

THE HIGH COURT

[2023] IEHC 680

RECORD NO 2021/5508 P

BETWEEN

DENISE MURPHY

PLAINTIFF

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA,

MINISTER FOR JUSTICE AND EQUALITY,

IRELAND AND ATTORNEY GENERAL

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Micheál O'Higgins delivered on the 24th

October 2023

1. This is the first defendant's appeal from the order of the Deputy Master dated the 3rd of May 2023. The Commissioner of An Garda Síochána is objecting to discovery of information that Gardaí placed before a District Judge at the time of applying for a warrant to search the plaintiff's dwelling. The Commissioner also objects to discovery of any documents pertaining to the belief of the gardaí that the target of the warrant was, at the time, residing in

the plaintiff's home. The case raises issues of discovery, state confidentiality and constitutional issues concerning the inviolability of the dwelling.

2. According to the plaintiff's personal injury summons, on or about the 9th of May 2020, the plaintiff was a single mother with two young children who was shopping in her locality when she was informed by a neighbour that members of An Garda Síochána had broken into her home. It is pleaded that the back gate to the plaintiff's property was damaged, and admittance was gained through a window of the house. The plaintiff duly returned to her property and found that it had been entered and a number of items were strewn around the place. She later reported the matter to Garda David Tracey at her local garda station and he apparently indicated that there had been a mistake, and that gardaí had entered the wrong house.

3. It is pleaded that a number of gardaí had entered the house and ransacked all of the bedrooms upstairs and left all the doors open. The blinds in the back room had been down but were now open to the public. Letters belonging to the plaintiff were examined in her room and left out on the dressing table. Cushions had been left on the floor in the sitting room. Two bay windows at the dwelling house were wide open.

4. Members of An Garda Síochána were in the house for a considerable number of minutes and conducted a search. There was some damage to the back gate insofar as two laths were removed. Books belonging to one of the plaintiff's children had been scrutinised. The plaintiff and her two young boys were distraught over what had occurred, and as to what they encountered when they came back from the shopping trip. The plaintiff and her two children were very upset at this turn of events, particularly as to what was the suggested cause of this garda incursion into their dwelling. They had given no cause to the gardai to invade the privacy of their home. They had been peaceful and law-abiding citizens at all material times.

5. It is pleaded that in the premises, the gardaí were involved in an unlawful intrusion into the plaintiff's home and that, subsequently when they realised that they had made a grievous mistake, and had clearly attended the wrong house, they proceeded to leave the premises. The plaintiff was left deeply traumatised and this occurred in a context where she had a previous history of anxiety and postnatal depression. Her psychological difficulties were greatly exacerbated by the unwarranted intrusion into her dwelling house by members of An Garda Síochána. The aforesaid acts on the part of the gardaí constituted a wrongful and unlawful invasion of the plaintiff's dwelling house and same was carried out in violation of the plaintiff's constitutional rights.

6. The indorsement of claim sets out detailed particulars of personal injuries including psychological injuries, loss and damage. In the prayer to the indorsement of claim it is pleaded that damages are being sought for:

- (i) Failing to vindicate the plaintiff's constitutional rights;
- (ii) Breaching the plaintiff's constitutional rights;
- (iii) Intermittently and recklessly inflicting emotional suffering;
- (iv) Trespass;
- (v) Invasion of privacy;
- (vi) Negligence;
- (vii) Breach of duty of care;
- (viii) Mifeasance of public officers (sic).

7. It is also pleaded that, having regard to the foregoing matters, the plaintiff claims aggravated and exemplary damages.

Defence of the defendants

8. Insofar as they are material, the following pleas are made by the first defendant at para. 3 of its defence:

“(i) The entry into the Plaintiff’s dwelling house by members of An Garda Síochána was pursuant to a warrant issued on the 9th May 2020 to Garda Diarmuid Loughnane. Entry was effected through an open upstairs window without force.

(ii) Prior to An Garda Síochána entering the house, the Gardai spent an hour attempting to make contact with the target of the warrant, believed to be resident in the Plaintiff’s dwelling house.

(iii) It is denied that damage was caused to the Plaintiff’s dwelling house or to her personal property therein, or that of her children. Papers were located upstairs in the Plaintiff’s dwelling house that raised concerns that the target of the warrant did not reside in the Plaintiff’s property, and therefore the Gardai immediately retreated from the property leaving no damage to the interior or the exterior.

(iv) Superintendent O’Callaghan visited the Plaintiff and apologised to her.

(v) The pleaded narrative of the intrusion by members of An Garda Síochána into the Plaintiff’s dwelling house is denied...

(vi) . . .

(vii) At all material times the First named Defendant acted in good faith in the discharge of its statutory duty in or about the execution of search warrants [for the address in question]”.

9. By correspondence dated the 26th of May 2022, the plaintiff sought 3 categories of discovery as follows:

“(a) Search Warrant and all information laid before the District Court to obtain the warrant...

(b) All documentation pertaining to the belief that the target of the warrant was resident in the Plaintiff's dwelling house...

(c) All documentation... pertaining to the surveillance of the plaintiff's dwelling house".

10. In the course of the motion hearing, I was told that the defendants have agreed to provide the search warrants and also documents coming within category (c) above, namely documents pertaining to the surveillance of the plaintiff's home. The dispute between the parties concerns whether the plaintiff is entitled to discovery in terms of category (a) (save for the warrant), in other words, the information put before the District Judge and category (b), being all documents pertaining to the belief that the target of the warrant was residing in the plaintiff's home. Accordingly, category (a) (save for the warrant) and category (b) were the subject of a contested discovery application before the Deputy Master of the High Court on the 3rd of May 2023. The Deputy Master granted discovery of the information laid before the District Court to obtain the warrant and also documents coming within category (b) as detailed above. The affidavit of Adeline Tuffy, solicitor for the State Claims Agency, indicates that the Deputy Master granted liberty to the defendants to file an affidavit so that the confidentiality issue could be put on affidavit and could ultimately be argued before a High Court judge.

11. The plaintiff's application for discovery is grounded on the affidavit of Donal Farrelly, solicitor, sworn on the 14th of February 2023. At para. 9 he avers that the defendant filed a full defence and whilst accepting that on the 9th of May 2020, members of An Garda Síochána entered the plaintiff's house, and had subsequently returned and apologised for what transpired, the defendants further plead that the garda entered the property through an open upstairs window, and that the entry was without any force. He states that it was also believed that papers were located upstairs in the plaintiff's dwelling house and that this raised

concerns that the target of the warrant did not reside in the plaintiff's property and therefore An Garda Síochána immediately retreated from the property, leaving no damage to the interior or exterior. He refers to the further plea in the defence that at all material times the first defendant acted in good faith to discharge their statutory duty in or about the execution of the search warrant.

12. Mr. Farrelly makes the case that the information as laid before the District Court is relevant to the issues in the case and should be furnished to the plaintiff. He contends that the defendants had obtained a warrant to search the premises of the plaintiff in circumstances where they did not admit that the warrant should not have been obtained for such a search, and in circumstances where they clearly plead in their defence that they spent an hour attempting to make contact with the target of the warrant.

13. Mr. Farrelly concludes his affidavit with the averment that discovery of the documents referenced in the notice of motion is necessary for the fair disposal of the action and indeed for the saving of costs in the matter.

Submissions of the defendant

14. In relation to both categories of discovery sought, the defendants resist the application for discovery on the basis that the documents sought are confidential and are not relevant to the plaintiff's case. The defendants will claim privilege, if the plaintiff's application for discovery is successful, but resist the granting of discovery because of concerns around listing the documents in the affidavit and being exposed to a challenge to a claim of privilege. The defendants are concerned that even listing documents in an affidavit creates an operational risk and has a "chilling effect" on members of An Garda Síochána carrying out their duties in the investigation of crime.

15. Insofar as the plaintiff relies upon the decision of Clarke J. in *Independent Newspapers v. Murphy* [2006] 3 I.R. 566, it is submitted the court should first of all consider the strength of the plaintiff's case for the purposes of considering whether the granting of discovery is required to ensure that there is not an unfair result in the proceedings. It is submitted that this requires an analysis of the merits of the plaintiff's claim in respect of which the discovery is said to be relevant, namely the plaintiff's claim for damages for the tort of misfeasance in public office.

16. The defendants say it is extremely difficult to see how the plaintiff has an arguable case for damages for misfeasance in public office given that the pleadings on both sides refer to errors in obtaining and/or executing the warrant, as distinct from the statutory powers being exercised in bad faith. The defendant also suggests it is difficult to see how documentation coming within these categories could advance or diminish the claim of good faith or bad faith. The defendants say the plaintiff's case appears to be that by reason of the fact of her house having been searched, she suffered an injury. She effectively maintains that she is entitled to damages because the house should not have been searched – because the gardaí made a mistake – and it is suggested the plaintiff is trying to shoehorn this scenario into a claim for damages for misfeasance in public office.

17. It is submitted that if the plaintiff is permitted to succeed in such a claim in negligence that this would result in an impossible obligation being imposed on the defendants: only to get a warrant where there is certainty that the search is justified. It is submitted this would open the door for the information in all warrant applications to be granted if the subject of the warrant wishes to ascertain the basis for the warrant application. This is precisely the kind of case where the court will invariably find that it is unjust, unreasonable, contrary to public policy and unfair to impose liability.

18. Insofar as the plaintiff complains that misfeasance cannot be proven in the absence of the discovery sought, the defendants submit that that amounts to a classic fishing expedition and that it is unacceptable for the plaintiff to maintain a claim for damages for misfeasance in the absence of pleading any facts capable of supporting such a claim. In fact, the plaintiff's pleadings contradict a claim of misfeasance of public office.

Submissions of the plaintiff

19. The plaintiff contends that categories (a) and (b) are relevant and necessary for the fair disposal of the proceedings. Category (a) is relevant and necessary in circumstances where the defendants in their defence allege that at all material times the first named defendant acted in good faith in discharge of a statutory duty in or about the execution of search warrants for the address concerned.

20. Insofar as part of the claim is for damages for misfeasance in public office, the issue of good faith on the part of the defendants is a central issue in these proceedings. Therefore, the plaintiff would be at a significant evidential disadvantage if the evidence grounding the issuing of the search warrant is not discovered.

21. There can be no dispute but that somewhere in the chain of events, members of An Garda Síochána erred in their actions. In order for the fair disposal of the proceedings, the plaintiff ought to be entitled to discovery of the information and evidence that was placed before the District Court. This evidence will identify what errors, misconceptions or mistakes (if any) were made by the gardaí. This category of documentation will either strengthen or weaken the plaintiff's case in circumstances where the evidence may disclose *mala fides*.

22. Regarding category (b), the plaintiff submits that this category is relevant and necessary in circumstances where the defendants allege that they acted in good faith in the discharge of a statutory duty in or about the execution of the search warrant, and in

circumstances where the defendants in their defence allege that they believed the target of the warrant was resident in the plaintiff's dwelling house.

23. Since the defendants claim that members spent one hour trying to contact the target of the warrant, and where they have not admitted that the warrant should not have been obtained, this category of documentation is relevant to the central issue of *knowledge* of the defendants and the actions of their agents. The documentation therefore goes directly to the issues in dispute and has the potential to strengthen or weaken either party's case.

24. The plaintiff also addresses the defendant's argument about confidentiality. The defendant has claimed that the documents sought are confidential and sensitive in nature as they relate to the functions of An Garda Síochána in investigating criminal conduct.

25. The plaintiff submits that there is no absolute bar to the discovery of the documentation placed before the District Court in obtaining the warrant. The issue was addressed in *McGuinness v. Commissioner of An Garda Síochána, Ireland and Attorney General* [2017] IECA 330.

26. In relation to the issue of confidentiality, the plaintiff relies upon the decision of Clarke J. in *Independent Newspapers v. Murphy*. The plaintiff relies on this case to support the proposition that "*confidential information (which is not privileged) must be revealed if not to reveal same would produce a risk of an unfair result of proceedings. The requirements of the interests of justice would, in those circumstances, undoubtedly outweigh any duty of confidence*".

27. The plaintiff contends that the information which was relied upon before the District Judge is a central issue for the claim of misfeasance of public office. Furthermore, Garda Loughnane, who provided the evidence to the District Judge, will likely be a witness at the hearing of the action. Should the plaintiff be prevented from relying on the evidence that was placed before the District Court, a real risk of prejudice would arise.

28. The defendant's case is likely to rely on the evidence of Garda Loughnane. The warrant issued on foot of his evidence, and that is the first step in the factual matrix of the proceedings. The *bona fides* or *mala fides*, the accuracy, integrity and impartiality of the evidence that was placed before the District Court is a central issue in these proceedings.

29. The same goes for category (b). The documentation in category (b) relates to the information the defendants had concerning the target's residence. Category (a) is limited to the evidence that was placed before the District Court. Category (b) goes to the state of knowledge of the defendants at the time of seeking the warrant. The plaintiff submits that this documentation may show the *mala fides* or *bona fides* of the defendants, the standard of duty of care afforded by public office in applying statutory regimes and the due diligence and accuracy of the investigation by the defendants.

30. It is submitted that if the plaintiff was prevented from questioning Garda Loughnane or other defence witnesses as to the information they held about the residency of the target, then a real risk of injustice would arise.

Analysis

31. In this case, the plaintiff is seeking damages, and aggravated and exemplary damages for a number of torts. These include trespass, negligence, breaching the plaintiff's rights and misfeasance in public office. The defendant claims that the last mentioned of these – misfeasance in public office – has not been properly pleaded. I will come back to that point, but for the moment it should be noted that amongst the torts alleged against the defendants is a cause of action that requires, as a key ingredient, proof that the officer concerned knew that he was acting unlawfully or that he acted with subjective recklessness as to the unlawfulness of his actions (*Eustace v. Lord Mayor, Aldermen and Burgesses of Drogheda Borough Council* [2019] IEHC 455). In that case, Ní Raifeartaigh J. examined the necessary

ingredients to ground a claim for misfeasance in public office, including the requirement that the defendant knew they were acting unlawfully or acted with subjective recklessness.

Although finding that the defendant council's conduct as a collective entity was "deeply disrespectful" of the plaintiff's property rights and "bewilderingly incompetent", Ní Raifeartaigh J. held that proof of bad faith was a necessary ingredient of the tort, and this had not been proved by the plaintiff. Accordingly, while damages were awarded for trespass, the claim in respect of misfeasance in public office failed.

32. In the present case, the plaintiff's personal injuries summons expressly mentions "misfeasance of public officers" (sic). While that isn't the normal name for the tort, it seems to me that everybody is clear that that is what was intended. The claim for damages for misfeasance in public office is consistent and "chimes with" the plaintiff's claim for aggravated and exemplary damages. Amongst the circumstances in which such damages can be awarded is where a defendant commits an act in bad faith.

33. Moreover, in its defence, the first defendant expressly pleads that at all material times the first defendant acted in good faith in the discharge of its statutory duties in or about the execution of search warrants for the address in question. It is also important to note that at para. 3 (ii) of the defence, the first defendant pleads that prior to the gardaí entering the house, they spent an hour attempting to make contact with the target of the warrant, who was believed to be resident in the plaintiff's dwelling house.

34. It follows from all of this that the first defendant has chosen, in the defence delivered on its behalf, to resist the plaintiff's claims on the ground, *inter alia*, that the gardaí at all times acted in good faith. This to my mind makes the issue of good or bad faith an issue in the case. It does not matter that, on one view, the case as pleaded by the plaintiff does not expressly reference the good/bad faith issue. The court is entitled to view the proceedings in

the round and should not overlook the positive case which has been pleaded on behalf of the first defendant.

35. In this regard, I agree with the view of Simons J. in *Moore v. St. John of God Community Services Company CLG and the HSE* [2023] IEHC 272 where he said as follows at para. 9:

“Counsel on behalf of the defendants submits that there is no positive plea on the part of the plaintiff to the effect that the service user has previously assaulted staff members. It is further submitted that the case, as pleaded by the plaintiff, is confined to the two alleged assaults both of which took place on the same day. With respect, this submission fails to consider the pleadings in the round and overlooks the positive case which has been pleaded on behalf of the defendants themselves”.

(emphasis added)

36. It seems to me that since the defendant has made the issue of good/bad faith an issue in the proceedings and has chosen to resist the reliefs on that basis, then this marks out the contours of the case and the tramlines of relevance will fall to be determined by reference to the good faith/ bad faith issue and/or the claim for misfeasance in public office.

37. The caselaw on discovery indicates that a document is relevant if it may reasonably form the basis of a line of inquiry which may lead to the discovery of information that will advance the case of the seeker and/or weaken that of the party against whom it is sought. It is sufficient that a document may contain such information – it is not necessary to prove that it will.

38. The caselaw also suggests that a plea must be taken at its high watermark, and it is generally not the role of the court to embark upon an inquiry as to the strength of the case or the probability of proving a pleaded fact. However, it is not open to a party to submit a bare and unparticularised plea in the hope of using discovery to obtain evidence in support of a

claim that is not so particularised (see generally the decision of the Court of Appeal in *O'Brien v. Red Flag Consulting Limited* [2017] IECA 258).

39. It seems to me that much of the defendants' argument on this motion is directed at the contention that the plaintiff's case for damages for misfeasance in public office has not been properly pleaded and is either weak or not arguable at all (see para. 9 of the defendants' written submissions). In my view, on the facts here, that approach is misplaced. While the claim for misfeasance in public office could have been pleaded more clearly, and with greater particularity, I don't think it can be claimed that the defendant has been misled or taken by surprise. The pleadings should be taken at their high watermark, and it is not the role of the discovery judge to embark upon an enquiry as to the strength of the plaintiff's case. After all, this is not an application seeking to strike out a plaintiff's claim for being frivolous or vexatious or bound to fail.

40. It seems to me the background context of the plaintiff's claim should also be borne in mind: the plaintiff's case is that she arrived back to her home to find that it had been entered and allegedly ransacked by the gardaí in her absence. The plaintiff was not present at the time of the search. She therefore was not told by anyone at the time of the search why her home was being raided. Nor was she present, obviously, for the application for the warrant in the District Court. According to the pleadings, An Garda Síochána has since apologised for what occurred, but it is by no means clear what error(s) are being owned up to and what precisely was the reason the gardaí applied for the warrant or entered the dwelling. Doubtless, these are matters that will be played out in the evidence, should there be a hearing. However, as matters stand, based on the pleaded facts, the plaintiff must be entitled to basic information as to why the Gardaí entered her home; why they subsequently apologised for entering her home; and why they sought a warrant in the first place.

41. By definition, the sworn information that was placed before the District Judge at the time of the application for the warrant will shed light on why the gardaí applied for the search warrant for the plaintiff's address. It seems to me that is an issue of either direct or indirect relevance to the proceedings. Moreover, the sworn information is relevant because it may reasonably form the basis of a line of inquiry which may lead to the discovery of information that will advance the plaintiff's case or weaken the defendant's case. The plaintiff does not have to prove that the document contains such information. It is enough if the document *might* contain such information.

42. The following matters of relevance are referenced in the pleadings:

- A Garda Tracey admitted that it was a mistake and that they had entered into the wrong dwelling house (para. 6 of personal injuries summons);
- Members of the Gardaí returned to the plaintiff's home and apologised for what had occurred (para. 1 (iii) of the defence);
- Prior to the Gardaí entering the plaintiff's home, the gardaí spent an hour attempting to make contact with the target of the warrant, believing him to be present in the plaintiff's dwelling house (para. 3 (ii) of the defence);
- Paper was located upstairs in the plaintiff's dwelling house that raised concerns that the target of the warrant did not reside in the plaintiff's property (para. 3 (iii) of the defence).

43. It strikes me that the parties may wish to explore at the hearing the basis on which the gardaí applied for the warrant, and secondly the question as to the nature of the factual error(s) which the gardaí say occurred that led to the gardaí entering the plaintiff's home and also leaving the dwelling mid-search. There is a reasonable possibility that discovery of the sworn information will shed light on these issues.

44. In addition, Category (b) of the requested documents is also relevant because it seeks documents pertaining to the garda belief that the target of the warrant was residing in the plaintiff's home. Again, this is a plea made by the first named defendant in its defence, and it seems to me the plaintiff is entitled to probe and test that factual plea and seek documents in the possession of the gardaí that relate to that factual plea.

45. The pleadings disclose that the issue as to the knowledge of the defendants at the time of applying for the warrant and executing it at the plaintiff's dwelling house may be an important issue in the proceedings. The requested documents may shed light on the extent of garda knowledge at the time and, as I have said, may also assist in identifying what errors and misconceptions were made by the gardaí both at the time of applying for the warrant and executing it.

46. For all these reasons, I am satisfied that both categories of the requested documents meet the *relevance* limb of the discovery test.

47. As pointed out by the plaintiff, it is somewhat telling that in the defendants' initial response to the request for discovery, no objection was made on grounds of relevance. The first time that objection is raised is in the defendants' submissions on the motion.

48. I note, however, that the relevance objection did feature in the Master's Court and for that reason I have endeavoured to deal with this objection on its merits.

Issue of confidentiality

49. The principal reason relied upon by the defendant for resisting discovery is the contention that the documents sought are confidential. It has been indicated that the defendants will claim privilege, if the plaintiff's application for discovery is successful, but resist the granting of discovery because of concerns around listing the documents in the affidavit. The defendants are concerned that even listing documents in an affidavit creates an

operational risk and “*has a chilling effect on members of An Garda Síochána carrying out their duties in the investigation of crime*” (para. 4, defendants’ written submission).

50. In my view, the defendant’s submission appears to conflate two issues that ought to be kept separate. In this application, the court is concerned with an application for discovery, not an application to uphold privilege. The privilege issue is for another day. Moreover, insofar as there appears to be an objection to even listing documents in an index to an affidavit of discovery, that issue can in the first instance be addressed by way of suitable redactions. Should the parties not be able to agree the redactions, then that issue can be addressed and ruled upon at the hearing dealing with the assertion of privilege (if any).

51. It is correct that confidentiality is a different, and broader, concept than privilege. Unlike privilege, which is absolute, the question of confidentiality is not a right but may be recognised by the court where the balance of justice so requires it. Quite properly, counsel for the first defendant made reference to *Fyffes Plc v. D.C.C. Plc [2005] 1 I.R. 59* (and other authorities mentioned in Abrahamson, Dwyer and Fitzpatrick, *Discovery & Disclosure*, 3rd Ed., (Round Hall, 2019) at para. 39.04 – 39.05) wherein the Supreme Court made clear that there is no principle of law by which documents are prohibited from discovery by reason of confidentiality alone. Nor is it the law that confidential documents should only be discovered in very rare cases. The furthest the defendant can put the issue is to say, relying on the judgment of Clarke J. in *Independent Newspapers*, that once the court is satisfied that the documents being sought are confidential, the court should interfere with the right of confidence “*to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing*”.

52. The relevant quotation from Clarke J. (as he then was) is as follows:

“4.3. *I am satisfied that the court should only order discovery of confidential documents (particularly where the documents involve the confidence of a person or*

body who is not a party to the proceedings) in circumstances where it becomes clear that the interests of justice in bringing about a fair result of the proceedings require such an order to be made.

4.4. It is clear that confidential information (which is not privileged) must be revealed if not to reveal same would produce a risk of an unfair result of proceedings. The requirements of the interests of justice would, in those circumstances, undoubtedly outweigh any duty of confidence. There is ample authority for that proposition which now may be taken to be well settled. Where, therefore, it is clear that the materials sought will be relevant, then discovery must be made notwithstanding any confidentiality.

4.5. However, it seems to me that the balancing of the rights involved also requires the application of the doctrine of proportionality. To that extent, it seems to me to be appropriate to interfere with the right of confidence to the minimum extent necessary consistent with securing that there be no risk of impairment of a fair hearing”.

53. The necessity for the discovery court to engage in a balancing exercise was also emphasised by the Court of Appeal in two recent judgments: *Ryan v. Dengrove DAC* [2022] IECA 155 and *A.B. v. Children’s Health Ireland (CHI) at Crumlin* [2022] IECA 211. The following is stated at para. 67 of the Court of Appeal’s judgment in the *Dengrove* case:

“In that context, a balance has to be struck between the likely materiality of any given document to the issues likely to arise in the proceedings and the degree of confidentiality attaching to it. A confidential document (and particularly one that is highly confidential) should not be directed to be discovered unless the court is satisfied that there is a real basis on which it is likely to be relevant at the hearing. The more material the document appears to be – the greater the likelihood that the document will have ‘some meaningful bearing on the proceedings’ – the more clearly

the balance will be in favour of disclosure. Such an assessment necessarily requires the court to look beyond the threshold test of Peruvian Guano relevance. The ‘nature and potential strength of the relevance’, and the degree to which the document is likely to advance the case of the requester, or damage the case of the requested party, are appropriate considerations in this context”.

54. Applying these principles to the present case, I find that there is a real danger that by the court not making an order of discovery, this could produce a risk of an unfair result in the proceedings. The requested documents are highly material to the issues in the case and in my view refusal of the application could affect the outcome. Since a key focus of the proceedings will be the lawfulness of the garda search, and since one side only is in possession of the material that was put before the District Judge, refusal of discovery would inevitably place the plaintiff at a disadvantage in the proceedings. There is every possibility that a line of inquiry in cross-examining the author of the sworn information could be lost to the plaintiff. Alternatively, the defendants may choose not to call the garda who applied for the warrant and in that scenario, without the sworn information, the plaintiff’s legal team would be at a heightened evidential disadvantage.

55. The same could be said of the documents coming within category (b). These documents may help to identify what errors and misconceptions (if any) were made by the gardaí, what matters were subjectively in their minds when they applied for the warrant, whether they did or did not believe that the target of the warrant was living in the plaintiff’s home, whether they did or did not act in good faith and whether the gardaí acted with knowledge of the risk that they might be acting unlawfully but proceeded to act anyway (the ingredient which, according to the authorities, may be sufficient for the tort of misfeasance in public office).

56. In my view, there is force to the plaintiff's argument that in circumstances where the defendant claims that garda members spent one hour trying to contact the target of the warrant, and where they have not admitted that the warrant should not have been obtained, this category of documentation is highly relevant to the central issue as to the *knowledge* of the defendants at the relevant times.

57. Applying *Dengrove*, the more material the requested documents appear to be in this case, the greater the likelihood the documents will have some meaningful bearing on the proceedings, the more clearly the balance will be in favour of disclosure.

58. These considerations underscore not just the *relevance* limb of the discovery test, but also the *necessity* limb. As Clarke J. noted in the *Independent Newspapers* case, confidential information which is not privileged must be revealed if not to reveal same would produce a risk of an unfair result. When weighing these matters, the discovery judge should also keep to the forefront of the court's mind the doctrine of proportionality. But where, as here, a refusal of discovery could affect the outcome of the proceedings, this constitutes a relevant factor in balancing whether the requirements of justice would outweigh any duty of confidence that may arise.

59. The other point to bear in mind is that granting discovery in this case will not automatically mean that the requested materials will be handed over. That is because the defendants have indicated they intend to assert a claim of legal privilege over the documents. The judge dealing with that application will be in a position to weigh the public and State interests that are said to justify non-disclosure of the documents. In all likelihood, the court dealing with that application will have more information as to the contents of the documents than is currently available to me.

60. As matters stand, this court has no more than a vague indication as to the contents of the requested documents. Whilst it is likely that some degree of confidentiality attaches to the

documents, it is not at all clear how high a probability of a breach of confidence arises, or on what basis. It is therefore difficult to know what weight to attach to this consideration.

61. Even if a high probability of a breach of confidence arises, in my view this should be balanced against the probability that the requested documents will be relevant and may influence the outcome of the proceedings. The *Independent Newspapers* case is clear authority for the proposition that confidential information (which is not privileged) must be revealed if not to reveal same would produce a risk of an unfair result. The overarching principle is that the interests of justice, in these circumstances, should outweigh any duty of confidence.

62. It should also be noted that the defendants have not objected to discovery of category (c) of the requested documents, being documents pertaining to the surveillance of the plaintiff's home. If that category of documents gives rise to little or no confidentiality concern, it is difficult to see how category (b) (documents pertaining to the belief that the target of the warrant was residing in the plaintiff's home) carries such dangers from a confidentiality perspective.

63. In any event, it will be open to the defendants to argue at the privilege hearing whether any duty of confidence to informants (for example) should operate so as to warrant refusing disclosure of the documents. Similarly, if disclosure of the documents would imperil an ongoing criminal investigation, this is something that can be canvassed at a privilege hearing.

64. In their written submissions, the defendants rely on the decision of the Court of Appeal in *McGuinness v. Commissioner of An Garda Siochana*. In my view, that case is readily distinguishable and does not assist the defendants. Firstly, it is clear from the judgment that Keane J. in the High Court refused the application on a number of grounds that are simply not relevant to the present case. Keane J. was critical of that applicant's position

because: the pleadings in the action were not closed; the relevant procedural rules requiring a voluntary letter seeking discovery and setting out why the documents were relevant and necessary had not been complied with; and the application was not couched as an application for discovery at all but rather as a somewhat irregular application seeking on an interlocutory basis a mandatory order compelling the production of the sworn information that was put before the District Judge. None of those criticisms arise here.

65. Secondly, in *McGuinness* when Keane J. ultimately ruled on the merits of the application, he did so by treating it as a privilege hearing. He considered two affidavits sworn on behalf of the defendants from a garda inspector which supported a claim of public interest privilege and informer privilege respectively. Keane J. viewed the documents in question himself and concluded that the range and detail of the information contained in the document at issue could result in the identification of a confidential informant. Both public interest privilege and informant privilege were properly invoked. The entire document was covered by the dictum of Denham C.J. in *McLaughlin v. Aviva Insurance* [2012]1 I.L.R.M. 487 at para. 492 wherein it was stated that, in general, “*documents material to an ongoing criminal investigation by An Garda Síochána should not be required to be disclosed in civil proceedings*”.

66. Keane J. ruled that the risk invoked in the case was not merely the potential compromise of an ongoing criminal investigation but also a potential risk to the life of an informant and hence could not be lightly weighted. Again, none of these features applies to the present case.

67. Thirdly, and perhaps most decisively of all, the *McGuinness* decision in my view is of no assistance to the defendants because in *McGuinness* the core finding in the appeal was that the plaintiff had failed to establish the relevance of the documents that were sought to be disclosed (see para. 23 of the judgment of the Court of Appeal).

68. In contrast, for the reasons that I have attempted to outline earlier, it seems to me that the documents that are sought here have a strong degree of relevance to the pleaded issues in the case.

69. One other matter that I think the court is entitled to take some account of is the very subject matter of the proceedings at issue, namely the inviolability of the citizen's dwelling.

In *Damache v. DPP & Ors.* [2012] 2 I.R. 266, Denham C.J. stated as follows:

"42. In Ireland the dwelling house is protected under the Constitution. The Constitution vindicates and protects fundamental rights. In The People (Attorney General) v. O'Brien [1965] I.R. 142 Walsh J. pointed out that: -

"The vindication and the protection of constitutional rights is a fundamental matter for all courts established under the Constitution. That duty cannot yield place to any other competing interest. In Article 40 of the Constitution, the State has undertaken to defend and vindicate the inviolability of the dwelling of every citizen." ...

47. The procedure for obtaining a search warrant should adhere to fundamental principles encapsulating an independent decision maker, in a process which may be reviewed. The process should achieve the proportionate balance between the requirements of the common good and the protection of an individual's rights. To these fundamental principles as to the process there may be exceptions, for example when there is an urgent matter...

55. The circumstances of the appellant's case also includes the fact that the place for which the search warrant was issued, and which was searched, was the appellant's dwelling house. The Constitution in Article 40.5 expressly provides that the dwelling is inviolable and shall not be forcibly entered, save in accordance with law, which means without stooping to methods which ignore the fundamental norms of the legal

order postulated by the Constitution. Entry into a home is at the core of potential State interference with the inviolability of the dwelling”.

70. While that case was concerned with the question as to the constitutionality of s. 29 of the Offences Against the State Act 1939, it nonetheless emphasises the important role which the inviolability of the dwelling provision of the Constitution plays in our constitutional order.

71. While it is not the role of this court hearing a discovery application to in any sense embark upon a consideration of the substantive issues, it does seem to me that the facts of the case as pleaded in the pleadings, coupled with the statements of principle identified by the Supreme Court in *Damache*, reinforce the entitlement of a party seeking to challenge the lawfulness of a garda entry into their dwelling to have disclosed to them the documents that may be relevant to the lawfulness of such entry. I make that observation mindful of the unusual facts of this case.

72. On the facts as pleaded in the parties’ respective pleadings, the plaintiff’s dwelling was forcibly entered in *prima facie* breach of her constitutional right to the inviolability of her dwelling. The justification for the garda entry into the dwelling is said to be, variously: a search warrant that was applied for in the District Court in the absence of the plaintiff, an operational error or errors on the part of the gardaí that apparently led to the gardaí later indicating to the householder that some (as yet unidentified) mistake had occurred, such that it was appropriate for the gardaí to apologise; a plea that gardaí spent an hour attempting to make contact with the target of the warrant in the belief that he was resident in the plaintiff’s dwelling; a plea that in the course of the search, papers were located upstairs in the dwelling that raised concern amongst the gardaí that the target of the warrant did not reside in the property and that therefore the gardaí immediately retreated from the property; and a plea that the gardaí at all times acted in good faith in the discharge of their statutory duties. It seems to

me the facts as pleaded are unusual and mark out the very specific factual framework within which this discovery application should be viewed.

73. Finally, in accordance with the proportionality principle, I have considered whether the discovery that is sought here is unduly broad or would be likely in any sense to place an undue administrative burden upon the defendants. It seems to me the two categories of documents have been narrowly drawn and are net and will not give rise to such issues.

74. Separately, I consider that granting discovery of the two categories sought in this case would be consistent with the guarantee of the inviolability of the dwelling and with the stricture contained within Article 40.5 of the Constitution that the dwelling of every citizen shall not be forcibly entered save in accordance with law. Discovery of the requested documents will assist the trial judge in determining whether the entry into the plaintiff's dwelling was or was not lawful.

75. In conclusion, I consider that the discovery sought is relevant and necessary to enable the trial court achieve justice in the case. The discovery sought may also assist towards the saving of costs. It may be that the parties, once discovery is made, may be able to agree the basis upon which the warrant was obtained and/or why the gardaí entered the dwelling. Agreement on these issues will be less likely if discovery is refused.

For all these reasons, I refuse the first defendant's appeal against the order of the Deputy Master.

76. In circumstances where the first defendant has not succeeded in this appeal, my provisional view is that the plaintiff should be entitled to an order for the costs of the appeal. If the first defendant wishes to contend for a different order, the matter can be listed before me within 14 days of this judgement.

Signed:

Mícheál P. O'Higgins.

Appearances:

Niall Gaffney BL instructed by Donal Farrelly & Co. Solicitors for the plaintiff.

Grainne Fahey BL instructed by the State Claims Agency for the defendants.