sentence, counsel for the plaintiff argues, suggests that, if a member's property is damaged as a result of "usual risks", they will not be compensated, but if their property is damaged as a result of their duties in a manner that is considered to be unusual then the member will be compensated. In this regard, it is submitted that "usual" risks include loss of property, water damage, accidental fire etc. But it is submitted that the damage suffered by the plaintiff in this case was not a usual risk because she was specifically targeted by criminals intending to intimidate her by causing damage to her property.

46. Against all this, the defendants submit that the first sentence of sub-clause (F) 12.2(3) is clear in its meaning and the second sentence does no more than advise members of the force that they should insure their goods. Moreover, the defendants point out that the plaintiff in this case did insure her goods, save those which could not be insured otherwise than through a household policy.

47. While there is much that is unclear about clause (F) 12.2, there is nothing at all unclear about the first sentence of sub-clause (F) 12.2(3), and the second sentence of it is, in my view, merely advisory. To construe the second sentence and, in particular, the reference to "the usual risks" as meaning that damage occasioned through unusual risks will be compensated would be to give the sub-clause a meaning it simply doesn't have. The problem with the argument advanced on behalf of the plaintiff in this regard is that it invites the Court to go beyond interpretation; the plaintiff is inviting the Court to conclude that the clause says something which, on any reading of it, it plainly does not say. I am of the view that the clause makes it clear, without any qualification, that no compensation will be payable in respect of property damaged in a garda station. Having thus concluded, it follows that the plaintiff's claim, in so far as it is grounded on the Code, must fail.

48. In light of that conclusion, it may be strictly speaking, unnecessary for me to consider whether or not sub-clause (F) 12.2(4) operates so as to place a ceiling on payments to be made under the Code up to a maximum of €317.43. Nonetheless, in view of the fact there are other claims pending to which this issue may be relevant, it is desirable that I should do so. If it had been intended to place a maximum on compensation payable, it would have been simple to do so. Sub-clause (F) 12.2.4 clearly does not do so, and in so far as there is any ambiguity, this should be resolved *contra proferentum*. All this sub-clause does is make it clear that claims up to the amount of €317.43 will be processed at local level and will be met if the claimant meets the requirements of clause (F) 12.2 as

a whole. Claims for larger amounts are not ruled in or out one way or another. So, while there is no maximum amount payable under the Code, nor is there any express obligation to pay claims in excess of this amount. No member of the force reading this sub-clause or clause 12.2 as a whole could reasonably infer that there is any commitment on the part of the defendants to pay claims in excess of €317.43. Whether or not to do so is a matter falling within the discretion of the first named defendant.

49. I turn next to consider the plaintiff's arguments based on negligence and breach of duty. It is clear that this case was not pleaded. This is no mere technical issue. If the case had been pleaded, then the defendants would have had an opportunity to consider the case, to enter their own pleas in reply and to lead their own evidence. It seems that this argument is advanced on this appeal only because of the reasons given by the Circuit Court Judge for his decision in the matter. Be that as it may, it is not open to the plaintiff on an appeal to plead a case which was not pleaded in the first place and in respect of which no evidence was led by either party, save to the extent that the report of Sergeant Farrelly was obviously available to the Circuit Court Judge.

50. Insofar as the plaintiff advanced an argument grounded upon the doctrine of legitimate expectation, it is not necessary to consider this argument, which I think was advanced in case the Court concluded that the Code did not have a contractual status. But, in any case, I do not consider that the plaintiff could have established a claim based upon legitimate expectation because it is clear from the authorities that, for such a claim to succeed, one of the criteria is that there must have been representations made and relied upon which were "unambiguous and unequivocal" (see decision of Charleton J. in *Cromane Seafoods*, para. 248). It is quite apparent that, whatever about its precise meaning, clause (F) 12.2 of the Code is anything but clear and unambiguous. While the plaintiff also places some reliance on the fact that she is aware that a trainee garda received compensation of €3,500.00 in respect of damage caused to her vehicle, the fact of such a payment cannot, of itself, ground a claim to legitimate expectation, although it might bolster such a claim where there was otherwise a strong case that the criteria necessary to establish such a claim were met.

51. For all of these reasons, I must allow the appeal. I do so, however, with considerable reluctance. As I have said above, there could not be the slightest doubt that the plaintiff sustained the losses that she has as a result of her duties as a member of An Garda Síochána. Moreover, these losses were not occasioned by reason of a spontaneous occurrence, but were the result of a deliberate and planned attack upon the property of a garda, with the express intention of intimidating her from conducting her duties, which intimidation continued after the event. It seems very likely to me that the Code was drafted in a more innocent time, but, whether or not I am correct in this observation, this decision identifies a lacuna in the Code which in my view should be addressed. I doubt very much if there is a single member of the law-abiding public who would not wish to see the plaintiff in these proceedings compensated for her losses and it goes without saying that this decision does not prevent the defendants from making an *ex gratia* payment to the plaintiff in the full amount of her losses.