

## THE HIGH COURT

## PLENARY ACTION

[2006 No. 6407 P.]

BETWEEN

KEVIN TRACEY AND KAREN TRACEY

PLAINTIFFS

AND

MICHAEL MCDOWELL, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND, THE ATTORNEY GENERAL, THE COMMISSIONER OF AN GARDÁ SIOCHANA, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE CHIEF EXECUTIVE OF THE COURTS SERVICE, BERNARD NEARY, EDWARD FINUCANE, JOHN KEENAN, PATRICK FLYNN, JOHN COSTELLO, DERMOT O'CONNELL AND DAVID O'BRIEN

DEFENDANTS

## JUDGMENT of Mr. Justice Eagar delivered on the 31st day of July, 2017

1. These proceedings arise out of an allegation that the State parties maliciously prosecuted the first named plaintiff on the 14th of August, 1999 for having no vehicle insurance, for having no driving license, for a failure to produce a driving license within ten days, and a failure to produce an insurance certificate within ten days.
2. The first named plaintiff produced his license and insurance at the nominated garda station within the statutory and specified ten days. He alleges he was subject to a malicious prosecution that resulted in serious consequences for both plaintiffs. This included the imposition of a court fine penalty on the first named plaintiff, the attempted endorsement of his license, a driving disqualification for one year, and a prison sentence for one month. The first named plaintiff further alleges that there was a forced entry into his home, he was subject to a wrongful and unlawful arrest, and that he was falsely imprisoned and trespassed upon. The first named plaintiff states that this was part of a long term and ongoing vicious campaign of abuse. Two discovery orders were made by the Master on the application of the plaintiff.
3. The first application made to the Master for discovery was on the 2nd of December, 2009 and the Master ordered the first, second, third, fourth, fifth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth named defendants to make discovery on a number of matters. This was grounded upon the affidavit of Kevin Tracey filed on the 2nd day of October, 2009.
4. The second order of the Master was dated the 4th of February, 2010 and this again appears to be grounded on the affidavit of Kevin Tracey filed on the 2nd of October, 2009. The order reads as follows: it is ordered that the defendants do within five weeks from the date hereof make discovery on oath of a number of documents.
5. All the orders made by the Master on the 4th of February, 2010 related to the Courts Service as defendants in these proceedings. The order related to paperwork including summons, Circuit Court appeal documents, legal diaries in the possession of the Courts Service, declarations of service relating to four summons, original court warrants and original court orders. It is also recorded by the Master that the affidavit sworn on behalf of the defendant is made by Margaret O'Neill, who when swearing her affidavit on the 14th of October, 2010, was the Assistant Head of Circuit and District Court Operations with the Courts Service.
6. The plaintiffs applied for further and better discovery by way of notice of motion and affidavits, with the affidavit of Kevin Tracey and Karen Tracey dated the 10th of June, 2017 and the supplemental and the further affidavit of Kevin Tracey sworn on the 12th of July, 2017. In relation to the order of the Master dated the 2nd of December, 2009 the Master ordered that the State defendants make discovery of the following documents which are, or have been in their possession or power:-

(1) Copy of the notebook entries taken on the 23rd of February, 2000 by Garda John Costello for Harcourt Terrace Garda Station.

(2) In respect of the issuing of summonses which were served on the plaintiff on the 23rd day of February, 2000, official records of any application for any decision to issue same together with any documents upon which the defendant intends to rely in support of its contention that the issuing of the summons was the result of an administrative error.

(3) The committal warrant executed on the 28th of May, 2001 together with the official record of the application for and issue of same and the recording of any findings subsequently arrived at by the defendants in regard to the irregularity of the committal warrant having been issued notwithstanding payment of the fine thereof and the affidavit on behalf of the State defendants was to be made by Inspector John Keenan.

7. Prior to the order of the Master however, the court notes correspondence from the Chief States Solicitors Office, on behalf of the State's defendants:-

"Firstly, re paragraph 1 of your said discovery request, the State defendants accept that the license was produced. No issue arises between the parties on this and discovery is therefore unnecessary. Please see paragraph 8(a) of the State's defence of the 30th of January, 2008.

Secondly, re: paragraph 2. This category of documents is unnecessary and irrelevant. The plaintiff was stopped while driving his vehicle, it is a requirement that a person driving a motor vehicle possess a driving license and insurance documentation. It is standard procedure that the person unable to produce when stopped by the gardaí are asked to produce their license and insurance at a garda station within ten days. The plaintiff did this (this Court's emphasis) and the State accepts this, no issue arises.

Thirdly, re: paragraph 3. This category is unnecessary and irrelevant. The reason for seeking the documents is to establish the details relating to the alleged offences brought against the first named plaintiff. These details are described in the four summons which are/were in the possession of the first named plaintiff. The first named plaintiff is aware of the

order of the District Court made against him in his absence.”

8. The affidavit of Niall O'Shea of the Chief States Solicitors Office referred to the three categories of discovery ordered by the Master.

*(1) Copy of notebook entries taken on the 23rd of February, 2000 by Garda John Costello of Harcourt Terrace Garda Station.*

He states that Garda Costello made no notebook entries on the 23rd of February, 2000, and consequently there were no documents to be discovered under this category.

*(2) Re: issuing of the summons which was served on the plaintiffs on the 23rd of February, 2000, and any official record of any application for and decision to issue same together, together with any document upon which the defendants intend to rely in support of the contention that the issuing of the summons was the result of an administrative error.*

He states “as is apparent from para. 4 of the affidavit of discovery sworn by Inspector John Keenan on the 25th of January, 2010 the State defendants are exerting a claim of State/Executive privilege attaching to these documents”. This is because the documents sought pertain to the decision making process concerning whether to prosecute or not. He says and believes that he is advised that it is contrary to the public interest for the documents to be disclosed.

*(3) The committal warrant executed on the 28th of May, 2001 together with the official record of application for and issue of same in the record of any findings subsequently arrived at by the defendants in regard to the irregularity of the committal warrant having been issued notwithstanding payment of the fine hereof.*

He states that as is apparent from the affidavit of discovery of Inspector Keenan, a copy of the committal warrant has been furnished to the plaintiff.

9. The supplemental affidavit of discovery of Detective Garda John Costello, Pearse Street Garda Station confirmed that discovery was made on the part of the State defendants by way of affidavit of discovery of Inspector John Keenan dated the 25th of January, 2010. He noted that the plaintiff subsequently issued a motion for further and better discovery dated the 13th of June, 2017 and he refers to the affidavit of Niall O'Shea dated the 23rd of June, 2017. He noted that Mr. O'Shea had confirmed in relation to Category 1 that there were no notebook entries taken by John Costello on the 23rd of February, 2000. He further explained the basis upon which privilege was asserted in respect of Category 2 documents. Mr. O'Shea further confirmed that there were no further documents in Category 3, the committal warrant having been included in the affidavit of discovery of Inspector Keenan.

10. In the replying affidavit of the plaintiffs dated the 12th of July, 2017, they expressed concerns regarding the privilege asserted over the documents of Category 2. Sergeant Costello confirms his understanding that it was common place for privilege to be asserted by State defendants in respect of documents pertaining to decisions concerning the commencement of prosecution – privilege was asserted in this instance accordingly.

11. He states however that in the instance case, to avoid any confusion regarding the circumstances in which the summons were issued, the State defendants have agreed to waive the claim of privilege in respect of Category 2. He addresses the circumstances surrounding the issuing of the summons and the documents generated.

12. He states that as is apparent from the statement of claim, the plaintiff was stopped at Lad Lane on the 14th of August, 1999. As is routine, the plaintiff was asked to produce his driving license and insurance at a station of the plaintiff's choice within ten days. The plaintiff chose to produce these at Rathmines Garda Station. In accordance with the then standard procedures, Sergeant Costello subsequently filled out a CT34 Form which he sent from Harcourt Terrace Garda Station where he was then stationed by ordinary post to his district station at Pearse Street Garda Station. From there, normally the form would be sent to Rathmines Garda Station from where it normally would have been returned to Pearse Street, and then on to him at Harcourt Terrace Garda Station. He states that occasionally CT34 Forms did not revert to the original sender. That is what occurred in this instance, and the CT34 Form was never located.

13. In the circumstances where the CT34 Form was not returned to him, he made an enquiry by telephone to Rathmines Garda Station, where he was told in error that the first named plaintiff had not produced the relevant documents.

14. Consequently, on the 7th of October, 1999 he completed an SAI Form for summons which he sent to the Courts Service. That form was duly processed and the summons issued. As is clear from the discovery made in the Schedule hereto, he said he once had a copy of the CT34 Form but that document was not returned to him, and the CT34 form cannot now be located. It is no longer in the power, possession or procurement of the State defendants.

15. Furthermore, the State defendants had a copy of the SAI Form but that is no longer in the power, possession or procurement of the State defendants, as it was sent to the Courts Service. He understands that discovery has been furnished to the plaintiffs by the Courts Service which includes the SAI Form. He said that the State defendants do have copies of the summons issued and discovery is therefore made in relation to same. He continued to object to producing the documents set forth in Part 2 of the First Schedule hereto.

16. This Court takes the view that the first named plaintiff now has discovery of the matters which he required to take proceedings. The Court upholds the claim of privilege in respect of Category 2 documents from the State.

17. On the 4th of February, 2010 the Master directed discovery of the following:-

(1) The entire application paperwork including SA1 Forms relating to the four summons in the possession of the Courts Service concerning the hearing at the District Court on the 27th of April, 2000 (original documentation if available, copy documentation if the original is not available).

(2) The Circuit Court appeal document handed to Mr. Derek Mills of the District Court on the 29th of September, 2000 (original documentation if available, copy documentation if the original is not available).

(3) The legal diary in the possession of the Courts Service for the Circuit Court appeal on the 9th of October, 2000 (original documentation if available, copy documentation if the original is not available).

(4) The legal diary in the possession of the Courts Service for the second Circuit Court appeal on the 26th of July, 2001 (original documentation if available, copy documentation if the original is not available).

(5) The original declaration of service relating to the four summons in the possession of the Courts Service (copy thereof if original is unavailable).

(6) The original warrant issued for the detention of the first named plaintiff at Mountjoy prison (copy thereof if original is unavailable).

(7) The original order of the District Court dated the 27th of April, 2000 recording conviction of the first named plaintiff together with the original orders by two of the Circuit Court of Appeal thereto dated the 9th of October, 2000 and the 26th day of July, 2001 and the original record of the removal of the conviction from the form of court record dated the 19th of December, 2001 (copies thereof if originals are unavailable).

18. The affidavit of discovery of the Courts Service defendants was that of Margaret O'Neill who says that she was the Assistant Head of Circuit and District Court Operations at the time of swearing the affidavit on the 14th of April, 2010.

19. Mr. Tracey complains that he did not receive a copy of this affidavit in 2010, and only received the affidavit in 2017. However, there has been difficulty in terms of serving documents on Mr. Tracey, and the court is satisfied that the affidavit was sworn by Margaret O'Neill on the 14th of April, 2010.

20. The plaintiff is now well advised of the issues raised therein. In her affidavit, she details the categories of documents which were the subject matter of the Master's order and although legal professional privilege is claimed in respect of some of the documents, the reality is that many of the documents are not available.

21. In her affidavit, she said that the Courts Service defendants no longer have in their possession, power or procurement the legal diaries for the 8th-9th of October, 2000 and the 26th of July, 2001. She said that the legal diaries were destroyed as there was no legal obligation to retain them. Nevertheless, she is in a position to exhibit the court lists for the 9th of October, 2000 before Judge John Buckley, circuit judge. Listed at item 6 is, *Garda John Costello v. Kevin Tracey*, and on the 26th of July, 2001 before Judge John Buckley, at No. 49 there is listed an application to reinstate *Garda John Costello v. Kevin Tracey*. She also says that in accordance with the Department of Justice Circular 20/1993 (dealing with the disposal of District Court records) which provides that computer summons older than three years could be destroyed, the computer summons with the declarations of service endorsed thereon have been destroyed. She refers to a copy of the circular which is clear on its face, and she says that the Courts Service defendants do not have in their possession, power or procurement the declarations of service specified at Category 5 of the order of discovery.

22. She said that the original warrants specified at Category 6 was issued by the Courts Service to An Garda Síochána and is no longer within the possession, power or procurement of the Courts Service defendants. At para. 12 of her affidavit she said that:-

"I understand that the obligation on a party given discovery is to discover all the documents and electronically stored information within their possession, power or procurement within the categories agreed and ordered to be delivered that contain information which may enable the party receiving the discovery to advance its own case or to damage the case of the party giving discovery or which may fairly lead to a train of enquiry which may have either of these consequences."

23. In the first schedule of the affidavit she sets out the documents which are the in the possession of the Courts Service defendants:-

(1) SAI 1 dated the 8th of August, 1999 – Category 1 as ordered by the Master.

(2) Correspondence from Kevin Tracey dated the 29th of September, 2000 addressed to the Circuit Court which clearly identifies what the Courts Service have in relation to the Circuit Court appeal withdrawal – Category 2 document.

(3) District Court order dated the 23rd of June, 2000 arising from the sitting of the court on the 27th of April – Category 7; and

(4) two other summons relating to the 23rd of June, 2000 arising from the sitting of the court on the 27th of October, 2000 – Category 7.

(4) Order of the Circuit Court dealing with the striking out of the appeal on the 9th of October, 2000 and the reinstatement allowing of the appeal on the 26th of July, 2001 – Category 7.

(5) Finally the record of the removal of the conviction from the formal court records dated the 19th of December, 2001 – Category 7.

24. The affidavit of Kevin Pigeon sworn the 28th of June, 2017 is of assistance to the court in that there is a table comparing the categories of discovery sought by the plaintiffs in their request for voluntary discovery dated the 6th of January, 2009, and in the plaintiffs grounding affidavit for the motion for discovery sworn on the 23rd of December, 2009 with the categories of discovery contained in the order.

25. It is interesting to note the issues which the plaintiff raised in relation to the Courts Service defendants and the discovery.

26. In relation to the application paperwork including the SAI 1 Forms relating to the four summons, these have now been disclosed and the plaintiff's main complaint is that he did not get them until this year.

27. The second document ordered by the Master has been discovered by the defendants.

28. In relation to the third and fourth sets of documents ordered for discovery by the Master, the plaintiff states that there is now no dispute.

29. In relation to the fifth sets of documents, the original declaration of service relating to the four summons in the possession of Courts Service has not been discovered.

30. The sixth document ordered for discovery by the Master has been discovered by the defendants by way of court orders.

31. Finally the seventh sets of documents ordered for discovery were the original order of the District Court and these documents have in this Court's view in relation to the four summons been discovered to the plaintiff.

32. Mr. Tracey set out in legal argument the general principles in relation to discovery. Counsel on behalf of the Courts Service quoted from a most recent decision of the Supreme Court dated the 28th of April, 2015 *O'Leary v. Volkswagen Group Ireland Ltd.* [2015] IESC 35.

33. Kenny J. in *Sterling-Winthrop Group Ltd. v. Farbenfabriken Bayer AG.* [1967] I.R. 97. He summarised the circumstances in which it is appropriate to make an order for further and better discovery as follows:-

"Such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit. The court will, however, order a further affidavit of documents when it is satisfied

(a) from the pleadings;

(b) from the affidavit of discovery already filed;

(c) from the documents referred to in the affidavit of discovery; or

(d) from an admission by the party who has made the affidavit of discovery that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit.

The Court is satisfied that all relevant documents have been disclosed by both defendants.

34. In the case of *Phelan v. Goodman* [2000] 2 I.R. Murphy J. stated:-

"Difficulties obviously arise in directing the discovery of documents or a particular range or class of document which the deponent denies are in his possession. To order the first defendant to swear a further affidavit of discovery presumably would result in his repeating the statements made and sworn by him on several occasions, namely, that he has not and never had any documents in addition to those already discovered in his power or possession relating to the matters in issue in the present proceedings. In those circumstances the court would have to be satisfied on the evidence before it that it was making a meaningful order."

In his most recent affidavit in reply the plaintiff in an affidavit sworn on the 25th July, 2017 refers at para. 3 to the CT34 Form. It appears to me that this is a matter of evidence and not a matter of discovery as Detective Garda Costello says he has not located that form. In relation to para. 4 of his affidavit it is clear that Detective Garda Costello has given details sufficient in the court's view for the purposes of the plaintiff.

35. It is not the function of the High Court to order the discovery of CT34 Forms which are unable to be discovered. The court is satisfied that the copies of the four summons were exhibited in the affidavit of Margaret O'Neill and I do not believe that the plaintiff can have a complaint in that regard. In para. 7 he refers to the waiving of privilege and so therefore there are no documents over which the State defendants are exerting any claim of privilege in respect of the order of discovery.

36. In para. 8 it is not also this Court's responsibility to order the telephone calls of the deponent's telephone call to Rathfarnham Garda Station the date and time of the call. This is a matter of evidence.

37. In the Court's view all relevant documentation has been discovered by the defendants in this matter and the court indicates that the motion seeking further and better particulars of discovery has now been completed. The case should be ready for trial once the witnesses have been summoned by Mr. Tracey for the next jury list which is at the beginning of October.