

APPROVED

THE HIGH COURT

[2024] IEHC 283

[Record No. 2014/7727P]

BETWEEN

FRANCIS MCGUINNESS

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SIOCHANA, IRELAND AND THE

ATTORNEY GENERAL

DEFENDANT

JUDGMENT of Mr Justice Nolan delivered on the 29th day of May, 2024

1. The Plaintiff in this action is a businessman who was born in Dublin, but now lives in Newry, County Down. He is the owner of a business premises including a yard at Hillcrest, Cochran, County Dublin.

2. On the 23rd of August 2014, he alleges that the Defendants unlawfully entered the premises and seized business documents, two envelopes of cash containing both euro and sterling, a cheque book, together with keys for two X5 BMW jeeps and failed to return them. He was never given a copy of the warrant or the information sworn to obtain it. He alleges that there was a conscious and deliberate violation of his constitutional rights to property and

good name and accordingly, seeks damages in negligence, breach of duty including statutory duty, breach of constitutional rights, as well as aggravated and exemplary damages. He also seeks orders compelling the return of the items seized.

3. The Defendants allege that they acted lawfully at all times, were not guilty of trespass and did not take the items allegedly taken, including the envelopes containing cash. They say the raid was not disproportionately excessive by either number or force.

Procedural History

4. It would be fair to say that the parties to this case are no strangers to each other or the courts. In early October of 2016, an application came before Keane J. in these proceedings, where the Plaintiff sought an order compelling the Defendants to furnish a copy of the sworn information supporting the application made to the District Court for a warrant to search the Plaintiff's premises. He examined the sworn information and concluded that the information was material to an ongoing criminal investigation and that there was a risk that the range and detail of the information could result in the identification of a confidential informant or informants.

5. The Plaintiff was not happy and appealed to the Court of Appeal which upheld the decision of the High Court.

6. The final judgement in these proceedings is that of Dignam J. in the case *McGuinness v The Commissioner of An Garda Síochána, Ireland and the Attorney General* [2023] IEHC 436. The Defendants brought an application to dismiss the Plaintiff's claim for an inordinate and inexcusable delay. By what I might describe as a "short whisker", the judge refused to dismiss the case, but, gave directions in relation to the trial of the action. This is the trial of that action.

The Evidence

7. Mr. Donal Terry, Engineer, gave evidence of attending the premises, located on the Old Dublin Road, within days of the raid at the request of the Plaintiff himself. He took appropriate photographs and measurements and produced a Google photograph of the layout of the yard, which can be described as triangular in shape with the thin part of the yard to the left of the photo and the broad part to the right, which included a house and unkept garden, which was Mr. McGuinness's family home for many years.

8. He also had photographs of the damaged locks of two large gates, which gave access to the yard. It was clear from the photographs of the gates that the padlocks and pins had been cut through by use of an ultra-high temperature oxy- acetylene torch.

9. The Plaintiff then gave evidence. On the day of the raid, there was a Polish national on the property employed by a customer who had parked his vehicle in the yard.

10. The Plaintiff was not on the premises at the time but when he came back, at about 10:00 AM, the gates were open. One of the two sets of gates had been, what he described as "*butchered*" by an oxy-acetylene torch. He went to a small portacabin where he discovered that the place had been ransacked and key documents relating to two of his companies, KTV Leasing and Pacific Traders Limited, were missing, as was a cheque book, together with two sets of fob keys and two envelopes of cash.

11. These were two brown envelopes, being old Dublin Corporation prepaid motor tax envelopes. These contained cash in two denominations. The first was for a customer in Northern Ireland initialed "*JB*" (which stood for "*Jelly Baby*", due to the gentleman's girth), contained £2,000. This gentleman was Kevin Donnelly.

12. The second envelope contained €1,800 and was initialed “MS”. This was for a customer in Castlebar named Mick Shaw. He had to make up the difference out of his own pocket. He said this was not the first time that money had gone missing after a Garda search.

13. In relation to the two sets of fob keys that were missing, the Plaintiff confirmed that each set contained three fobs for the two jeeps, which were unregistered having just arrived from Belgium. Therefore, there were six fobs missing.

14. In cross examination, he confirmed that he had to get replacement keys for them, cut in the UK.

15. The documentation taken related to the two companies, were in two leather pouches containing books of receipts and sales, bank statements, shipping notes and other associated papers. These were for his accountant in Ilford, London and as a result of not having the documents, he was obliged to pay a fine for late VAT declarations in the UK.

16. The Plaintiff said that the cheque book missing was in relation to another one of his companies, NMT Mount Trading.

17. After much correspondence and following the issue of proceedings, he got to examine the warrant. It referred to a vehicle 98 D 55178, which was found at Quinn Packaging, Rathkeenlan, Co. Cavan. He said that there were absolutely no grounds to suspect him of anything connected with that vehicle.

18. He said the man on the premise was a Polish national employed by Raymond Coghlan, called Pavel, who has since died. He said that no warrant was ever shown to that person as far as he was aware.

19. It was only near the end of his evidence in chief that reference was made to his brother, Cyril McGuinness, from whom he was estranged. He believed that this was the driving force behind the raid and the other difficulties which he had with the Defendants. He acknowledged there was bad blood between himself and the Gardaí.

20. He said Cyril McGuinness was a close confidant and friend of Sean Quinn, the former managing director, chairman and principal shareholder of the Quinn Direct empire which spectacularly imploded in 2008. The Plaintiff confirmed that Cyril McGuinness was the subject of a lot of Garda attention, prior to his death in November of 2019.

21. The Plaintiff was then cross examined. It is fair to say that the cross examination did not go well and highlighted significant deficiencies in his recollection of what were important matters in the context of this litigation.

22. In relation to the fine imposed, he confirmed that that his company, Pacific Traders, had paid the fine, but since he was the beneficial owner, he felt it had come out of his pocket.

23. It was put to him that in evidence he had said that the man on the premises was called Pavel, but in his Replies he said the man was named Simon. He said they were one and the same person. He also said in evidence that the gentleman was employed by Raymond Coughlan. Yet, in his Replies, he said that he himself had employed him. He refuted that and said that he never employed drivers.

24. In relation to the two initialed envelopes, it was put to him that in evidence he said that the envelopes had been brown with postage paid, yet his Replies said that the envelopes were white and that the names of the recipients, namely Mick Shaw and Kevin Donnelly, were on them. The Plaintiff, having been empathic about the matter initially, conceded that he had made a mistake both in regard to the initials and the colour.

25. He reiterated that he was buying and selling the vehicles in his own name and therefore, the money that was missing was his monies and not that of any of his companies.

26. When he was asked what his complaint was, he said that he wanted the court to deliver him some satisfaction in relation to the unlawful activities of the Gardaí; cutting down his gates, taking his property and continuously harassing him. He said that the warrant was wrong and that the Gardaí had lied to get it.

27. He did not believe that there was ever any confidential informant. He said that the Gardaí had made accusations which connected him with the arson attacks at the Quinn properties and that he had no hand, act or part in those attacks.

28. He was adamant that nothing had ever been returned to his solicitor. Yet, when he was shown a receipt, dated the 12th of September 2014, from his solicitor, showing that nearly everything taken had been returned, he had no explanation.

29. The Plaintiff described his brother, Cyril McGuinness, as being a person of notoriety and of being somebody who was suspected of being involved in the arson of the Quinn properties. It was put to him that Cyril McGuinness was the mastermind behind the campaign against the former Quinn companies. He said that his brother was friendly with Sean Quinn all of his life and acted as a subcontractor for him and lived on a property once owned by Sean Quinn. However, he was emphatic that he was not or never had been his brother's keeper.

30. He was adamant that he was subjected to harassment because of this relationship and that in the absence of ever getting Cyril McGuinness, he was always on the side of the Swords Road as the Gardaí's second choice.

31. He said the cheque book which had been taken was for NMT Mount Trading Limited. He said that this was the cheque book of a customer, Kevin Donnelly, who had left pre-signed cheques for him if he had anything to pay, such as commission. In answer as to why there was no complaint about the cheque book not being returned, he said that was because it was of no benefit to anyone else other than the owner.

32. Fergus Treanor, a retired member of An Garda Síochána, was the senior investigation officer in relation to a number of attacks on properties previously owned by the Quinn Group, including a packaging facility at Ballyconnell, Co. Cavan. On the 13th of March 2013, a jeep, the roof of which had been removed, was driven through the front doors of the building, filled

with burning tyres. Thirty people were working in the building at the time whose lives were put at risk. Over €500,000 worth of damage was done.

33. As a result of information received, a member of the general public had said they had seen the jeep in the Plaintiff's yard in 2012 and 2013. This led the Gardai to seek a warrant to search the yard to discover any evidence since the matter was of the highest degree of seriousness.

34. In those circumstances, where crimes were being committed on a fortnightly basis and that the people involved were highly organized criminals who are ruthless in their methods of carrying out the attacks, a warrant was necessary. This was a major lead in the investigation. Knowing the family of the Plaintiff and the fact that he had been on the premises on a number of occasions over 30 years, he briefed a Detective Sergeant Fraher, who was in charge of the raid, that they were likely to encounter dangers at the property. He felt there was a risk of violence, obstruction and the potential for a major incident.

35. In cross examination it was put to him if it was his decision to withhold a copy of the search warrant from the affidavit that was sworn. He said it had not been his decision and that he had not seen the original search warrant, which would have been returned to the incident room in Ballyconnell Garda Station by Sergeant Fraher. As for the strength of the search team, that was his operational decision. This was due to the layout of the area, the machinery and portacabins, all of which had to be searched.

36. He had briefed the emergency response unit ("ERU") and they then assessed the property and decided what was required. He confirmed there were between four or five members of the ERU involved. They were armed. It was put to him that the person who was on the premises was never shown the warrant. Since he was not there at the time, he could not comment.

37. He confirmed that an exhibit list was drawn up after the raid by Garda Niall Brady, the exhibits officer employed at the scene.

38. He confirmed that what they were looking for were cut off parts of a roof, number plates and any documents in relation to the vehicles such as a logbook, paperwork or pieces of paper that might have been removed which might identify the previous owner. They were looking for anything that connected it back to a person who had possession of the jeep prior to the attack.

39. He said that the fact that the Plaintiff was not arrested did not mean there was no issue, since a crucial piece of evidence had been placed at his property.

40. It was put to him that the only reason why the raid took place was because the premises were owned by the brother of Cyril McGuinness. He responded that there was strong evidence that linked the jeep to the yard.

41. The next witness was Sergeant James Fraher, who retired in 2016. He confirmed that the operation in question was entitled "*Operation Larissa*" and related to a number of incidents which occurred in or around the Quinn group. He confirmed that he was the person who applied to the District Court for the warrant and that it was duly issued. He was also the person who executed the warrant. He confirmed that the search had to be taken seriously since the briefing suggested that there was potential for trouble or as he put it "*unhelpfulness*".

42. He said he knocked on the door of the house attached to the yard. A lady answered it, but didn't know where the Plaintiff was. He confirmed that the person present on the yard was a foreign national and that once he was satisfied that it was not the Plaintiff, he was let go.

43. In cross examination he confirmed that he had the original warrant with him at the time he executed it, but he did not have a copy. He didn't have the name of the lady who opened the door. He had no recollection as to what she looked like. He did not show her the

warrant since it was not addressed to her. The house was not searched. The warrant was not marked in any way other than, perhaps, by his initials. The original warrant was in the incident room.

44. He confirmed that no physical evidence of relevance was found on the scene. It was put to him that the purpose of the raid was a document trawling exercise. He confirmed that that was not the case but that is what they discovered.

45. He produced his original notebook which showed that he had sworn information to obtain a search warrant for the premises. The warrant was granted. There was then a briefing at Swords Garda station at 7:30 AM and then a note that he tried to contact Mr. McGuinness, but he was not at home. He confirmed that he was at the portacabin throughout the raid. At no stage was it ever put to him that he had not sought a search warrant or that his notes were wrong on this issue.

46. The last witness was Garda Niall Brady who was the exhibits officer. He confirmed that items on the exhibit list were returned to the Plaintiff's solicitor. He produced a receipt signed by the secretary of the Plaintiff's solicitor's firm and that the documents had been in his possession until that time. He also confirmed that he returned one fob key for one jeep.

The Issues

47. It seems to me that there are a number of key issues which I have to determine in order to decide this case based upon the evidence.

1. Does the search warrant have to be proved in a civil trial?
2. If it has not been proved, does that make the raid unlawful?
3. Has the Plaintiff proved, on balance of probabilities, that the raid was heavy-handed, oppressive and constituted harassment?

4. Has the Plaintiff proved, on balance of probabilities, that goods and money were unlawfully taken?

The Search Warrant - Unlawful

48. The first two issues which I have to decide is whether or not the raid on the day in question was unlawful, which in turn is dependent on whether or not the warrant was valid. The Plaintiff says that the burden of proving the warrant rests with the Defendants on the basis of the Latin maxim “*onus probandi*”, or as often asserted, “*he who alleges must prove*”. Thus, the Plaintiff argues, the Defendants have the burden of justifying what is otherwise a *prima facie* unlawful interference and a tort. The Plaintiff relies upon a number of cases including *Entick v Carrington* [1799] 95 ER 807, *Simple Imports Limited v Revenue Commissioners* [2000] IESC 40 and *CRH PLC & others v the Competition and Consumer Protection Commission* [2017] IESC 34.

49. In *Entick v Carrington* Camden CJ said: -

“Our law holds the property of every man so sacred, that no man can set his foot upon his neighbor’s close without his leave; if he does he is a trespasser, although he does no damage at all; If he will tread upon his neighbor’s ground, he must justify it by law...”

50. The Plaintiff says that no effort was made by the Defendants to prove the warrant either by oral testimony, affidavit or production of the original search warrant in court. There is no seal authenticating it. There is nothing to prove whether it was issued by a District Court clerk or a District Court judge.

51. Since it was done in the private chambers of the judge, it was not a public document and leave or license to grant the search warrant was not made in open court. It was also an *ex parte* application and was simply addressed to the Sergeant. It was not subject to an

automatic renewal and was limited in time. In those circumstances, the raid was unauthorized and therefore, the Defendants are guilty of a trespass.

52. The Plaintiff relies on *Myers v DPP* [1965] A.C. 1001. However, that was a criminal case and it does not seem to me to be relevant to the proofs in a civil action where the onus rests on the Plaintiff to prove his case.

53. In this case, however, a number of copy warrants were before the court. It would have been preferable for the original warrant to have been produced, but it is clear from the copies that it was signed by District Justice McLoughlin, that it contained the time when it was sought, to whom it was directed to be enforced, the property to which it related, and the person who owned that property.

54. Therefore, in my view, *prima facie*, there was a warrant in existence. I agree with the Plaintiff that “*he who asserts must prove*”, but it is the Plaintiff who must prove.

55. If he asserts that the warrant has not been proven, and therefore might not exist, the onus is upon him to show it. It is simply not enough to say because the original was not produced in court, therefore the court must assume that it does not exist. A mere assertion in pleadings does not amount to the shifting of the onus of proof onto the defense. There must be more. If it were so, any pleading making any assertion on the part of a Plaintiff would shift the burden onto the Defendants. That is not the law in this jurisdiction, or indeed in any common law jurisdiction, unless the statute so specifies.

56. It is particularly noteworthy that when Sergeant Fraher, the man who sought the warrant from the District Judge, gave evidence, he was never challenged that he had not done so. He gave forthright evidence that the warrant had been obtained in circumstances where very serious crimes had been committed. None of that was challenged.

57. Further, it seems to me that the procedural history of the case must be considered. This matter was before Mr. Justice Keane on two occasions, in circumstances where he

examined the text of the sworn information at issue in order to identify and weigh the competing interests in compelling or withholding its production.

58. Having done so, he was satisfied that the document concerned was material to an ongoing criminal investigation and that there was a risk that the range and detail of the information could result in the identification of a confidential informant or informants. On that basis he was satisfied that both the public interest privilege and informant privilege were properly invoked. He even went so far as to consider whether he could allow the information in a redacted form be produced but felt that that would be inappropriate. He went on to say:-
“it cannot be forgotten that the risk involved in this case is not merely the potential compromise of an ongoing criminal investigation but also a potential risk to the life of an informant (or informants) and, cannot be lightly weighed.”

59. The matter then was appealed to the Court of Appeal. In his Notice of Appeal there was no challenge to the existence of the warrant. It was never submitted that, lurking somewhere in the background of the affidavits, the warrant itself either didn't exist or was in some way defective. The appeal was on the basis that there was an existing warrant but no valid information or that the information did not go so far as to justify the seeking of a warrant.

60. Edwards J. found that the Plaintiff had failed to demonstrate the relevance of the document in respect of which he sought. Therefore, in my opinion, it would create a judicial nonsense if this court were to find that there never was a warrant on the basis of some technicality.

61. Further, in the replying affidavit of Inspector Treanor, sworn in October of 2014, he swore that an application had been made to the District Court for a warrant to search the property on the 23rd of August 2014. He even set out the reason why a warrant was sought

which related to the attack on the Quinn packaging plant in Ballyconnell, Co. Cavan on the 13th of March 2014. None of that was challenged.

62. The cases which have been referred to me, *Myers v DPP, Attorney General v O'Brien* [1963] IR 92, *DPP v Owens* [1999] IESC 107, *Simple Imports Ltd v Revenue Commissioners* and *CRH PLC v CCPC*, all relate to a direct challenge either by way of judicial review or otherwise as to the validity of the warrant and the taking of documentation which was then used for the purposes of a criminal prosecution. No authority has been opened to me which suggests that in any way that there is an obligation upon the Defendants to somehow “*prove*” the warrant in a civil case.

63. In those circumstances, I find as a fact that the failure to produce the original warrant, does not make the warrant in any way invalid. I find as a fact that Sergeant Fraher did what he said he did, namely, apply to the District Court for a search warrant to search the Plaintiff’s premises, on the 21st of August 2014. I find as a fact that the Sergeant executed that warrant in a lawful manner and therefore, what happened thereafter was not unlawful.

Was the Raid Oppressive?

64. The next issue is whether the Defendants acted in a heavy-handed or oppressive manner so as to constitute harassment by virtue of the manner in which the raid was carried out.

65. Those behind the outrageous illegal acts of violence, vandalism, torture and blackmail in the Cavan and Meath area, following the collapse of the Quinn property empire, constituted one of the most serious challenges to the security of the state. The evidence given included the use of a jeep, the roof of which was cut off, piled with burning tires, and then rammed into one of the Quinn properties, was truly shocking. The fact that not only over

€500,000 damage was done but that 30 lives were put in danger is even more shocking. It shows a total disregard for life. This was all done to further a vile campaign of intimidation of any person who showed an interest in acquiring the Quinn empire.

66. There is an innuendo introduced by the Plaintiff himself, that the person behind this campaign was the Plaintiff's brother, who was said to be one of Sean Quinn's best friends and lived in one of his properties. That may or may not be the case, but the country was agog with alarm and concern at the activities which were constantly in the media with one more outlandish and outrageous act of brutality matched by another.

67. In those circumstances, it was perfectly right and proper that, based upon credible information which has been seen by a High Court Judge, that the steps taken by the Gardai should be as they were.

68. The unchallenged evidence of the Gardaí, the witnesses, and in particular, Superintendent Treanor, was that they did not know what to expect when they went to execute the warrant. Evidence has been given, which I accept, that there was a risk of violence, obstruction and a potential for major incident to occur at or during the raid. It matters not that the Gardaí met no such obstruction. The fact remains that it was a legitimate expectation given the history of this investigation.

69. Therefore, in those circumstances, I find as a fact that the Defendants acted appropriately in the manner in which they executed the warrant. I do not regard the cutting of the two gates as being excessive given that time was limited and that they did not know what was behind the gates. Given the size of the yard, it seems to me that the number of Gardaí who were employed cannot be criticized.

70. That being the case, the final issue I have to decide is whether the Plaintiff has proved, on the balance of probabilities, that his goods and money were unlawfully taken.

Were The Fob Keys Unlawfully Taken?

71. The evidence in regard to the fob keys is somewhat confusing and I am not at all clear as to what the Plaintiff's case is. He said that he had to procure new fob keys, but no invoices were produced. One would have thought that if the Plaintiff had been put to the trouble of getting new fob keys made up in the UK, that would have cost a significant sum. Yet, other than a passing reference, there was little made of it. I find that strange.

72. There was some confusion as to exactly how many fob keys were allegedly taken. Bearing in mind how clear minded the Plaintiff was on certain issues, I find this uncertainty goes to his credibility. I do not find it credible that the Defendants would take six fob keys for two jeeps and then only return one fob, leaving five missing. If that had occurred, one would have expected the Plaintiff's solicitor to have written very pointed correspondence, to say the least, complaining of the lost fob keys. However, not a word was said by the Plaintiff after his initial affidavit sworn on the 2nd of September 2014 before the return of his possessions.

73. Therefore, I find as a fact that fob keys were not unlawfully taken by the Defendants.

Was The Cheque Book Unlawfully Taken?

74. In evidence in chief, the Plaintiff said as follows:

“Q. You have another company, NMT Mount Trading I think, is that right?”

A. Yes.

Q. Was there documentation in relation to NMT Mount Trading missing?”

A. There was a chequebook only in relation to that.”

However, in cross examination, in relation to the same company, he said:

“that's Kevin Donnelly's company judge.

Q: why would you have a cheque book for a customer?

A: He would leave cheques for me if I had to pay for anything on his behalf hence the Commission payments. I do it myself, I'd do it myself.

Q: You would leave your cheque book in the hands of somebody else?

A: I would, yeah.

Q: OK, that's in your affidavit but there's no reference to it afterwards. You don't seem to complain that it was never returned. It's not included in the list of items that were returned?

A: no, well possibly, judge because that's of no benefit to anyone else, other than the owner."

75. Further, in his grounding affidavit to the original injunctive proceedings, he swore as follows: -

"I say that a cheque book for another one of my companies NMT mount trading limited was also removed and is missing."

76. Frankly, all of this is baffling. He has contradicted himself twice on a material issue. I find it very hard to believe that somebody would not know whether a cheque book in their possession was theirs or somebody else's.

77. Therefore, I do not accept his evidence that there ever was a cheque book. If a cheque book had gone missing, particularly in circumstances where it was alleged that cheques were already signed, one would have thought that the Plaintiff would be up in arms and that it would be to the fore in his complaints and that he would immediately go to the bank and cancel the cheque book. Yet, none of that happened.

78. In those circumstances, I find as a fact that the Defendants did not unlawfully take a cheque book and refuse to return it, in the name of NMT Mount Trading Limited, or any other company.

Were The Envelopes Unlawfully Taken?

79. That leaves the issue of the envelopes. In this case, the Plaintiff was adamant the envelopes were two old brown prepaid postage Dublin Corporation envelopes. The first was initialed “JB” and contained £2,000 whilst the second was initialed “MS” and contained €1,800.

80. Yet, under cross examination when it was put to him that in his Replies, the envelopes were white and had the names of Mick Shaw and Kevin Donnelly on it. He had no answer.

81. I presume that this must be the same Kevin Donnelly, who the Plaintiff said at one stage, was the owner of NMT Mount Trading Limited and whose cheque book he was allegedly holding.

82. Throughout his testimony, the Plaintiff came across as an intelligent, driven, successful person. He could at times be dogmatic and indeed close to belligerent in the manner in which he answered questions. He was adamant that he never received boxes from the Defendants, containing copies of his documents taken from his premises. Yet the documents were returned, and his solicitor’s firm signed a receipt for them. At times, he had an extraordinarily good grasp of certain details and an extraordinarily vague grasp of matters crucially important to the issues to be determined in this case.

83. Therefore, it seems to me that the very concern that Dignam J. had in relation to the application to dismiss for want to prosecution, where he referred to “*the general impact of the passage of time on memory*” or as I might describe it, “*memory fade*”, has come back to haunt the Plaintiff. He was not clear in his recollection, as far as the crucial facts of this case are concerned, and contradicted himself on a number of different occasions. This was explained by his counsel as a “*senior moment*” or “*tiny memory lapses*”. The Plaintiff is not an old man. I cannot simply explain these very significant divergences of his own case on crucial issues, going to the core of these proceedings, as simply a “*senior moment*” or “*tiny memory lapses*”.

The combined effect of these errors is to lead me to the conclusion that I cannot rely upon his testimony as being accurate.

84. Therefore, I find as a fact that the Defendants did not take any envelopes containing cash or failed to return them.

85. In those circumstances, I find that the Plaintiff has not discharged the burden of proof placed upon him that the search was unlawful, was carried out in a heavy-handed, oppressive manner so as to constitute harassment or that any items were unlawfully taken and accordingly, I will dismiss the Plaintiff's case and will hear the parties in relation to the issue of costs.