

THE HIGH COURT

[2022] IEHC 309

[Record No. 2020/5336P]

BETWEEN

JOHN BARRETT

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA AND THE MINISTER FOR JUSTICE

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 25th day of May, 2022.

Introduction.

1. The plaintiff is the Executive Director of Human Resources and Human Development in An Garda Síochána. He is currently suspended on full pay from his position of employment.
2. The first defendant is the Garda Commissioner and the second defendant is the Minister with responsibility for An Garda Síochána.
3. This judgment concerns an application by the plaintiff that the defendants should make discovery of eleven categories of documents. There has been agreement between the parties in relation to five of the categories. In respect of five further categories, the defendants have agreed to make discovery of some of the documentation sought in these categories, but not to the extent sought by the plaintiff in his notice of motion. There is one category of documents that has been refused outright by the defendants.
4. This case has had a protracted and acrimonious history. Unfortunately, it is necessary to set out the background to the case as pleaded, in some detail, as it is relevant to the consideration of the disputed categories of discovery sought by the plaintiff.

Background.

5. The plaintiff's case against the defendants is neither simple, nor straightforward. It was summarised in the following way by Mr. Byrnes BL on behalf of the plaintiff: The plaintiff has been the Executive Director of Human Resources and Human Development in An Garda Síochána, since 2014. While he continues to hold that role, he was suspended from his position of employment by the second defendant, on foot of a recommendation made by the first defendant, in October 2018.
6. In his role as Executive Director of HR and Human Development, the plaintiff was part of the senior management team in An Garda Síochána. He is one of a number of civilians on that team. One of the plaintiff's responsibilities was in relation to oversight of the Garda College in Templemore. In that role, the plaintiff came to learn of financial irregularities in the college. He made a protected disclosure to the Garda Commissioner, which included a recommendation that the Commissioner should report the matter to the Comptroller and Auditor General. These concerns and the recommendation that had been made by the plaintiff, subsequently became

public. They led to the holding of hearings before the Public Accounts Committee (hereinafter "the PAC"), at which the plaintiff gave evidence.

- 7.** Mr. Byrnes BL stated that the report issued by the PAC was scathing of Garda management in relation to its handling of the matter; in particular, of its failure to report the matter. The plaintiff had given evidence that was critical of the then Garda Commissioner and of the Executive Director of Finance in An Garda Síochána.
- 8.** The plaintiff has alleged that after he made these statements, in which he was critical of Garda management, the Executive Director of Finance went on the offensive against the plaintiff, by suggesting that the steps that had been taken by him had allegedly breached the Official Secrets Act 1963, as amended, in reporting his concerns about the financial irregularities in the Garda College in Templemore. The plaintiff was not aware of these allegations at the time. He only learnt of the existence of the letter that was critical of him much later. He had encountered difficulty obtaining sight of the letter. The plaintiff eventually got to see it in the course of the hearing before the PAC.
- 9.** The plaintiff has also pleaded that he was called to give evidence to the Disclosures Tribunal in the McCabe module, as he was the Protected Disclosures Manager at the relevant time. In that role, the plaintiff had received a number of other protected disclosures from the former Sgt. McCabe. The plaintiff states that he was compelled by his line manager, to provide these protected disclosures to the tribunal. The plaintiff alleges that his role as the Protected Disclosures Manager was wrongly interfered with in this regard. The plaintiff made a second protected disclosure to the Minister in relation to this aspect. In their defence, the defendants deny that that constituted a protected disclosure. The plaintiff alleges that that protected disclosure was not properly dealt with by the Minister. The plaintiff also made a protected disclosure to the Oireachtas Committee in this regard.
- 10.** The plaintiff has also alleged that insofar as he gave evidence to the Disclosures Tribunal, that constituted another protected disclosure, being his fourth protected disclosure. In his 3rd interim report, Charleton J. did not accept all the evidence that had been given to the tribunal by the plaintiff. That report issued in October 2018.
- 11.** In November 2017, an internal issue had arisen between the plaintiff and a former Assistant Commissioner of An Garda Síochána, who held the senior HR role before the plaintiff. The issue concerned the internal selection process for appointment of a person to the ERU. The plaintiff had made a decision to put forward a particular member, who had appealed a refusal to admit him to that unit. The plaintiff did that because that member had made protected disclosures prior to that time.

- 12.** The Assistant Commissioner concerned, had been contacted by the GRA, who were concerned by the appointment process. The Assistant Commissioner alleged that the plaintiff had breached procedures by advancing the man to the next stage of the selection process. The Deputy Commissioner of An Garda Síochána tried to resolve the matter informally. Mediation of the issue was suggested, but did not proceed.
- 13.** According to the plaintiff, nothing much happened between November 2017 and May 2018, when the Executive Director of Legal Compliance wrote to the plaintiff informing him that his interaction with the Assistant Commissioner on that issue, was part of the disciplinary process in relation to a threat which was alleged to have been made by the plaintiff to the Assistant Commissioner.
- 14.** The alleged threat in question concerned a text message which was sent by the plaintiff to the Assistant Commissioner, in which the plaintiff had stated as follows: "Consider carefully the matter I raised with you, and reflect appropriately. Amplification is neither helpful nor becoming, be on notice."
- 15.** A senior counsel was retained to informally investigate, the matter concerning the alleged breach of selection procedures and to carry out an inquiry into the unhappy differences between the plaintiff and the Assistant Commissioner. That informal investigation was subsequently changed to become an investigation under the disciplinary code against the plaintiff.
- 16.** The plaintiff states that he was unaware of what was going on and when he became aware of it, he had asked the Executive Director of Legal Compliance, where it had all come from. He stated that no reply was furnished to him. The plaintiff then elevated his complaint to the then acting Garda Commissioner. He stated that his complaint was not dealt with. The plaintiff stated that he has never seen the actual complaint that was alleged to have been made by the Assistant Commissioner in relation to the text message.
- 17.** The current Garda Commissioner took up office in September 2018. In October 2018, he wrote to the plaintiff indicating that he was elevating the allegations that had been made by the Assistant Commissioner of a threat to him, from misconduct to serious misconduct, which could lead to summary dismissal. This was done because the Garda Commissioner had taken serious issue with three letters that had been written by the plaintiff complaining about some of those who had made complaints against him, which the Garda Commissioner regarded as constituting serious misconduct on the part of the plaintiff. The plaintiff alleges that those letters constituted protected disclosures, being the fifth, sixth and seventh disclosures made by him.
- 18.** Terms of reference of the disciplinary charge were drafted. The Commissioner held the view that in writing the impugned letters, the plaintiff had gone "beyond the pale". On this basis, the Commissioner had sought the suspension of the plaintiff by the Minister. That was done in mid-October 2018.

- 19.** From October 2018 to December 2018, the disciplinary process took its course. The Commissioner was the complainant in relation to the letters that had been written by the plaintiff. The persons to whom the letters had been written, did not make any complaints in relation to them.
- 20.** In 2019, one of the allegations of breach of discipline against the plaintiff, being that he had threatened the Assistant Commissioner, was withdrawn by the Garda Commissioner, because he held that that allegation had not been substantiated by the Assistant Commissioner. The plaintiff was not told why that had occurred. The plaintiff stated that the Assistant Commissioner subsequently told him that he had never made any complaint about the text message in the manner that had been presented in the disciplinary charge against the plaintiff.
- 21.** The Commissioner proceeded with a disciplinary investigation in relation to the letters that the plaintiff had written in response to being informed of the institution of the disciplinary procedure against him. A disciplinary hearing was held over a period of four days. The Garda Commissioner attended and gave evidence at that hearing. The plaintiff maintains that it is the second defendant, who was the person who had the statutory power in relation to the holding of disciplinary investigations and any resultant suspension that may be made thereafter. The plaintiff submitted that the procedure that was adopted in this case, effectively allowed the Commissioner to be both the complainant and the decision maker, who recommends either suspension, or dismissal to the Minister.
- 22.** The plaintiff alleged that during the disciplinary hearing, he had tried to have the senior counsel who was carrying out the investigation, examine the substance of the complaints that he had made in the letters that he had written. However, it was ruled that the investigation was only into the manner in which the letters had been written. It did not concern their substantive content. The plaintiff stated that there was no investigation of the substantive issues that he had raised in the letters. Thus, he stated that he was being disciplined, not for what he had said, but for how he had said it. The plaintiff stated that he was found to be in breach of discipline, without there having been any investigation of the substance of the letters, nor of the issue as to who could lawfully commence the disciplinary process.
- 23.** When the investigator had held that he did not have jurisdiction to rule on whether the letters constituted protected disclosures, as maintained by the plaintiff, and that he would only look at the tone of the letters, not at their substance; the plaintiff stated that it was clear that he would not get a fair hearing. For that reason, he withdrew from the disciplinary process and commenced these proceedings.
- 24.** The investigation by the senior counsel continued. He gave a report at the conclusion of the investigation that was adverse to the plaintiff. That report is also impugned by the plaintiff. On reviewing the report, the Commissioner invited the plaintiff to attend a disciplinary meeting. The plaintiff declined to do so. The Commissioner went on to adopt the investigation report and made

a recommendation to the Minister that the plaintiff should be dismissed. That recommendation was communicated to the Minister in December 2020.

- 25.** In January 2021, the plaintiff obtained short service for his motion for an interlocutory injunction to restrain the continuation of the disciplinary process against him. In October 2021, the application for an interlocutory injunction was heard before Stack J., who gave her decision in February 2022, reported at [2022] IEHC 86, refusing an injunction. That judgment is currently under appeal to the Court of Appeal.
- 26.** The plaintiff stated that when the Garda Commissioner took over the investigation, he appointed the Chief Administration Officer (hereinafter "CAO") to oversee the investigation. The plaintiff had previously made a protected disclosure against the CAO in relation to the handling of the complaints that had been made by Sgt. McCabe. In addition, there was serious animosity between the CAO and the plaintiff, because the plaintiff had made a protected disclosure to the Minister about him.
- 27.** The plaintiff alleged that when the investigation changed from the informal investigation by the senior counsel, into a formal disciplinary investigation, the CAO took it on himself to carry out his own investigation into whether the plaintiff had breached the framework procedure in relation to public services appointments. Accordingly, the plaintiff was subjected to an investigation of that matter, but was never given a copy of any complaint against him.
- 28.** The CAO made a determination, which he notified to the Commissioner of Public Services Appointments, that the plaintiff had breached the procedural framework in relation to appointments within the public service, even though the plaintiff had been given no notice of that and had not participated in that investigation.
- 29.** The plaintiff further complained that in 2021, he learnt of an article in the Irish Times, which stated that certain senior members of the police, who had given evidence to the Disclosures Tribunal had become the subject of a criminal investigation. It referred to both "sworn" and "unsworn" members. The plaintiff was one of the latter group. The plaintiff was unable to get any details in relation to the assertion that had been made in the newspaper article.
- 30.** Eventually, he was told by a Detective Superintendent that he was the subject of an investigation under the Tribunals of Inquiry (Evidence) Act 1921, as amended, that he had given false and misleading evidence to a sworn tribunal of inquiry.
- 31.** Subsequently, the plaintiff learnt that the Commissioner had directed that a criminal investigation be commenced in December 2018, which was shortly after the time when the plaintiff had made his complaint. That investigation commenced within days of the publication of the third interim report by Mr. Justice Charleton.

- 32.** The plaintiff stated that as a person who had made protected disclosures and had spoken up about matters that he regarded as being wrong within An Garda Síochána, the disciplinary process was a contrived process, which was designed to get him dismissed, because he had not had an adequate opportunity to respond to the charges against him in the course of that disciplinary investigation.
- 33.** The plaintiff alleged that during the entire course of the disciplinary process, when it was known that the plaintiff would rely on the fact that he had made protected disclosures to the tribunal and to the PAC, the Garda Commissioner did not disclose to him that he was the subject of a criminal investigation, which had been directed by the Commissioner in December 2018. The plaintiff alleged that that conduct came within section 13 of the Protected Disclosures Act 2014. In addition, the plaintiff would rely on the fact that since December 2021, the EU whistleblowing directive (Directive 2019/1937) had come into force, although it was not yet implemented into Irish law. It was indicated that the plaintiff would argue that parts of that directive had direct effect.
- 34.** The plaintiff asserted that the Garda Commissioner and/or the Assistant Commissioner did not have the vires to commence disciplinary proceedings against him, because due to a 2008 amendment, the Commissioner was removed as the authority to make the suspension of senior members of the police force, with that power resting with the Minister. The plaintiff asserted that that had not been observed in this case. It was that fact which had been the subject of complaint in the three letters that the plaintiff had written.
- 35.** It was asserted that those three letters constituted protected disclosures, even if the content of the letters was inaccurate, or wrong. It was accepted that in her judgment, Stack J. did not accept that the letters were protected disclosures.
- 36.** It was submitted that the application for discovery had to be seen in the context of the fact that some of the matters about which complaint had been raised by the plaintiff in the proceedings, had occurred in a clandestine way. This meant that in framing his application for discovery, the plaintiff by definition, may not be aware of all the salient facts when grounding his request.
- 37.** In this regard, counsel referred to the decision in *Clarke v. CGI Foods* [2020] IEHC 368, where Humphreys J. ruled in the context of an appeal from the Circuit Court in injunction proceedings, that matters which occurred in an employment context and which gave rise to disciplinary processes, could be an “invention”, which the court may be obliged to penetrate.
- 38.** The plaintiff further submitted that part of his claim was that he had been marginalised as a result of the stance that he had taken on various matters. In this regard, he complained that, when he had been called to give evidence before the Disclosures Tribunal, his request for an indemnity in respect of his legal costs had been refused by the Garda authorities. This was despite the fact that other similar witnesses, who were called to give evidence, had been provided with an indemnity in

respect of their legal costs. In these circumstances, the plaintiff stated that he had had to engage his own legal team and pay it for two of the modules in which he had given evidence to date. He had ultimately been successful in obtaining an order for payment of his costs from the tribunal in respect of those two modules.

- 39.** However, in relation to a further module, that was still ongoing, he had also been refused an indemnity in respect of his legal costs, even though others, who are scheduled to give evidence before the tribunal in respect of that module, had obtained an indemnity in respect of their legal costs. It was for that reason, that he required documentation, not only concerning the refusal of costs to him, but dealing with the indemnity in respect of legal costs provided to other witnesses, who were in a similar position to him.
- 40.** It is only proper to point out that on 12th November, 2020, a detailed defence was delivered on behalf of the defendants. In that defence, the defendants denied that the various statements and evidence given by the plaintiff on various occasions, constituted protected disclosures within the meaning of the 2014 Act. The defendants have also denied the assertions of fact and the inferences that should be drawn from them, as pleaded by the plaintiff in his statement of claim. Thus, it is fair to say that all matters are hotly disputed between the parties. It should also be noted that a detailed reply to defence was delivered by the plaintiff on 23rd June, 2021.

The Disputed Categories of Discovery.

- 41.** Having set out the numerous issues that arise for determination in these proceedings in some detail, it is now appropriate to deal with the categories of discovery that remain in dispute between the parties. As already noted, the defendants have agreed to make discovery of five categories in the terms sought by the plaintiff in his notice of motion. In respect of five more categories, the defendants are agreeable to making discovery in principle, but they do not agree to the extent of the discovery sought by the plaintiff. Finally, there is one category of documents, which the defendants object to in toto. The court will deal with each of the disputed categories in turn.
- 42.** Category 2 concerns the following class of documents:

"All documents evidencing the communications, records, agreements or decisions specifically concerning, in relation to or in connection with the Plaintiff and his protected disclosure to the First Named Defendant regarding the financial irregularities at the Garda College in Templemore (Protected Disclosure 1)."

- 43.** The defendants are willing to make discovery of this category of documents, but suggest that it should be limited to the period from 20th March, 2017 to 28th October, 2018. The defendants submitted that the first date is the relevant date to commence the obligation to produce documents, because that was the date of publication of the initial Garda report highlighting

irregularities in the Garda training college. The defendants suggest that the latter date is appropriate, as that was the date on which the plaintiff was suspended from his position as head of HR.

44. The plaintiff has accepted that there should be some temporal limit on this category of documents, but submits that it should be for the period 1st July, 2015 to 31st December, 2018. It is submitted that the appropriate start date is July 2015, because that was when the plaintiff's concerns were first made known to the Garda Commissioner. The plaintiff opts for a slightly longer end date, of December 2018, because that was when the current Garda Commissioner directed that a criminal investigation should be commenced in relation to the evidence given by the plaintiff to the Disclosures Tribunal.

45. There is not a great deal between the parties in relation to this category of discovery. Having considered the matter, the court is persuaded by the argument put forward by the plaintiff that the relevant start date should be 1st July, 2015, as that was the date on which it is alleged that the plaintiff first made his concerns known to the then Garda Commissioner. Thus, even though the concerns that he had in relation to the financial irregularities in the Garda training college may not have been published until some time later, it seems to the court that July 2015 is the appropriate start date. In relation to the end date, while there is some substance to the argument put forward by the defendants, that the appropriate finish date should be the date on which the plaintiff was suspended, the court is of the view that providing discovery for two further months to the end of December 2018, is appropriate in all the circumstances. Accordingly, the court directs that in respect of category 2, discovery is to be made by each of the defendants of this category for the period 1st July, 2015 to 31st December, 2018.

46. The next category in dispute is category 4 in the notice of motion. The disagreement between the parties was exactly the same as that in relation to category 2. For the reasons set out above, the court directs that the defendants are to make discovery of the documents contained in category 4 in the notice of motion for the period 1st July, 2015 to 31st December, 2018.

47. The next category in dispute is category 6, which was in the following terms:

"All documents evidencing the communications, records, agreements or decisions concerning, in relation to or in connection with:

(i) The attendances by the Plaintiff as a witness at the Disclosures Tribunal.

(ii) The provision of legal advice and representation or for the indemnification for the costs of same, which was given by the Defendant to all or any persons who attended as witnesses at the Disclosures Tribunal.

(iii) The failure or refusal by the First Named Defendant to provide the Plaintiff and any other sworn or unsworn member of An Garda Síochána with independent legal advice and representation or for an indemnification for the costs of same."

- 48.** In relation to the documentation sought in this category, the defendants point out that the plaintiff has only pleaded that he was refused legal representation in relation to the Charleton Tribunal, which only dealt with the McCabe module. Thus, it was submitted that he has not made any case in his pleadings in relation to any refusal to grant legal representation in relation to the Keogh and O'Brien modules. Furthermore, it was submitted that the hearing in relation to the O'Brien module was ongoing. Insofar as the plaintiff had been refused an indemnity in respect of his legal costs for that module, that was the subject of a separate set of judicial review proceedings.
- 49.** In these circumstances, the defendant suggested that the discovery ordered should be limited to documents concerning an indemnity for his legal costs when appearing before the module dealt with by Mr. Justice Charleton, as that was the only module that has been pleaded. In addition, the defendant stated that the documentation should be limited to documents concerning the plaintiff's application for an indemnity in respect of his own legal costs and should not cover applications that had been made by other persons.
- 50.** In response to that submission, it was submitted on behalf of the plaintiff that his case was that he had suffered a detriment as a result of making protected disclosures. That detriment took the form of being denied an indemnity in respect of his legal costs for various modules that were being investigated by the Disclosures Tribunal, when indemnities had been furnished to other witnesses, who were in the same circumstances as the plaintiff. For that reason, it was submitted that the discovery should not be limited to the module dealt with by Mr. Justice Charleton, nor should the discovery be limited to the plaintiff's application for an indemnity in respect of his legal costs.
- 51.** The court can see the merit of the argument put forward on behalf of the plaintiff. The court is satisfied that the category of documents should not be limited to his application for an indemnity in respect of his legal costs before the tribunal in respect of the McCabe module alone. It is appropriate that the category of documents should cover his application for an indemnity in respect of his legal costs in respect of the Keogh and O'Brien modules as well.
- 52.** The court agrees with the submissions made on behalf of the defendants that it would be inappropriate for the court to direct discovery of all the documents concerning applications for an indemnity in respect of legal costs that have been submitted by other members, both sworn and unsworn, who were called to give evidence before the tribunal.
- 53.** The court has to be cognisant of their rights to privacy and to the privacy of the communications that may pass between them and their employer in relation to the giving of an indemnity in respect of their legal costs when appearing before the tribunal. However, as the essence of the

plaintiff's case is that he was treated differently and therefore wrongly, by virtue of the fact that he was not provided with an indemnity, when other people in similar positions to him, were given an indemnity; the court is of the view that it is appropriate to give the following direction: the defendants are to give details of the names of those witnesses who applied for an indemnity in respect of their legal costs before the Disclosures Tribunal and must identify those members of An Garda Síochána, both sworn and unsworn, in respect of whom an indemnity was given and those members in respect of whom an indemnity was refused. The court is satisfied that the discovery ordered under this category, together with the particulars that the court has directed should be furnished by the defendants, will enable the plaintiff to adequately put forward this limb of his case at the trial of the action.

- 54.** The next category of documents that was in dispute, was category 8, which was in the following terms:

"All documents evidencing the communications, records, agreements or decisions specifically concerning, in relation to or in connection with the letters dated 13 and 24 October 2015, which were written by Michael Culhane (former Executive Director Finance and Services of An Garda Síochána) respectively against Niall Kelly (Head of Internal Audit in An Garda Síochána) and the Plaintiff and any disciplinary process or action taken against Mr Culhane or any other person for this wrongful conduct."

- 55.** The defendants objected to making discovery of documents in relation to the letter dated 13th October, 2015, as that letter related to a person other than the plaintiff. The defendants are prepared to make discovery of the letter dated 24th October, 2015, which concerned the plaintiff. The defendants are not agreeable to making discovery of any documents concerning any disciplinary action that may have been taken against Mr. Culhane, on the basis that such documents are not relevant to the matters at issue between the parties in these proceedings.
- 56.** It was submitted on behalf of the plaintiff that while the letter dated 13th October, 2015 concerned allegations that were made against the Head of Internal Audit, it was nevertheless relevant, as both letters arose out of the concerns that had been raised by the plaintiff and Mr. Kelly in relation to affairs in the Garda training college in Templemore. It was submitted that having regard to the complaints made in relation to the veracity of the complaints contained in those letters, it was appropriate that the plaintiff should have discovery of any disciplinary procedures that were taken subsequently against Mr. Culhane.
- 57.** The court is of the view that the defendants' submissions in relation to this category of documents are well-founded. The plaintiff's complaint is in relation to the letter that was written about him. That was the letter dated 24th October, 2015. The defendants are willing to make discovery of that letter and the documents in connection with it. The court is satisfied that that is more than sufficient for the plaintiff's requirements in this action. The court refuses to direct that discovery

be made of the letter of 13/10/2015, or documents connected with it. The court also refuses to direct discovery of documents concerning any disciplinary proceedings that may have been taken against Mr. Culhane, as the existence or non-existence of any such disciplinary proceedings, is not relevant to the matters that are pleaded in this action. Accordingly, the court directs that under category 8, the defendants are to make discovery of the documents sought therein, but only in relation to the letter dated 24th October, 2015.

58. The next category in dispute is category 9, which is in the following terms:

"All documents evidencing all communications, records, agreements or decisions concerning, in relation to or in connection with Luan Ó Braonáin SC and the informal enquiry and disciplinary investigation which he was selected, briefed and/or was paid to conduct and did conduct concerning the plaintiff and any other matters relating to and concerning the issues in dispute in these proceedings."

59. In relation to this category, the defendants submitted that they had made a reasonable offer to make discovery of all documents concerning the selection and briefing of the senior counsel to conduct the investigation in respect of the plaintiff. Effectively, the defendants were confining the discovery to the formal disciplinary investigation conducted by the senior counsel.

60. The plaintiff was not satisfied with that limitation on this category of documents. The plaintiff maintains that this category should not be restricted to documents concerning the formal disciplinary inquiry carried out by the senior counsel, but should also include the briefing and other documents, that were furnished to him at the initial stage, when he was first approached to carry out an informal inquiry into the unhappy differences that had arisen between the plaintiff and the Assistant Commissioner, prior to that being escalated into a full disciplinary inquiry.

61. The court is satisfied that the submissions made on behalf of the plaintiff in relation to this category are well-founded. Where it is accepted that the documentation concerning the appointment and briefing of the senior counsel in advance of the disciplinary inquiry is relevant and necessary to the matters at issue between the parties, it seems to the court that, having regard to the complaints that are made by the plaintiff in relation to the escalation of the informal inquiry into a full disciplinary investigation, that the initial documentation furnished to the senior counsel in advance of the informal inquiry, is relevant to the matters that are likely to arise at the trial of the action. Accordingly, the court will direct that discovery be made of the documents in category 9, as set out in the notice of motion.

62. The final category of documents that is in dispute between the parties is category 11, which is in the following terms:

"All documents evidencing the records of entry, modification, and access by the First Named Defendant, his servants or agents of the PULSE system operated by An Garda Síochána concerning or in relation to the Plaintiff, to include all records of alleged or suspected criminal complaints or investigations, and also:

(i) Those involving the decision to commence and maintain the criminal investigation against the Plaintiff in or about December 2018 for an alleged breach of section 1 (2)(c) of the Tribunals of Inquiry (Evidence) Act 1921 as amended and any statements obtained from any complainant or witness upon which this investigation is or may be based upon.

(ii) Those involving the decision to commence and maintain the criminal investigation or decision to prosecute any other person for an alleged breach of section 1 (2)(c) of the Tribunals of Inquiry (Evidence) Act 1921 as amended and any successful prosecution occurring on foot of same."

- 63.** The defendants object to any order for discovery being made in the terms of this category. It was submitted by Mr. Power SC on behalf of the defendants, that where there was an ongoing criminal investigation, as there is in this case, it is well settled that it would be inappropriate for the court to direct the gardaí to make discovery of the documents and materials assembled by them in the course of that investigation. Counsel pointed out that the criminal investigation was not impugned in the present proceedings. The plaintiff's only complaint in that regard, was in relation to the decision of the Garda Commissioner to direct that a criminal investigation should be commenced.
- 64.** It was submitted on behalf of the defendants that the criminal investigation was an entirely separate process. It had its own self-contained rules of disclosure of documents, which would be made to any person who may be facing criminal charges; which disclosure would be made to them at the appropriate time. Other than the documentation that may have to be furnished by the prosecution in advance of the holding of a criminal trial, the documents assembled by the gardaí in the course of carrying out a criminal investigation were privileged from production during the course of that investigation. In this regard, counsel relied on the decision in *Keating v. RTÉ* [2013] IESC 22.
- 65.** Furthermore, counsel submitted that the terms of the discovery sought under this category, were extremely broad. Not only did it relate to any criminal investigation being carried out in relation to the plaintiff; he also sought production of any documents in relation to any criminal investigation of any other person in relation to the same matter. It was submitted that the rights of third parties, who may be under criminal investigation by the gardaí, had to be considered. It was submitted that there was no justifiable basis on which documents concerning third parties could possibly be relevant to the plaintiff's action.

- 66.** Finally, it was submitted on behalf of the defendants, that the documents and materials which may have come into the possession of the gardaí in the course of their ongoing criminal investigation, were not relevant to any of the issues that arose for determination in the plaintiff's present action against the Garda Commissioner and the Minister for Justice. In these circumstances, it was submitted that the court should refuse to order discovery of any of the documents sought in category 11 in the notice of motion.
- 67.** In response, Mr. Byrnes BL on behalf of the plaintiff submitted that while there was a privilege against production of documents that had come into being during the course of the police investigation, that was a privilege that ought properly to be invoked at the inspection stage, rather than as a means of blocking an order for discovery being made. It was submitted that the case law made it clear that it was only in very exceptional circumstances that the court should decline to order discovery of documents on the basis that they had been obtained by the police as part of a criminal investigation. In this regard, counsel referred to the decision in *McLoughlin v. Aviva Insurance* [2012] ILRM 487 and *Meegan v. Times Newspapers Ltd* [2016] IECA 327.
- 68.** Counsel submitted that it was not correct to say that the criminal investigation itself was not impugned in these proceedings. It had been impugned, as being a detriment that was suffered by the plaintiff, on account of his having made protected disclosures. In relation to the broad nature of the discovery, it was accepted that the plaintiff was only seeking police records in relation to the plaintiff himself. He was not seeking police records in relation to third parties.
- 69.** In giving its decision on this category, the court notes that it is common in civil litigation for parties thereto, to seek third party discovery from the gardaí in relation to documents that have come to hand in the course of a criminal prosecution. This often happens where a plaintiff sues the owners of a public house or nightclub in relation to injuries suffered by him, or her, as a result of an assault by either another patron in the premises, or by doormen employed at the premises. Invariably, orders for third party discovery in relation to statements and other documents or records, such as CCTV recordings, are only made against the gardaí, once the criminal prosecution has been concluded. The court has never come across a case where parties to a civil action have sought to obtain documents that may be in the possession of the gardaí, who are in the course of carrying out a criminal investigation. It is difficult to imagine any possible circumstances, in which an order for discovery could be made in relation to an ongoing Garda investigation.
- 70.** This issue was considered by the Supreme Court in the Keating case, where McKechnie J. stated as follows at para. 46:

"That being said however, there is also no doubt but that on a discovery motion the court has an inherent jurisdiction to refuse the application on the basis that its entire purpose, namely access to relevant evidence capable of aiding or defeating a particular claim, can never be achieved in the face of a privilege plea which inevitably must succeed. Before

holding however that the normal process can be abridged in this way and that privilege can ground a refusal for a discovery order as distinct from an inspection order, the court will have to be satisfied that such plea permits of no other possible result. For if it should or might, the court will not refuse to grant a discovery order on such grounds. To view the situation otherwise would be to conflate distinct steps in a two-tier process which involve addressing different questions and determining different issues. Accordingly, when the matter is raised at this stage of the process, the first enquiry must be to determine whether success on the plea is unavoidable. It is only if it is, that an affidavit as to documents will not be required."

- 71.** The court is satisfied that there are valid reasons why documents that have been obtained by the gardaí in the course of an ongoing criminal investigation, should not be made the subject of an order for discovery while that investigation is ongoing. The court is satisfied that if the gardaí were forced to disclose the existence of the documents that they had in relation to an ongoing criminal investigation, the identification of those documents in the affidavit of discovery, could impede the ongoing Garda investigation; may assist the people who are the subject of that investigation; and might even put the people who were identified as having cooperated with the criminal investigation, for example by making statements, in great danger. All these factors are in favour of the court refusing to order discovery of the documents sought under this category.
- 72.** While the plaintiff through his counsel, resiled from the breath of the discovery sought in the notice of motion, the court is satisfied that it would be inappropriate to direct the discovery as sought in the notice of motion, because that would involve the disclosure of documents that concern third parties, who may be the subject of an ongoing Garda investigation. Those investigations may not result in a prosecution. Those third parties have a right to privacy in relation to the investigation. There are strict rules as to when the identity of such people can be made known in the course of the criminal process.
- 73.** Finally, the court is not persuaded that the documents sought in this category are relevant to the issues that are likely to arise at the trial of the action. The plaintiff's civil action is not about whether he gave false or misleading evidence to the tribunal at its public hearings, or in his statements to the tribunal in advance of those hearings. As such, the issues that are being investigated by the gardaí as part of the criminal investigation, do not arise in the present action. For this reason, the court is not persuaded that production of these documents is relevant or necessary, either to enable the plaintiff to put forward his case at the trial of the action, or to enable him to refute the case that may be made against him by the defendants.
- 74.** For all of these reasons, the court refuses to direct that the defendants make discovery in the terms of category 11 in the notice of motion.

- 75.** As this judgment is being delivered electronically, the parties will have two weeks within which to furnish an agreed draft order setting out the categories of documents in respect of which it is agreed that discovery shall be made and those, in respect of which the court has directed that discovery should be made. The defendants will have to furnish the names of the deponents for the affidavits of discovery to be sworn on behalf of the first and second defendants. The parties should also agree a time period within which discovery is to be made.
- 76.** The parties may also submit brief written submissions on the issue of the costs of this application. The taking of these steps and the making of submissions will, of course, be without prejudice to the right of either party to appeal the judgment herein, once the final order has been perfected.