

THE HIGH COURT

[2021] IEHC 808

[Record No. 2014/9348 P]

BETWEEN

MARK KELLY

PLAINTIFF

AND

**COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR JUSTICE AND EQUALITY
AND IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 15th day of December, 2021

Introduction.

1. This is an application brought on behalf of the plaintiff challenging the claim to privilege made in an affidavit of discovery sworn on behalf of the defendants by Inspector Amanda Reynolds on 5th February, 2020.
2. The origin of the present application, arises from the fact that on 26th September, 2013, the plaintiff and his wife received an envelope at their home containing a forty-nine-page document that had apparently been written by a work colleague of the plaintiff's, outlining conduct on the part of the plaintiff which would represent misconduct on his part as a member of An Garda Síochána. The document also contained observations and allegations against the plaintiff's wife, who is also a member of An Garda Síochána. The document was apparently written by another Garda, with whom the plaintiff had very strained working relations. The background between the plaintiff and the alleged author of the document will be set out in more detail in the next section of the judgment.
3. In November, 2014, the plaintiff issued proceedings against the defendants claiming damages for personal injuries alleged to have been caused by bullying and harassment of him by another member of An Garda Síochána. He also claimed damages for failure on the part of the Garda authorities to investigate his complaint of bullying and harassment, adequately or at all.
4. On 22nd July, 2019, an order was made on consent that the defendants would make discovery of documents to include "Any and all documentation submitted to the Director of Public Prosecutions on foot of the plaintiff's complaint of harassment against 'Sergeant D'". In the affidavit of discovery that was sworn by Inspector Amanda Reynolds on behalf of the defendants, privilege was claimed over the following at item G4:

"Investigation file submitted by Inspector O'Callaghan to the Director of Public Prosecutions. The first named defendant asserts litigation privilege and public interest privilege over this document."
5. In the present application, the plaintiff has asked the court to view this category of documents and determine whether privilege has been properly claimed over this category of documents.

Background

6. It is only necessary for the purpose of this application to set out a very brief summary of the civil proceedings between the parties, in respect of which this discovery application is made. The plaintiff and his wife were at all material times members of An Garda Síochána. The plaintiff and one Sergeant D, were stationed in the same rural Garda Station. Upon the retirement of the previous sergeant in charge at the station, both the plaintiff and Sergeant D applied for that position. The position was given to Sergeant D.
7. The plaintiff alleges that from shortly after the appointment of Sergeant D as sergeant in charge of the station, in or about 2011, she began a campaign of bullying and harassment against him. Without going into the allegations in detail, the plaintiff alleges that Sergeant D engaged in a systematic campaign to humiliate and belittle him within the station and in particular, in the eyes of his work colleagues.
8. The plaintiff alleges that, contrary to the practice which had existed in the station theretofore, Sergeant D locked the office belonging to the sergeant in charge and would not give him a key to the office. He states that as a result, he was unable to get relevant documentation when he needed it and that was a cause of considerable embarrassment to him before his work colleagues. The plaintiff states that he subsequently found out that a key to the office had been given to a civilian member of staff at the station. When he queried the matter with Sergeant D, she responded to the effect that she had not permitted him access to the office as there was money and other items in the office which required to be kept safely. The plaintiff states that he regarded that statement as containing an imputation that he was not a person who could be trusted with such items. He stated that Sergeant D had represented to at least one other Garda at the station, that items had been removed from the office while she had been on holidays. The plaintiff stated that that could only have referred to him, as he had been entrusted with the key at that time. He stated that the suggestion made by Sergeant D in that regard was designed to cause distress and humiliation to him and to undermine his position as sergeant.
9. The plaintiff asserts that Sergeant D also departed from established practice in the station, by rostering him for night duty in the days leading up to court appearances, meaning that he had very little, or no time, to prepare the files necessary to present cases in court.
10. The plaintiff stated that on one occasion he had granted a member of his unit two days leave, but this was subsequently countermanded by Sergeant D, without informing the plaintiff, or the member concerned. The plaintiff complained that on another occasion, he had been berated by Sergeant D for not contacting her when a tragic death had occurred in the area at a time when she was not on duty. The plaintiff stated that when he told Sergeant D that it was very difficult to contact her by telephone, she shouted at him "You are a barefaced liar".
11. The plaintiff further asserted that Sergeant D had become openly hostile towards him within the station, in particular, by ignoring him and failing to respond to his questions. The plaintiff further asserted that on occasions she had called members of his unit into her office and spoke to them about aspects of their work, without involving the plaintiff,

who was the sergeant in charge of their unit. He stated that this was designed to undermine his authority over his own unit.

12. The plaintiff claims that as a result of the alleged bullying and harassment by Sergeant D towards him, he was caused to suffer ill-health and had to come under the care of his GP and a psychiatrist. He was required to take medication to deal with his mental health issues.
13. The second aspect of the plaintiff's claim, as pleaded in his personal injury summons, was that once he reported the alleged bullying and harassment to his superiors, the Garda authorities failed to investigate the matter adequately or at all. The plaintiff alleges that such investigation as was carried out, was both deficient and was excessive in its duration. In the course of argument at the bar, the court was informed that of ten allegations made by the plaintiff against Sergeant D, two were upheld and eight allegations were rejected. In the personal injury summons, the plaintiff claims damages against the defendant for its failure to carry out a full, proper and timely investigation into his complaints.
14. In the personal injury summons, the plaintiff pleads that on or about 26th September, 2013, he received an envelope at his home, which contained a forty-nine-page document, which appeared to have been authored by Sergeant D. In that document, Sergeant D made a large number of allegations against the plaintiff. She alleged that he was lazy and inefficient in his work practices. It was alleged that he and others in the relevant station had formed a "brat pack" and had engaged in making her life, as sergeant in charge, unpleasant and difficult. She alleged that the plaintiff had engaged in bullying and harassment towards her by undermining her in a number of ways and by excluding her from social activities organised for members of the station party. The statement also contained a number of allegations against the plaintiff's wife, who was a Garda stationed in another station. It was alleged that she spent a lot of her time in the plaintiff's station, doing his work. It was also alleged that the plaintiff and his wife used to bring their children to the station for babysitting purposes on a frequent basis.
15. The plaintiff and his wife were greatly upset by the allegations contained in the document which they had received. They brought the document to the Garda authorities and made a criminal complaint of harassment in relation to receipt of that document. An investigation was carried out by An Garda Síochána to try to determine who may have been responsible for creation of the document and more particularly, delivery of same to the plaintiff. It is the garda file in relation to the investigation of that criminal complaint that is the subject matter of the claim to privilege herein.
16. It is important to note that, while the plaintiff made reference to this document and to its content in his personal injury summons, he does not base any claim to damages upon it, or in relation to the handling by An Garda Síochána of his criminal complaint in relation to it.

Submissions of the parties.

17. As already noted, at item G4 of the second part of the first schedule to the affidavit of discovery sworn by Inspector Amanda Reynolds on 5th February, 2020, privilege was claimed over the investigation file submitted by Inspector O'Callaghan to the DPP in respect of the receipt by the plaintiff of the document, on the basis of litigation privilege and public interest privilege. The affidavit sworn by Inspector Reynolds did not go into any further detail of the basis on which privilege was claimed over this class of documents.
18. At the hearing of the application, it was accepted by the parties that the onus of proof lay on the party asserting privilege to establish to the satisfaction of the court that the privilege claimed was valid and outweighed any interest that the plaintiff may have in obtaining inspection of the documents.
19. Mr. Burke SC, on behalf of the defendants, began by stating that the defendants were no longer claiming privilege over the forty-nine-page document which had been received by the plaintiffs and which was the subject matter of the investigation. Nor were they maintaining any claim to privilege over the statements that had been made by the plaintiff and his wife in the course of the investigation. However, they were maintaining a claim to privilege over the remainder of the investigation file and over the directions issued by the DPP in relation to the matter. It was common case that on 25th January, 2015, the plaintiff had been informed by Inspector O'Callaghan that the DPP had directed that there be "no prosecution" in relation to the matter.
20. Counsel for the defendants accepted that where a claim to privilege had been invoked by a party in possession of documents, it was appropriate for the court to inspect the documents to determine if the privilege was validly claimed. That had been established in *Murphy v. Dublin Corporation* [1972] IR 215. In the present case, the court was furnished with a copy of the investigation file, as set out at item G4 in the affidavit of discovery.
21. It was submitted that having regard to the decision in *Breathnach v. Ireland* [1993] 2 IR 458, where the court had to determine whether it was appropriate to order the production of a garda investigation file, the court had to carry out a balancing exercise between the public interest in the due administration of justice which may be in favour of production of the documents, against the public interest in preserving the confidentiality of garda documents.
22. It was submitted that in carrying out this balancing exercise, the court was entitled to take a view, having read the documentation, as to the relevance of same in relation to the issues that were likely to arise in the substantive civil proceedings. It was submitted that if the documents were found by the court to have very minor relevance in relation to either the case put forward by the plaintiff, or in relation to his ability to defeat the case put forward by the defendant, that was relevant in relation to weighing that interest, as against the public interest in preserving the confidentiality of the garda investigation file.
23. It was submitted that in the present case, having regard to the fact that the plaintiff made no complaint in relation to the conduct of the criminal investigation into the receipt

of the forty-nine-page document by him, the documents had very little relevance, if any at all, to the issues that were central to his civil proceedings, which were the allegation that he had been bullied and harassed by Sergeant D and secondly, that the garda authorities had failed to investigate the matter, when he had complained about that to them.

24. It was submitted that the public interest in preserving the confidentiality of garda investigation files, which had been recognised in the *Breathnach* case, far outweighed the public interest in the administration of justice by ordering production of the documents, due to the fact that they were of very little relevance to the issues that arose for determination in the plaintiff's civil action. On this basis, it was submitted that the court should uphold the privilege that had been claimed by the defendants over the garda investigation file.
25. Counsel also referred to the decision in *McLoughlin v. Aviva Insurance (Europe) plc* [2011] IESC 42, where the plaintiff had sought production from the Gardaí of CCTV recordings and forensic reports thereon carried out by the insurers, in the context of his civil proceedings against his insurance company, who had failed to pay out under the policy of insurance, on the basis that the plaintiff had maliciously caused the fire. In that case, the Supreme Court held in a majority decision, that where there was an ongoing garda investigation, it was not appropriate to direct release of the materials and documents sought, notwithstanding that some of them had originally been furnished to the Gardaí by the plaintiff.
26. In response, Mr. Mark Boyle BL submitted that the issue of relevance or necessity of the documents could not be raised by the defendants as a bar to production of the documents, because the court had previously made an order on consent directing production of *inter alia*, the garda investigation file into the plaintiff's complaint in relation to receipt of the document. On this basis, counsel submitted that the issue of relevance and necessity had already been determined.
27. Counsel further submitted that it was clear from the *McLoughlin v. Aviva* decision that once a decision not to prosecute had been taken by the DPP, the right to withhold the file disappeared. As the DPP had directed that there be no prosecution in this case, it was submitted that there was no basis on which to assert that there was any continuing public interest in withholding the garda investigation file.
28. It was submitted that in the circumstances of this case, the defendant had not discharged the onus of proving that the public interest in withholding production of the garda file, outweighed the public interest in the due administration of justice in the context of the plaintiff's civil action.

Conclusions.

29. It is appropriate to begin by looking at the legal principles that apply when a claim of privilege is raised over documents. It has been established in Irish law that there are only very rare cases when it could be argued that a claim of privilege arises over a class of

documents per se, such that their production should be withheld, even without the court inspecting same. The existence of any such general principle in those terms was rejected in *Murphy v. Dublin Corporation*. In the present case, counsel for the defendants, quite rightly did not submit that the court could not inspect the documents for the purpose of determining the validity of the claim to privilege maintained by the defendants. The court was furnished with a copy of the documents over which privilege had been claimed.

30. The law in relation to legal professional privilege, and in particular in relation to the sub-category thereof known as litigation privilege, has been considered in a number of cases. The principles were considered by McDonald J. in *Artisan Glass v. Liffey Trust* [2018] IEHC 278. In *Colston v. Dunnes Stores* [2019] IECA 59, Irvine J. (as she then was) in delivering the judgment of the court, set out the general principles as follows at para. 43:

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"43. *Therefore, from the case law cited, the following principles may be stated to apply when a challenge is made to a claim of privilege over documents which predate either notification of an intended claim or the commencement of proceedings:-*

- (1) *Every application for inspection of documents in respect of which litigation privilege is claimed, must be decided on its own facts.*
- (2) *The Court must be satisfied, on the evidence, that the party claiming privilege has demonstrated that they reasonably apprehended litigation when the documents were created. This is an objective test and is one to be decided on the basis of the evidence.*
- (3) *If the documents in respect of which privilege is claimed were created for more than one purpose, the Court must be satisfied that the evidence demonstrates that apprehended litigation was the dominant purpose for the creation of the documents."*

31. More recently, this Court considered the issue of litigation privilege in *Kunzo v. Kepak* [2021] IEHC 180. The court does not propose to discuss this form of privilege in any further detail, as it is satisfied that litigation privilege does not arise in respect of the documents that have been furnished to it and which are encompassed within category G4 in the affidavit of discovery. While they comprise statements that were prepared in the course of the investigation and may have been used in a prosecution, if one had been directed; I am not satisfied that that of itself gives rise to an entitlement to claim litigation privilege.

32. Of more relevance, are the principles laid down in relation to public interest privilege in respect of the withholding of criminal investigation files in the possession of An Garda Síochána. There is some support in the *McLoughlin v. Aviva* case for the proposition that once a decision has been made by the DPP that there should be no prosecution in a matter, then the claim to privilege disappears. In delivering the majority judgment, Denham C.J. stated as follows at para. 19: -

"I am satisfied that it is established that the documents and items sought, being the two DVR recorders and the two forensic reports, are privileged. This privilege exists until the decision is made not to prosecute or until the decision is made to prosecute, when the matters will be disclosed in the Book of Evidence."

33. Similar comments were made by O'Donnell J. (as he then was) in his concurring judgment at para. 5, where he discussed the issue of priority between civil and criminal proceedings. He noted that the immunity against production of the documents, which were necessary to a criminal investigation, was limited in time. As a result, the parties to the civil litigation had the choice whether to proceed without the material, in the same way as a party might proceed having failed in the challenge to legal professional privilege, or they could wait until the issue of public interest immunity falls away, either by the disclosure of the material in criminal proceedings, or by a decision not to prosecute.
34. However, it is important to bear in mind the particular circumstances that were before the court in those proceedings. Firstly, it was an application to obtain a CCTV recording that had originally been furnished by the plaintiff to the Gardaí, along with two forensic reports thereon that had been commissioned by the insurers, which had been voluntarily furnished to the Gardaí by the insurers, and secondly, the garda investigation into the criminal aspect was ongoing at the time that the discovery application was being considered.
35. Of more relevance, is the decision of the High Court in *Breathnach v. Ireland*, which concerned civil proceedings brought by the plaintiff arising out of his alleged mistreatment by the Gardaí and in particular, the obtaining of an inculpatory statement from him, in the course of their investigation into the Sallins mail train robbery in 1974. Following the plaintiff's trial and conviction before the Special Criminal Court, his conviction had subsequently been overturned by the Court of Appeal.
36. In the course of his civil action, Mr. Breathnach sought production of *"all records relating to communications between [various members of the Gardaí involved in obtaining the alleged confessions], and any other members of An Garda Síochána in the months of March and April 1976, which are, or have been, in the possession or power of the Director of Public Prosecutions"*. In the course of his judgment, Keane J. (as he then was) stated that the court had to carry out a balancing exercise when faced with such a claim of privilege. He stated as follows at p.469: -

"On the contrary, the court, as I understand the law, is required to balance the public interest in the proper administration of justice against the public interest reflected in the grounds put forward for non-disclosure in the present case. The public interest in the prevention and prosecution of crime must be put in the scales on the one side. It is only where the first public interest outweighs the second public interest that an inspection should be undertaken or disclosure should be ordered. In considering the first public interest, it is necessary to determine to what extent, if any, the relevant documents may advance the plaintiff's case or damage

the defendant's case or fairly lead to an inquiry which may have either of those consequences."

37. The judge further elaborated on this aspect at p.472: -

"If privilege exists in relation to such documents, it can only be because of the other factors referred to by Mr. Liddy, of which undoubtedly the most important is the desirability of freedom of communication between the Gardaí and the Director of Public Prosecutions. The extent to which that freedom might be inhibited by the knowledge that the documents furnished to the Director of Public Prosecutions may subsequently be disclosed in court proceedings is clearly a matter which has to be taken into consideration in determining whether the public interest in the particular case requires its production... the circumstances of the particular case must determine, in the light of the constitutional principles to which I have referred, whether an inspection should be undertaken by the court and whether, as a result of that inspection, production of any of the documents should be ordered."

38. In the *Breathnach* case, the court determined that the public interest in the administration of justice outweighed the desirability in general of preserving the confidentiality of such documents, in the circumstances of those proceedings. Accordingly, the court inspected the documents and directed that a number of those over which privilege had been claimed, should be produced to the plaintiff.
39. I am satisfied that having regard to the principles laid down in the *McLoughlin* and *Breathnach* cases, it is appropriate for this Court to read the documents contained in the investigation file and having done so, to balance the public interest in the due administration of justice, being the conduct of the civil litigation being maintained by the plaintiff against the defendants; as against the public interest in preserving the confidentiality of a garda file in relation to a criminal investigation conducted by it.
40. The court is satisfied having read the documents, that no issues arise therein in relation to either informant privilege, or state security. The court is further satisfied that there is no material within the garda investigation file that would be of any benefit to any criminal, or subversive organisations in general.
41. The court also approaches its consideration of the matter in light of the fact that a decision has been made by the DPP that there should be no prosecution arising out of the receipt by the plaintiff and his wife of the document in question. The court has also had regard to the fact that as there is no claim to damages made by the plaintiff arising out of the garda investigation of his criminal complaint concerning receipt of the document, the garda investigation file into that matter, can only be seen as being of very minor relevance to the issues that will arise for determination at the trial of the civil proceedings between the plaintiff and the defendants.
42. Notwithstanding that the content of the file will only be of very marginal relevance to the issues that the plaintiff will face in his civil action, the court is of the view that the

following documents from the garda investigation file should be furnished to the plaintiff, as the court is of the view that there is almost no public interest in the withholding of these documents in the circumstances of this particular case.

43. The court directs that the following documents are to be produced to the plaintiff. They are statements that were made by various Gardaí and others in the course of the investigation. They will be identified by name and by number as appearing in the list of statements in the investigation file: -

Garda Thomas Finnan (3); Superintendent Pat O'Connor (5); Sergeant Susan O'Brien (6); Sergeant Paul Lyons (7); Inspector Patrick O'Callaghan (8); Inspector Margaret Howard (9); Sergeant Hazel Delahunt (10 and 10A); Retired Inspector Bernard Barry (11); Garda Margaret Slevin (12); Ms. Linda Walsh (13); Reserve Garda Seamus O'Neill (14); Ms. Miriam Martin (15); Garda Tom Hanrahan (16).
44. The court does not direct production of the statements made by Sergeant Tom McCormack (4) and Garda Siobhán Thornton (17), due to the fact that these statements were stated to be "awaited" and did not form part of the investigation file produced to the court. If those statements have since come to hand, the defendant can decide whether, in light of this judgment, it wishes to maintain its claim to privilege over those statements. If it does, the court can rule on that issue, having had sight of the documents. The parties have liberty to apply in that regard, if necessary.
45. The court also directs production of the memo of interview with Sergeant D as set out at Appendix B to the investigation file. The court also directs production of the email appearing at item C of the list of appendices.
46. The court declines to direct production of the accompanying report which was drawn up by Inspector Patrick O'Callaghan and which was submitted to the DPP. The court is satisfied that where the officer having overall charge of the investigation submits a report to the DPP, he or she must be free to express various views therein, which may be based on speculation and which may refer to other matters not strictly speaking germane to the investigation, but which may be relevant to the decision that has to be taken by the DPP. The court is of the view that were it to direct production of such reports, the Gardaí having overall charge of an investigation and making a report thereon to the DPP when submitting the investigation file, may well be inhibited in expressing their views in a full and forthright manner. The court is satisfied that such inhibition would not be in the interests of justice, or in the interest of the public in the proper prosecution of criminal offences. Accordingly, the court is of the view that the public interest in withholding this document from production to the plaintiff, outweighs his interest in obtaining sight of the document; particularly having regard to the very marginal relevance of the investigation file to the subject matter of the civil litigation between the parties.
47. Finally, while it does not form part of the investigation file set out at item G4, but in fact forms part of the document set out at item G5, being the direction issued by the DPP and therefore does not strictly speaking come within the ambit of the present application; the

court is satisfied that the direction issued by the Director of Public Prosecutions dated 21st January, 2015, is privileged and should not be produced to the plaintiff. The court is satisfied that this is necessary in order to ensure the public interest in the proper prosecution of criminal offences and in particular, so as not to inhibit communications between the Gardaí and the DPP and vice versa. The court notes that in the *Breathnach* case, Keane J. held that the direction of the DPP in relation to the charges against the accused was clearly privileged and should not be produced (see p.475 of the judgment).

48. The order of the court will provide that the claim to privilege has been validly asserted over some of the documents contained in category G4, but has not been validly asserted in respect of the various statements outlined in the judgment.
49. As this judgment is being delivered electronically, the parties will have four weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matter that may arise.