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NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/175

Allen J.

Burns J.

Hyland J.

BETWEEN/

FRANCIS MCGUINNESS

PLAINTIFF/APPELLANT

- AND –

THE COMMISSIONER OF AN GARDA SÍOCHÁNA,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 24th day of January, 2025

Introduction

1. This is an appeal by Mr. Francis McGuinness against the judgment of the High Court (Nolan J.) delivered on 29th May, 2024 ([2024] IEHC 283) and consequent order made on 13th June, 2024 dismissing Mr. McGuinness's action against the Garda Commissioner and the State, with costs.

2. The grounds of appeal are set out in sixteen numbered paragraphs, but the gravamen of the appeal is that the Garda Commissioner and the State failed to prove that a search of Mr. McGuinness's business premises on 23rd August, 2014 was carried out pursuant to lawful authority. Specifically, the argument is that because the Garda Commissioner and the State failed to produce to the High Court the original warrant authorising the search, the action should have succeeded.

Background

3. On the morning of Saturday 23rd August, 2014 a number of Gardaí attended at Mr. McGuinness's yard at Pinnock Hill, Cloghran, County Dublin. Some were detectives, others were in uniform, and yet others were members of the Garda armed response unit. It was suggested by counsel in the course of the trial that there were up to 40 Gardaí in eleven vehicles but Mr. McGuinness was not at the yard when the search took place and did not call any witness who was. By no fault on the part of the Garda Commissioner or the State, the trial took place nearly ten years after the event. The four Gardaí who gave evidence – and who were involved in the search – could not precisely recall the number of Gardaí but it is clear enough that there were a good few, with a commensurate number of vehicles.

4. There were two metal gates to the yard, which were locked. The Gardaí used cutting equipment to cut the locks and bolts on the gates. They entered and searched the yard and offices and took away papers and materials.

5. Mr. McGuinness reacted swiftly and indignantly. He immediately engaged an engineer to survey and photograph his premises and then instructed solicitors to write to the Garda Commissioner.

6. In a letter dated 28th August, 2014, Mr. McGuinness, by his solicitors, asserted that his premises had been searched by approximately 40 Gardaí – who had arrived in eleven vehicles – and who had destroyed the gates by cutting them with oxy-acetylene torches. The Gardaí –

it was said – had ransacked Mr. McGuinness's office and taken his books of account and two envelopes of cash. In addition – it was said – the Gardaí had taken three boxes of documentation relating to two of Mr. McGuinness's U.K. companies, the removal of which would hamper a U.K. VAT audit. Besides – it was said – two sets of keys for two new BMW vehicles had been removed and a cheque book for another U.K. company had been removed and was missing.

7. The substance of the complaint in relation to the search was that:-

> *"No search warrant or warrant of any kind was presented to the person who was on the premises and none has been presented to our client in the interim or since. … In the absence of your demonstrating the legal authority upon which your servants or agents acted in raiding our client's premises, it is clear to us that the actions of members of your force represent a conscious and deliberate violation of our client's constitutional rights and his property rights. We call upon you to forthwith produce and furnish to us a copy of any warrant that may exist for the actions of your members by immediate return.*
>
> *Even if a warrant was applied for and obtained (and we reserve our client's position regarding the validity of any such warrant and we request a copy of any sworn information grounding any application for a warrant along with a copy of the warrant itself together with details of what court issued same) the actions of your members were clearly disproportionate to the damage that was caused."*

8. The letter suggested that it was inconceivable that it had been necessary to cut both gates. Rather – it was said – the yard could have been accessed by the Gardaí opening a pedestrian garden gate to the adjoining residential property – which was also owned by Mr. McGuinness – and then crossing a low garden wall.

9. In a page and a half, the letter set out Mr. McGuinness's complaints in relation to the search which had been carried out on the morning of 23rd August, 2014. Over the following three pages the letter set out in detail complaints in relation to previous engagements between Mr. McGuinness and various Gardaí, which – as the letter made clear – were already the subject of Circuit Court and High Court proceedings.

10. I pause here to observe that it was not unambiguously suggested that the Gardaí had searched Mr. McGuinness's premises without a warrant. The premise of the complaint of unwarranted heavy handedness and the request for a copy of the warrant, a copy of the sworn information, and details of the court which issued the warrant, was that there was a warrant.

11. Mr. McGuinness's solicitors' letter was acknowledged by the Garda Head of Legal Affairs on the following day, when it was said that a comprehensive investigation file had been sought and would be forwarded to the State Claims Agency, to which any further correspondence should be directed.

The High Court proceedings

12. By plenary summons issued on 2nd September, 2014 Mr. McGuinness issued proceedings against the Garda Commissioner and the State claiming damages for negligence and breach of duty and breach of statutory duty; damages for misfeasance in public office; damages for unlawful interference, conversion, trespass and/or detinue; an order requiring the Garda Commissioner *"to return the items seized from the premises"*; an order requiring the Garda Commissioner *"to furnish the plaintiff with a copy of any warrant authorising or purporting to authorise Garda entry on his premises"*; an order restraining the Garda Commissioner from interfering with Mr. McGuinness's property and/or premises or his person without notice to his solicitors; damages for breach of constitutional rights; aggravated and exemplary damages; interest; and costs.

13. On the following day – by leave of the High Court (Cross J.) – Mr. McGuinness issued a motion returnable for 9th September, 2014 for orders requiring the Garda Commissioner to return the items seized; to furnish a copy of any warrant authorising or purporting to authorise the entry onto the premises; and an order restraining the Garda Commissioner from interfering with Mr. McGuinness's property or person without notice to his solicitors.

14. Neither the summons nor the notice of motion identified the items alleged to have been seized.

15. Mr. McGuinness's motion was grounded on an affidavit which in substance replicated the assertions which had been set out in his solicitors' letter of 28th August, 2014 and referred to and exhibited the correspondence from the Garda Head of Legal Affairs. He also exhibited a copy of the pleadings in a Circuit Court action commenced on 4th August, 2011 and a statement of claim delivered on 6th February, 2012 in High Court proceedings which had been commenced in 2011. Following an exchange of affidavits, that motion came before the High Court (Keane J.) on 15th October, 2014, when – in circumstances to which I will come – it was struck out.

16. Following a motion to dismiss for failure to deliver a statement of claim, Mr. McGuinness's statement of claim was delivered on 22nd January, 2015. It, too, more or less reflected the complaints made in the initial letter in relation to the search carried out on 23rd August, 2014. It was said that the *"dawn raid"* was unlawful and even if lawfully authorised, was carried out in an unlawful manner. It was pleaded that the Gardaí had wrongfully damaged two gates to the premises and had unlawfully seized and had retained *"business documents"* and two envelopes containing cash. By the prayer to the statement of claim Mr. McGuiness claimed damages; an order for the return of all of the items seized from his premises; and an order compelling the Garda Commissioner to furnish him with *"a*

legible copy of any warrant and the sworn information authorising or purporting to authorise the Garda entry on his premises."

17. The reference to *"any"* warrant perpetuated Mr. McGuinness's non-acceptance that there was a warrant but again the premise of the request for a legible copy and the sworn information was that there was one.

18. By notice for particulars dated 3rd February, 2015 further particulars of the claim were sought and – following two motions on behalf of the Garda Commissioner and the State – were provided on 6th October, 2015.

19. In the meantime, on 10th March, 2015 a motion was issued on behalf of Mr. McGuinness seeking:-

> *"(a) an order compelling the [Garda Commissioner] to furnish the plaintiff with a copy of <u>the</u> sworn information grounding the application for <u>the</u> search warrant of the plaintiff's premises at Pinnock Hill, Swords, Co. Dublin.*
>
> *(b) if necessary, an order compelling the [Garda Commissioner] to furnish the plaintiff with a legible copy of <u>the said</u> search warrant."* [Emphasis added.]

20. That motion was grounded on an affidavit of Mr. McGuinness's solicitor, Mr. John Geary, which was sworn on 9th March, 2015. Mr. Geary recalled that from his first correspondence with the Garda Commissioner on 28th and 29th August, 2014 he had *"sought a copy of <u>the</u> sworn information grounding <u>the</u> … application for a search warrant …"* and that *"neither <u>the</u> warrant nor <u>the</u> information were furnished to me prior to the issue of the proceedings. After they issued, the defendants sent me a copy of <u>the</u> warrant. However, the copy that was sent is very faint in places and it is not possible to discern its date".* [Emphasis added.]

21. Mr. Geary's affidavit shows what became of Mr. McGuinness's first motion, which was dealt with on 15th October, 2014. On the eve of the date on which that motion was listed

for hearing, Mr. Geary advised the defendants' solicitors that he would be applying for a copy of *"the sworn information in addition to the search warrant"* and on the day, counsel for Mr. McGuinness applied for an adjournment of the motion. Keane J. ruled that the application for a copy of the sworn information should be by way of a separate motion grounded on a fresh affidavit. According to Mr. Geary, the parties had by then agreed that nothing further could be done with the motion which was then before the court and it was struck out, and the costs reserved.

22. It is to state the obvious to say that the premise of the motion issued on 10th March, 2015 was that there was a search warrant.

23. That motion was heard by the High Court (Keane J.) and was the subject of two written judgments. In the first of those judgments delivered on 7th October, 2016 ([2016] IEHC 549) Keane J. recorded that the search of Mr. McGuinness's premises had been conducted under a warrant issued by a judge of the District Court on 21st August, 2014 and that Mr. McGuinness had by then been provided with a copy of that warrant. With some misgivings as to the circumstances in which the issue had been brought before him and as to the procedure adopted, Keane J. said that he would examine the sworn information in order to identify and weigh the competing interests in compelling or withholding its production. In the second judgment delivered on 28th October, 2016 ([2016] IEHC 591) Keane J. ruled that the sworn information was material to an ongoing criminal investigation and that there was a risk that the information contained in it could lead to the identification of a confidential informant or informants whose life or lives might be put at risk if their identity became known.

24. An appeal by Mr. McGuinness to this Court was dismissed for the reasons given in a written judgment delivered on 18th December, 2017 by Edwards J., with whom Birmingham and Mahon JJ. agreed ([2017] IECA 330).

25. Thereafter, the action appears to have gone into abeyance until the sleeping bear was poked by a motion to dismiss for inordinate and inexcusable delay which – as the trial judge put it – it survived by a short whisker. ([2023] IEHC 436).

The High Court judgment

26. The action was eventually tried by the High Court (Nolan J.) on 9th, 10th and 11th April, 2024.

27. In a number of respects, Mr. McGuinness's evidence did not reflect the case which had been pleaded. For example, he swore – but had never previously suggested or pleaded – that a passport, a driving licence and a tachograph card had been removed. And the description he gave of two envelopes containing cash was materially different to what had been said in the replies to particulars.

28. As to the search warrant, Mr. McGuinness confirmed that he had instructed his solicitors to establish whether the Gardaí had a warrant and that he had eventually been told that the search had been carried out on foot of a search warrant. In his evidence in chief, he said:-

> *"Q. And I think it took some time for that search warrant to be sent on to your solicitor I think, is that right?*
>
> *A. Yes.*
>
> *Q. It seems to have been sent in or about 11th or 12th September?*
>
> *A. That's correct.*
>
> *Q. That's about two and a half weeks after these events?*
>
> *A. Afterwards, yeah. To date I can't read what it says on the warrant. I saw a very bad copy of it.*

Q. I'll just hand you a copy of that there for the moment. (SAME HANDED) When it was sent on to Mr. Geary, did you discuss the contents and wording of this particular search warrant with him at the time?

A. I did.

...

Q. You in particular were exercised at this search warrant and the grounds that are now being protested in relation to it?

A. Yes."

29. Mr. McGuinness went on to complain that the Gardaí had not contacted him *"before the execution of this warrant"* and to confirm – as he had previously deposed – that his case was that *"the approach of the Gardaí in the execution of the warrant which later surfaced, [was] part and parcel of an overall campaign ...".* Later, his counsel sought to elicit evidence in relation to *"another search warrant"* which was unrelated to the pleaded case. In cross-examination Mr. McGuinness confirmed that:- *"... we're talking about the search warrant that was executed in August 2014."*

30. Detective Inspector Fergus Treanor, who was in charge of the criminal investigation as part of which the warrant was obtained, gave evidence that in accordance with procedures the original warrant ought to have been returned to the incident room at Ballyconnell Garda station. In cross-examination, he was asked:-

" Q. Where is the original warrant today?

A. I'd say it's available to us.

Q. Where is it? Is it in this room?

A. I would hope so."

31. Detective Sergeant James Fraher gave evidence that he had applied to the District Court for the warrant; that it had been granted; and that he had executed it. In cross-

examination he confirmed that he had the original warrant with him when he went to execute it. He was also asked:-

"Q. Do you know where that original warrant is now?

And answered:-

"A. It would have been handed back into the incident room."

32. Later, at the request of counsel for Mr. McGuinness, Detective Sergeant Fraher produced his notebook and was cross-examined on the entries he had made in relation to the application for, and granting of, the search warrant. The questioning was directed to the execution of the warrant. It was never suggested to him that he had not obtained the warrant.

33. In a written judgment delivered on 29th May, 2024 Nolan J. summarised the claims, the procedural history of the case, and the evidence.

34. The trial judge found as a fact that – as Detective Sergeant Fraher had sworn, and as to which he had not been challenged – Sergeant Fraher had applied to the District Court on 21st August, 2014 for a warrant to search Mr. McGuinness's premises, and that he had executed that warrant in a lawful manner. The trial judge found as a fact that the Gardaí acted appropriately in the manner in which they executed the warrant. He found as a fact that the car keys, cheque book and envelopes containing cash were not unlawfully taken by the Gardaí.

The appeal

35. By notice of appeal dated 15th July, 2024 Mr. McGuiness appealed against the judgment and order of the High Court on sixteen numbered grounds. Not without justification, the Garda Commissioner and the State take issue with the grounds on a number of grounds in various respects, including that they do not identify any errors of law or fact, and that they are vague and ambiguous and fail to identify any rational basis for an appeal in law or in fact. However, I will do my best.

36. The first of the sixteen numbered grounds of appeal is that the trial judge erred in law and in fact when he determined that there was no burden on the Garda Commissioner and the State *"... to prove entry, otherwise unlawful, was authorised by law."* The following three paragraphs say the same thing in different words.

37. It seems to me that the submissions on behalf of Mr. McGuinness below and the grounds of appeal are disconnected from the case pleaded, the evidence adduced on both sides, and the findings of the trial judge.

38. To start at the beginning, Mr. McGuinness was indignant that his premises had been searched. In his correspondence, his affidavit, and in the statement of claim, he did not accept that the search had been conducted on foot of a warrant but he never asserted or pleaded that his premises had been searched without a warrant.

39. Logically if not necessarily chronologically, the first complaint was that the warrant had not been shown to a man who was said to have been on the premises at the time of the search. That man was said to have died by the time the case came to trial. According to the initial correspondence and to Mr. McGuinness's evidence, this man was someone who had permission to park his vehicle – variously a car and a Scania rigid truck – on the premises. According to the replies to particulars, he was *"The plaintiff's driver"*. According to Mr. McGuinness's evidence, he was employed by a customer. Consistently, he was said to have been a Polish national; but there was confusion as to his name.

40. Which or whether, Mr. McGuinness arrived at the premises after the Gardaí had left to find that his gates had been cut and his premises searched. There was never any suggestion that Ms. McGuinness's gates might have been cut and his premises searched by anyone other than the Gardaí. Mr. McGuinness instructed his solicitors to establish whether – or perhaps to confirm that – the Gardaí had had a search warrant. Mr. Geary wrote to the Garda Commissioner asking for a copy of *"any"* search warrant and he was provided with a

copy of a search warrant. Whether the copy search warrant was provided as soon as it should have been is neither here nor there. The next step was that Mr. Geary – on behalf of Mr. McGuinness – justifiably complained that the copy search warrant which had been provided was illegible. It is unclear when the legible copy of the warrant was provided but by reference to the notice of motion issued on 10th March, 2015 Mr. McGuinness still did not have one; and by reference to the judgment of Keane J. delivered on 7th October, 2016, Mr. McGuinness had by then been provided with a copy of the warrant.

41. It will be recalled that by his first motion issued on 3rd September, 2014 Mr. McGuinness sought an order for a copy of any warrant and – on Mr. Geary's account – when that motion came on for hearing on 14th October, 2014 it was struck out on the basis that nothing further could be decided on it in the context of an interlocutory application. In those circumstances it is somewhat surprising that the motion issued on 10th March, 2015 suggested that Mr. McGuinness might not have had a legible copy of the warrant. It seems to me that if on 14th September, 2014 Mr. McGuinness still did not have a legible copy of the warrant, that was something that could and should have been addressed before the motion was struck out. In his affidavit sworn on 10th March, 2015 Mr. Geary deposed that the copy warrant sent to him after the proceedings had issued was faint in places, but he did not suggest that he did not at that stage have a legible copy. As I have said, the premise of the application for disclosure of the sworn information on foot of which the warrant had been obtained was that a warrant had been obtained.

42. The case pleaded in the statement of claim – which was delivered on 22nd January, 2015 – was that the Garda Commissioner and her servants and agents unlawfully entered Mr. McGuinness's premises and unlawfully seized documents and two envelopes containing cash, and wrongfully damaged his gates. It was then pleaded that:-

"9. No search warrant or other evidence of authority was presented to the person who was on the premises at the time and none was prior to the issue of these proceedings. Endeavours since then by the plaintiff to obtain a copy of the information sworn to obtain the warrant, inter alia, his solicitors' letters of 27 August and 29 August 2014 have been disregarded by the defendant's servants or agents."

43. Thus, whatever about what may have previously been said in correspondence or in Mr. McGuinness's first affidavit, the unlawfulness alleged in the statement of claim was not that the search had been conducted without a warrant. If there might have been any room for doubt, that was comprehensively eliminated by the later application for a copy of the sworn information and the appeal to the Court of Appeal from the refusal of the High Court to order its disclosure. In due course – or at least, eventually – the run of the evidence matched the case pleaded.

44. In reply to a question from the Court, senior counsel for Mr. McGuinness first agreed that no challenge to the validity of the warrant had been pleaded but later suggested that the validity of the warrant was put in issue by the plea at para. 4 of the statement of claim that the Gardaí had *"unlawfully"* entered the premises. He was right the first time.

45. Apart altogether from the case pleaded, there was no suggestion that the copy warrant which had been provided to Mr. McGuinness – and which was produced to the High Court by Mr. McGuinness – was not a copy of an original warrant. Detective Sergeant Fraher's evidence that he had applied for and obtained a warrant on 21st August, 2024 was not challenged. Nor is there any challenge on the appeal to the finding of the trial judge that a warrant was obtained and executed.

46. Counsel for Mr. McGuinness now relies on *"... an early challenge at the High Court hearing before Nolan J. to prove the warrant ..."*. But of course the issues were knit by the

pleadings. And – although, at least with the benefit of hindsight it would have saved a lot of fuss and bother – proof of the warrant did not necessarily require the production of the original. The written submissions filed on behalf of Mr. McGuinness cite extensive passages from a number of authorities but do not attempt to tie in those passages with the issues or the evidence in this case.

47. Among the authorities relied upon in Mr. McGuinness's written submissions is a judgment of a divisional court in *R. v. Chief Constable of the Lancashire Constabulary, ex parte Parker* [1993] Q.B. 577. But that was a judgment on a judicial review application which turned on issues of compliance with the requirements of the Police and Criminal Evidence Act, 1984. It does, however, contemplate that any issue that might later arise as to the validity of a warrant and its execution might be resolved by reference to a copy – albeit, under the terms of the English Act of 1984 a certified copy – rather than the original.

48. At the hearing of the appeal counsel for Mr. McGuinness spent some time opening the judgment of Keane J. (as he then was) in *Simple Imports Ltd. v. Revenue Commissioners* [2000] 2 I.R. 243 and emphasised a paragraph on p. 255 which was said to set out the *ratio decedendi*:-

> *"I am satisfied that the submission on behalf of the respondents that, in a case where the warrant itself states that it is being issued by the district judge on a basis which is not justified by the statute creating the power, the invalidity of the warrant can be cured by evidence that there was in fact before the district judge evidence which entitled him to issue the warrant within the terms of the statute is not well founded. That proposition seems to me to be contrary to principle and unsupported by authority. Given the necessarily draconian nature of the powers conferred by the statute, a warrant cannot be regarded as valid which carries on its face a statement*

that it has been issued on the basis which is not authorised by the statute. It follows that the warrants were invalid and must be quashed."

49. *Simple Imports* was a challenge by way of judicial review to the validity of a number of warrants issued by a District Court judge pursuant to – or, as it turned out, purportedly pursuant to – the Customs Laws Consolidation Act, 1876 and the Customs and Excise (Miscellaneous Provisions) Act, 1988. It was difficult to see how it was in any way relevant to this appeal. Counsel explained that it was relevant to a point that had first occurred to him on the Saturday before the Monday on which the appeal was heard. Accepting – as, of course, he must have – that any such point could not have been a point pleaded, or argued, or decided by the High Court, or captured by any of the grounds of appeal, counsel persisted in it.

50. The point was as follows: the warrant issued on 21st August, 2014 – it was said – was issued on the grounds that the District Court judge was satisfied that there were *"reasonable grounds for suspecting that evidence of, or relating to the commission of an offence"* [Counsel's emphasis.] might be found at Mr. McGuinness's yard. However – it was said – the power to issue a search warrant was only available in the case of an arrestable offence.

51. As a matter of first principles, Mr. McGuinness was not entitled to introduce on the appeal, on the fly, an issue which had not been pleaded or argued or decided by the High Court but insofar as counsel may have a concern that they overlooked a killer point, I will put their minds at rest.

52. Section 10(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997, as substituted by s. 6 of the Criminal Justice Act, 2006 provides that:-

"10. – (1) If a judge of the District Court is satisfied by information on oath of a member not below the rank of Sergeant that there are reasonable ground for suspecting that evidence of, or relating to, the commission of an arrestable offence is

to be found at any place, the judge may issue a warrant for the search of that place and any persons found at that place." [My emphasis.]

53. The proposition was that because the warrant in this case referred to *"an offence"* and did not use the words *"arrestable offence"* it was invalid. This proposition was founded on the isolation of the word *"offence"* in the warrant. It is not only wrong but unstateable. On the face of the warrant, the *"offence"* was *"an offence referred to in subsection (1) of Section 10 of the Criminal Law (Miscellaneous Provisions) Act, 1997 as substituted by Section 6 of the Criminal Justice Act, 2006."* The only offence referred to in s. 10(1) of the Act of 1997, as substituted by s. 6 of the Act of 2006, is an arrestable offence. Any reader of the warrant who was familiar with s. 10(1) of the Act of 1997, as substituted – or who looked it up – would understand that the offence referred to in the warrant was an arrestable offence. If the proposition had ever been pleaded, it would not have survived superficial scrutiny.

54. Much of the argument appears to be directed to the admissibility of a copy document in substitution for, or in the alternative to, the original and to hearsay evidence. However, for the reasons given, no such issues arise in this case. The unchallenged evidence of Detective Sergeant Fraher that he applied for and obtained the warrant was not hearsay. Moreover, the copy warrant was introduced into evidence by Mr. McGuinness. If his counsel wondered and asked the Garda witnesses where the original was, he did not formally call for the production of the original.

55. The fifth and sixth grounds of appeal are that the trial judge erred in treating the evidence adduced at the trial in the same way as evidence adduced at interlocutory hearings. I see no basis for this suggestion. The trial judge had the direct evidence of Sergeant Fraher that he had applied for, obtained, and executed a search warrant; various copies of which were produced – and were unchallenged.

56. The seventh ground is that the judge erred when he determined that:-

"Authority asserted to enter or infringe property guaranteed by Article 40.5 of the Constitution might be inferred in default of proof of such authority without 'save in accordance with law'".

57. This is very jumbled but the trial judge did not infer anything. He found as a fact – and there is no appeal against his finding – that the search which was carried out on 23rd August, 2014 was conducted on foot of a warrant obtained by Sergeant Fraher from District Court Judge McLoughlin on 21st August, 2014.

58. This disposes also of the eighth and ninth grounds which suggest that the trial judge acted on some sort of *"presumptive effect of a search warrant never proved"*.

59. The tenth ground of appeal is that:-

"Where the defendants signally failed to produce or prove the search warrant asserted that a burden thereupon somehow arose upon the plaintiff to prove the search warrant invoked did not now exist or had never existed."

60. Again, with all due respect, this is very jumbled. For a start it conflates the failure to produce the original search warrant with a failure to prove it. Secondly, it supposes that the fact that the original search warrant was not produced somehow gave rise to a doubt as to whether it existed. Thirdly, for the reasons already given, not only was the existence of the search warrant never in issue but the existence of the warrant was demonstrably the basis of the application for disclosure of the confidential information on foot of which it was obtained.

61. The twelfth ground of appeal is not a ground of appeal at all but a fairly wild assertion that:-

"Hence inviolability of commercial premises guaranteed by Article 40.5 of the Constitution ('save in accordance with law') must ever be vulnerable to mere assertion by defendants, but signally without legal proof."

Properly understood, the judgment of the High Court in this case means no such thing.

62. The thirteenth ground of appeal appears to be directed to the finding of the trial judge that the search was not conducted in a heavy handed or oppressive manner but does not engage with the evidence or reasoning by which that conclusion was reached. It is said that in circumstances in which – in broad daylight and without resistance – entry to the premises could have been effected by simply stepping over a three foot wall, that wanton blowtorch destruction of not one but two sets of steel gates was excessive.

63. The evidence was that the search warrant for Mr. McGuinness's premises was obtained as part of a still ongoing criminal investigation into a campaign of very serious acts of violence, vandalism, torture, intimidation and extortion following the collapse of the Quinn group of companies. As the judge recalled at para. 68, the evidence of the lead investigator, Detective Inspector Fergus Treanor, was that the Garda assessment was that there was a risk of violence, obstruction and the potential for a major incident to occur at or during the search. The ground of appeal as formulated does not challenge the judge's conclusions as to the assessment of the risk or the number and nature of the team deployed. Rather, the proposition appears to be that in circumstances in which there was a risk of violence, obstruction and the potential for a major incident, Detective Sergeant Fraher should have led those Gardaí who were to be immediately involved in the search through the pedestrian gate, up the garden path, over the three foot wall and into a locked compound with no means of escape or reinforcement unless by the same route. It is, frankly, ridiculous.

64. The fourteenth ground of appeal is that:-

> *"Despite continued detention of his documents and effects until challenge and then only belated return of some, that assertion or protection of the plaintiff's rights by access to the courts was not warranted, upon a footing that further detention and*

postponed return was somehow to be permitted 'in the ordinary course' of business."

65. I am not sure what to make of this. The summons and statement of claim claimed an order for the return of *"all of the items seized"*. The statement of claim identified only *"business documents and two envelopes of cash …"* but the judge dealt also with the claims made in Mr. McGuinness's first affidavit but not in the statement of claim that car keys and a cheque book had been taken and not returned. For the reasons given, the judge found that the car keys, envelopes containing cash and cheque book had not been taken.

66. On the first day of the trial, Mr. McGuinness swore that his business documents – never mind that many of them were not his but belonged to companies with which he was associated or with which he did business – had not been returned. In a rather surprising turn of events, counsel for the Garda Commissioner handed him a receipt dated 12th September, 2014 for the return of a long list of documents, which had been signed by his solicitors. Mr. McGuinness said that he had never received the documents from his solicitors and had been unaware that they had been returned. On Day 2, Detective Garda Niall Brady gave evidence that, as the designated exhibits officer, he had logged all the material taken – and from precisely where in the premises it was taken – and that he had returned all of the material to Geary solicitors on 12th September, 2014. Detective Garda Brady was asked a number of what appear to me to have been pointless questions but significantly his evidence that he had logged, retained, and returned everything which had been taken from the premises was not challenged.

67. The fifteenth ground of appeal, that the judge somehow erred in that:-*"On the evidence, apart from the signal failure to prove the search warrant asserted, that the defendants' acts were no other trespass to goods or property"* is unintelligible.

68. Paragraph 27 of Mr. McGuinness's written submissions seeks to introduce an argument which was no part of the case made in the High Court and no part of the appeal, which is the warrant was confined to *"the cut off section of the roof of a vehicle bearing the registration plates and steel cuttings consistent with the cut offs from the metal used on vehicle 98 D [*****]."* By the way, the warrant was not so confined but related to *"... documentary, telephone, computer and any other evidence relating to motor vehicle 98 D[*****] including the cut off section"* etc. It is more appropriate, however, to decline to entertain this argument on the basis that it was no part of the case made and, for that reason, not addressed in the judgment of the High Court.

69. The last of the sixteen grounds of appeal is in respect of the costs order made by the High Court. In his judgment of 29th May, 2024 Nolan J. indicated that he would dismiss Mr. McGuinness's case and would hear the parties in relation to the issue of costs. The judge heard the parties on 13th June, 2024 and made an order *"that the defendants do recover against the plaintiff the costs of this action"*.

70. The ground of appeal is:-

> *"16. The wholesale adjudication as to costs, contrary to Veolia considerations, was premised on some rationale the plaintiff had no right of access to courts for protection of property."*

71. The answer to this, in the respondents' notice, was that in circumstances in which Mr. McGuinness had failed in all aspects of the case and in which not one of the reliefs sought had been granted, the principes outlined in *Veolia* did not arise.

72. In the written submissions filed on the appeal, all that was said about the costs order was to set out the text of para. 12 of the judgment of Clarke J. in *Veolia Water UK plc v. Fingal County Council (No. 2)* [2007] 2 I.R. 81. The answer to this was that Mr.

McGuinness had not identified any basis for the contention that Nolan J. ought to have departed from the ordinary rule that costs follow the event.

73. What was said at the hearing of the appeal was confused. It was baldly asserted that the judge did not have regard to *Veolia* but it was not explained how the principles in Veolia were applicable in the instant circumstances. It was accepted that the Garda Commissioner had won hands down and that the general rule was that the costs should follow the event. It eventually transpired that counsel had no argument to make that the judge erred in awarding the costs – that is to say all of the costs – of the action against Mr. McGuinness. Rather, the argument was that the judge had not taken into account the *"fact"* that the proceedings had been necessary for Mr. McGuinness to obtain a copy of the warrant and to recover the property which had been returned to him – or at least to his solicitors – on 12th September, 2014. It was said to flow from this there ought to have been an allocation of the reserved costs with a certain portion being awarded to the plaintiff.

74. There was no transcript of the costs hearing on 13th June, 2024 or of the trial judge's ruling. Senior counsel for Mr. McGuinness – who had not dealt with the costs application – could not say what application had been made but recalled a report from his junior that the application – whatever it was – had been roundly rejected by the judge.

75. There was no direct evidence as to when or in what circumstances the copy warrant was provided to Mr. McGuinness's solicitors. If, inferentially, it had not been provided before the summons and motion were issued, it is quite clear that Mr. McGuinness's real grievance was with the manner in which the search had been conducted and, indeed, that his property had been searched at all.

76. The evidence established that all of the property and documents seized by the Gardaí was returned to Mr. McGuinness's solicitors on 12th September, 2014 but this emerged for the first time in cross-examination. In circumstances in which Mr. McGuinness swore that he

had been unaware until the trial that the documents had been returned, it is difficult to see how he could rely on his first interlocutory motion as having achieved any degree of success. It is the fact that the documents and property were returned after the action was commenced and the first interlocutory motion issued but there was no evidence of any connection between the two events. Similarly, there was no evidence that the copy warrant was only provided in response to the proceedings.

77. On an appeal to this Court against a judgment of the High Court, the onus is on the appellant to identify an error which this Court should intervene to correct. I am not persuaded that any coherent argument was made to the trial judge as to why he should depart from the ordinary rule that the costs should follow the event. It follows that Mr. McGuinness has not identified any error on the part of the judge in making the order which he did.

78. It will be recalled that when Mr. McGuinness's first interlocutory motion was struck out on 14th October, 2014 the costs were reserved. Previously, the costs of the application to Cross J. for short service of that motion had been reserved, as had the costs of the hearing before O'Hanlon J. on the original return date on 9th September, 2014. It was common case that whatever was said on behalf of Mr. McGuinness on the costs application, there was no application that he should have the reserved costs. It was also common case that there was no application on behalf of the State that it should have the reserved costs.

79. In any event, the High Court order of 13th June, 2024 shows that the Garda Commissioner and the State are to have their costs of the action. It says nothing about the reserved costs and counsel for the Garda Commissioner and the State accepted that it does not include the reserved costs.

Conclusions

80. For the reasons given, I would dismiss Mr. McGuinness's appeal on all grounds.

81. The Garda Commissioner and the State having been entirely successful on the appeal are presumptively entitled to an order for the costs of the appeal. If Mr. McGuinness wishes to contend for any other order, he may within 14 days of the electronic delivery of this judgment file and serve a short written submission, limited to 1,500 words setting out what other order he contends should be made and why; in which event the respondents will have 14 days to file and serve a reply, similarly so limited.

82. As this judgment is being delivered electronically, Burns and Hyland JJ. have authorised me to say that they agree with it and with the orders proposed.