THE HIGH COURT

[2023] IEHC 313

[Record No. 2003/182P]

Between

John Doyle

Plaintiff

v

The Commissioner of An Garda Síochána, The Minister for Justice, Equality and Law Reform, and Ireland and the Attorney General

Defendant

Judgment of Mr. Justice Dignam delivered on the 13th day of June 2023

Introduction

1. This judgment deals with a discrete issue as to whether the plaintiff should be given leave to adduce additional evidence on a motion after the hearing has concluded but before judgment has been delivered.

2. After the Court heard the defendant's application for an Order dismissing the plaintiff's claim by virtue of inordinate and inexcusable delay in the commencement and/or prosecution of the proceedings on the basis of prejudice to the defendants and in the interests of the timely and effective administration of justice but before judgment was delivered, counsel for the plaintiff indicated that evidence which it was maintained was significant to the court's consideration of that motion had recently come into the plaintiff's legal representatives' possession and they sought leave to adduce that evidence. The

defendant maintained that this evidence was not relevant. The Court granted the plaintiff liberty to issue a motion seeking leave to adduce additional evidence and this judgment deals with that motion.

Applicable Principles

3. I was referred to the following cases: *Re McInerney Homes Limited [2011] IEHC 25*; *Hinde v Pentire Property Finance [2018] IEHC 575*; *Fanning v Trailfinders Ireland Limited & anor [2021] IEHC 247*; *Cave Projects Limited v Gilhooley & Ors [2022] IECA 245*; *The Governor and Company of Bank of Ireland v Ward [2023] IECA 25*; *Murphy v The Minister for Defence [1991] 2 IR 161*; and *Fitzgerald v Kenny [1994] 2 IR 383*. *Cave Projects Limited* is more relevant to the assessment of the underlying motion and I therefore do not consider it necessary to refer to it in any great detail at this stage (though I do refer to a specific point below).

4. In *Murphy v The Minister for Defence [1991] 2 IR 161* Finlay CJ considered an application under Order 58 Rule 8 of the Rules of the Superior Courts to adduce further evidence before the Supreme Court in a pending appeal. He identified the principles as being:

> *"1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;*
>
> *2. The evidence must be such that if given it would probably have an important influence on the result of the case, though it need not be decisive;*
>
> *3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible."*

5. The Supreme Court also considered the exercise of its discretion in *Fitzgerald v Kenny [1994] 2 IR 383* and held:

> *"That the discretion should be exercised in accordance with the following, non-exhaustive, guidelines:-*

(a) …;

(b) that fresh evidence might be admitted if some basic assumptions, common to both sides, had clearly been falsified by subsequent events, particularly if this had happened by the act of the defendant;

(c) that the primary consideration was that it might be expected that fresh evidence would be permitted when to refuse it would affront common sense or a sense of justice;

(d) …"

6. More recently, in *Re McInerney Homes Ltd [2011] IEHC 25* Clarke J had to consider whether to permit additional evidence to be adduced in respect of an examinership petition after he had delivered judgment but before the final Order had been made. At paragraph 3.1 of his judgment he noted the need for an extremely high test for reopening a case when it has come to its natural conclusion, i.e. after the case had been concluded and a final ruling delivered "*whether in a court of first instance or, in the event of an appeal, as a result of a determination of the court which has the final appellate role in the circumstances of the case*". He went on to state that "*the necessity to bring finality to proceedings outweighs any possible injustice that might be caused in an individual case. It is important to note that, if it were possible to reopen proceedings on a significantly less stringent test, then the finality of every case would be called into question with a significant collective injustice to all parties to all litigation. It is that consideration that outweighs any possible injustice on the facts of an individual case."* He went on to distinguish this from the principles applying to the admission of new evidence or new arguments "*when the proceedings are still alive in the sense that a valid appeal remains before an appellate court and has not yet been finally determined*" and said at paragraphs 3.2 and 3.3:

"*3.2 However, the situation is not quite the same when the proceedings are still alive in the sense that a valid appeal remains before an appellate court and has not yet been finally determined. In those circumstances the courts have recognised a jurisdiction to admit additional or new evidence subject to stringent conditions which have been the subject of definitive judicial ruling…*

3.3 In that context it must be remembered that, at the stage when an application to admit such new evidence or make new argument is made, the proceedings are not over in the full sense of the word. There is an appeal pending before an appellate court of competent jurisdiction and there remains the real

possibility that that appellate court may take a different view on any material issue than the view taken by the court of first instance. While giving a generous jurisdiction to the courts to allow new evidence or argument at such a stage would be a recipe for litigation chaos, it nonetheless remains the case that, provided the relevant stringent tests are met, the balance of justice is found to favour allowing the additional evidence or argument to be heard principally, it would appear, because the weight to be attached to the finality of proceedings is somewhat less when there is still a live appeal extant in relation to those proceedings than would be the case if the appeal had been finally determined."

7. He then went on to consider the position at an even earlier stage of the process, i.e., after the court which is being asked to reopen the matter has delivered its reasoned decision but before the court Order has been made, and said that "[*O]ne of the issues which it will be necessary to address is as to whether the circumstances which would justify the court in revisiting its own judgment prior to the making up of a final order (on the basis of the availability of new evidence or argument) are any wider in those circumstances when compared with an application to an Appeal Court to admit new evidence or argument.*" He considered the judgment of the Court of Appeal of England and Wales in *Paulin v Paulin & Anor [2010] 1 WLR 1057* in which Wilson J reviewed the history of the jurisprudence in this area in England and Wales. Clarke J accepted that the passage from Wilson LJ's judgment represents the law in this jurisdiction and stated that "*[I]n those circumstances, it seems to me that, in order for the court to exercise its jurisdiction to revisit a question after the delivery of either an order or written judgment, it is necessary that there be "strong reasons" for so doing*." (This was a formula which had been suggested by Rix LJ in *Cie Noga D'Importation et D'Exportation SA*). Clarke J then concluded at paragraph 3.12 that:

"…where the basis for seeking that the court revisit its judgment is to be found in the proposed presentation of additional evidence or materials, then it seems to me that it would be inappropriate for the court to go down that road without applying, at least in general terms, a test similar to that which an appellate court would apply in deciding whether to admit new evidence at an appeal. In those circumstances it seems to me that the new materials must be such that same would probably have an important influence on the result of the case, even if not decisive, and be credible. In addition, such new evidence will not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, have been put before the court at the trial."

8. Of course, what was being considered by Clarke J was the jurisdiction of the Court to admit further evidence or argument after judgment has been delivered but before a final Order is made. In this case we are at an even earlier stage: the hearing has concluded but the Court has not yet delivered its decision. That was also the situation in *Hinde v Pentire Property Finance Designated Activity Company & Kavanagh [2018] IEHC 575.*

9. In that case Costello J had to consider an application for leave to adduce further evidence between the conclusion of the hearing of a motion and the delivery of the judgment. She was referred to *Re McInerney Homes* and she set out paragraphs 3.11 and 3.12 of Clarke J's judgment and noted that Clarke J had established a dual test which had to be satisfied before a court should admit new materials in circumstances where the court has concluded the hearing of the case and has delivered a reasoned judgment. She said that the elements of the test are:

> *"(1) that the new materials would probably have an important influence on the result of the case, and be credible.*
>
> *(2) Such new evidence will not ordinarily be permitted to be relied on if it could, with reasonable diligence, have been put before the court as the trial."*

10. The parties do not appear to have suggested to Costello J that any different approach should be taken when the application was being made in advance of judgment being delivered and therefore Costello J did not have to consider this.

11. In *Fanning v Trailfinders Ireland Ltd [2021] IEHC 247* Barton J had to consider re-opening a motion on a choice of law clause after hearing the motion but before delivering judgment. It was not a case concerning the admission of new evidence (see paragraphs 27 and 28 of the judgment) but nonetheless the judge considered the authorities relevant to that issue. He referred to paragraph 3.1 in *Re McInerney Homes* and the importance of bringing finality to proceedings and the public interest underlying cause of action estoppel.

12. Barton J considered the jurisdiction to re-open a matter before judgment and concluded at paragraphs 32-35:

> *"32. It is apparent from the authorities opened to the Court that a significant corpus of law has developed on the jurisdiction to reopen a case and admit new evidence in circumstances where a judgment has been delivered but a final order has yet to be made or where made, an appeal is pending. In the latter case an express jurisdiction is conferred on the Supreme Court by Order 58 Rule 30 to receive further evidence in the circumstances provided for in sub paras (a), (b) and (c) thereof. However, there appears to be a dearth of authority governing circumstances where leave is sought to re-open a motion or a trial where the evidence and submissions have been completed but the judgment thereon has yet to be delivered…*
>
> *33. … In essence* [the approach to re-opening the matter where the evidence and submissions have been completed but judgment not yet delivered] *should mirror the approach to be taken after judgment is delivered but before a final order is made or an appeal therefrom is pending. Whether before or after judgment, the exercise of the court's discretion is to be considered as an exception and warranted only once certain criteria are satisfied, the rationale being the same in either case. Reopening the case is an extreme measure and should only be allowed sparingly and with the greatest of care.*

13. He went on to refer to a number of Canadian authorities (*Scott v. Cooke [1970] OJ No. 1487, 2 OR 769 (HCJ); in 671122 Ontario Ltd v. Sacaz Industries Canada Inc. 2001 SCC 59, 2 SCR 983 (SCC) and Varco Canada Ltd v. Pason Systems Corp [2011] FC 467, 92 CPR (4th) 399 (FC)*). While he referred to them as formulating a test that the new evidence must be such as could reasonably influence the result, he in fact noted that the judgments in these cases were almost on all fours with the test enunciated in the Irish authorities (*Re McInerney Homes*) and that having regard to the similarity with that test he was satisfied that the statement of the law in those Canadian cases represents the law in Ireland. Given that these Canadian cases (with the exception of *Varco*) refer to the need to establish that the evidence would probably have changed the result, I understand that Barton J did not depart from the formulation in *Re McInerney Homes*. That in fact is implicit from paragraph 33 of his judgment where Barton J said "*In essence it should mirror the approach to be taken after judgment is delivered but before a final order is made or an appeal is pending therefrom*" which is, of course, the issue with which Clarke J was concerned in *Re McInerney Homes*.

14. There does seem to me to be some basis for having a slightly lower test for the admission of new evidence before judgment is delivered. For example, in the Canadian case of *Varco,* which was concerned with the reopening of a case before judgment had been delivered, Phelan J stated that "*Since there is no result to change, the relevant question is whether the new evidence* ***could*** *influence the result – is the evidence relevant?*" [emphasis added]. The private and public interest in finality identified in paragraph 3.1 of Clarke J's judgment in *Re McInerney Homes* is not quite as acute at that stage. Indeed, However, while my attention was drawn to Barton J's judgment by Senior Counsel for the plaintiff with, perhaps, the suggestion that the test is lower than in *Re McInerney Homes* when the evidence is sought to be adduced pre-judgment, the application of a different, lower, test, was not pushed with any vigour and was not argued, and therefore may have to be decided in a different case. I have therefore decided the case on the basis of the *McInerney Homes*/*Hinde* formulation subject to the requirement, in circumstances where the decision is still to be given, to express the test in prospective terms, i.e., would the proposed new evidence probably have an important influence on the result of the case, rather than a consideration of whether it would change the result. The test is therefore whether the evidence would probably have an important influence on the result of the case, though not necessarily decisive, is it credible, and could it have been obtained for the original hearing with reasonable diligence on the part of the plaintiff. Of course, overarching the test are the general principles that the exercise of the Court's discretion is to serve the interests of justice and that the exercise of that discretion is an exception and is one which should be exercised sparingly.

15. It is important to note that the *Re McInerney Homes* formulation contains the qualification that the evidence need not be decisive. It seems to me that conceptually the qualification that the evidence need not be decisive is an important one because, at the point of deciding whether or not the new evidence should be admitted, the Court will not be deciding the actual case (in this case, the motion) but rather whether the evidence should be admitted to be considered along with the other evidence. Furthermore, the Court will not necessarily have the other side's substantive response to that evidence. It therefore could not reach its decision on the basis that the evidence which is sought to be admitted is decisive. It seems to me that what is constituted by the test is whether the proposed evidence would probably have an important influence on the Court's consideration or be an important part of those consideration and therefore be an important influence on the result.

Background

16. It is not necessary to set out the background in any great detail but it may be helpful to give a brief summary.

17. The plaintiff issued a Plenary Summons on the 8th January 2003. A Statement of Claim was delivered on the 31st July 2018. A Notice for Particulars was served by the defendants on the 10th December 2018. Replies to Particulars were served on the 4th January 2021. The plaintiff then issued a motion for judgment in default of defence on the 31st January 2022 and the defendant issued the motion underlying this application on the 28th February 2022 seeking the dismissal of the plaintiff's claim on the grounds of inordinate and inexcusable delay. It is in the context of this motion that the current application arises.

18. The reliefs in the plaintiff's Summons and the Statement of Claim are directed towards what the plaintiff claims was an unlawful termination of his employment as a member of An Garda Síochána in January 1999. However, there is a considerable background pleaded in the Statement of Claim which runs to 20 pages and 54 paragraphs. For the purpose of this application, it suffices to summarise part of his claim as follows (this is not a full summary). The plaintiff claims that during his time in An Garda Síochána, from 1993 onwards, he came into contact with a person who became involved in passing on information in relation to the importation of drugs into the country. This person subsequently became an informant and the plaintiff and this informant worked together along with a number of more senior Gardaí. The plaintiff claims a particular Detective Sergeant was centrally involved. It is not necessary to identify this member for the purpose of this judgment and I will therefore simply refer to him as Detective Sergeant A. This member was subsequently promoted several times so held a number of different ranks but I will refer to him throughout this judgment as *"Detective Sergeant A"* for ease of reference. In the Statement of Claim (paragraphs 11 to 24 in particular) the plaintiff gives details of various Garda operations relating to drugs shipments and identifies Detective Sergeant A's central involvement in these Garda operations. Further particulars are given in the Replies to Particulars dated the 4th January 2021. The plaintiff claims that in a certain period he did not meet the informant for some time until he met him again in the middle of 1996 on which occasion the informant told him that a consignment of drugs had been brought into the State in May 1995 with the knowledge of the Drug Squad and the entire consignment got through to the drug gang. At the end of 1996 the informant also gave

the plaintiff further information about drugs getting through to criminal gangs to the knowledge of the Gardaí and Detective Sergeant A and that while there had been opportunities to arrest some leading criminal figures they had not been arrested. The core of the plaintiff's claim in relation to this is that the Gardaí (including Detective Sergeant A) were deliberately permitting drugs to enter the State and to reach the criminal gangs. The claim, indeed, may go further and amount to a claim that this was being facilitated and assisted by the Gardaí. He pleads at paragraph 27 of the Statement of Claim that he "*became very concerned on learning of the large consignments of drugs which were being brought into and permitted to enter the State with the knowledge and/or assistance of An Garda Síochána and were being permitted to reach their intended recipients, being certain gangs. The Plaintiff was also very concerned that the informant was making drugs drops within the State with the knowledge and/or assistance of An Garda Síochána and that many of these drops did not give rise to any action on the part of Garda Síochána. The Plaintiff determined that he would have to take action, in the public good*". The plaintiff then advised a friend who worked for a relevant State agency of what he claimed had been going on. The plaintiff claims that he thereafter started having difficulties, including (though not limited to) restless nights and a sense of abandonment and deep concern for his own safety and that of his wife. Ultimately, he claims that he was unlawfully retired on medical grounds. It is unclear from the Statement of Claim whether the plaintiff claims that these difficulties came about simply because of his knowledge of these events, his involvement, or as consequence of having started to raise these concerns about them. I do not need to consider this for the purpose of determining this application. The point is that he claims that Detective Sergeant A was heavily involved in these events and in particular in the arrangements where drugs were being permitted to reach criminal gangs.

19. As noted above, the defendants issued a motion to dismiss for delay. This was grounded on the affidavit of Detective Superintendent John G Healy in which he set out various types of prejudice which it is claimed the defendants would suffer if the proceedings were permitted to continue. They are (i) the natural fading of memories and the difficulty for witnesses in having to give evidence following the passage of between 30 and 22 years since the matters pleaded in the Statement of Claim - it is pointed out that the Statement of Claim names 36 witnesses in total, and that oral testimony will be crucial; (ii) the death of two specific witnesses and their consequential non-availability due to the delay; (iii) an inability to locate two potential witnesses; (iv) the non-availability of documents; and (v) specific averments that six witnesses have instructed that their memory of the matters contained in the Statement of Claim is impaired. One of these witnesses is Detective Sergeant A. The averment in relation to Detective Sergeant A is

that he *"instructs that given the passage of time his memory is not what it was and he is not in a position to consult any contemporaneous notes or other reference material. He says he would be seriously disadvantaged if he were called to give evidence; Detective Sergeant [A] is referred to extensively throughout the Statement of Claim and Replies."*

20. This application for leave to adduce further evidence is directed entirely at this averment and the memory of Detective Sergeant A.

21. In the grounding affidavit to this application the plaintiff's solicitor explains that following the hearing of the motion to dismiss the proceedings an individual contacted the plaintiff's legal team and told them that he had been involved in similar operations to those described by the plaintiff and that Detective Sergeant A was centrally involved. The grounding affidavit exhibited an affidavit sworn by this individual. It is this affidavit which is sought to be admitted. He says at paragraph 2 of the affidavit "*I do not know the Plaintiff, and never had any dealings with him personally but knew of him and the informant…central to his case. I was intimately involved in the type of operations which he outlines in his proceedings which was obvious from the newspaper reportage and from information given to me by his Solicitors and I dealt with many of the same individuals both within An Garda Síochána and the criminals they were dealing with during the Plaintiff's involvement.*" He says he became actively involved in such matters from in or around 1997 and continued until 2014 at least. He gives considerable detail in his affidavit and essentially avers that he was involved in the drugs trade under the supervision and instruction of An Garda Síochána who controlled what drugs got to what dealers. He identifies Detective Sergeant A as his contact and as the person who was in charge and made all the key decisions. He explains that Detective Sergeant A from about 2001 was less directly involved and handed-over the direct role to another member of An Garda Síochána but that he remained in control and was at various meetings and involved in various decisions and approvals in 2008 and 2012.

The Parties' Positions

22. It is the plaintiff's position that this wholly undermines the averment in the affidavit grounding the motion to dismiss the proceedings that Detective Sergeant A does not recall the matters pleaded in the Statement of Claim and that it must therefore be a relevant

consideration for the Court in assessing the prejudice which it is claimed would be suffered by the defendant if the proceedings are allowed to continue. In *Cave Projects* Collins J stated:

> *"In many (if not most) applications to dismiss based on the Primor principles, the defendant will assert that some specific prejudice has arisen from the delay of the plaintiff. As McKechnie J observed in Mangan v Dockeray, "the existence of significant and irremediable prejudice to a defendant", such as by reason of the unavailability of witnesses, the fallibility of memory recall, loss of documentary records such as medical records (Mangan involved a claim for medical negligence) "usually feature strongly" (at para 109 (iv)). The absence of any specific prejudice (or, as it is often referred to in the caselaw, "concrete prejudice") may be a material factor in the court's assessment. However, it is clear from the authorities that absence of evidence of specific/concrete prejudice does not in itself necessarily exclude a finding that the balance of justice warrants dismissal in any given case. General prejudice may suffice. The caselaw suggests that the form of general prejudice most commonly relied on in this context is the difficulty that witnesses may have in giving evidence – and the difficulty that courts may have in resolving conflicts of evidence – relating to events that may have taken place many years before an action gets to trial. That such difficulties may arise cannot be gainsaid.* ***But it is important that assertions of general prejudice are carefully and fairly assessed and that they have a sufficient evidential basis…****" [emphasis added]*

23. The plaintiff's essential position is that this evidence (if admitted) would show that Detective Sergeant A was involved in the type of operations described in the Statement of Claim on an ongoing, direct and intensive basis for a long number of years and this would go to the issue of whether or not he might remember the events pleaded in the Statement of Claim. The plaintiff's solicitor puts it as follows in his grounding affidavit "*In light of what is averred to by him in the Affidavit which we now seek leave of the Court to file, it seems beyond belief that [Detective Sergeant A] would not have sufficient recall of matters to deal with the Plaintiff's claim. It is clear that [Detective Sergeant A] was centrally involved with the same characters and the same modus operandi for some significant time after the dismissal of the Plaintiff. In fact, he continued to oversee similar matters in which this witness was involved, up until at least 2013/2014. It is simply not credible that, given such central involvement for such a significant period of time, his memory would be so impaired that the Defendants can claim prejudice and/or to the point where the court can*

safely rely upon that averment of alleged prejudice to dismiss this action on the grounds advanced." In fact, the plaintiff's solicitor goes further and asserts that the import of the passage from the defendant's grounding affidavit quoted above is "*that [Detective Sergeant A] was a bit player, a serving officer at a low rank that could not be expected to deal with historical facts of which he may or may not have taken much note may not have been of such import to him or otherwise such as to remain prominent in his memory some 20 years later*" and that the affidavit which it is sought to admit shows that "*such an impression is not a fair reflection of the long years of involvement of Detective Sergeant A…*".

24. I do not believe that the averment in the grounding affidavit is any way misleading or conveys the import or impression suggested by the plaintiff's solicitor. It is a simple statement of fact (which is obviously challenged). Thus, I am satisfied that the issue falls to be determined on the basis of whether Detective Sergeant A's involvement in similar matters, as averred to by the individual whose evidence is sought to be admitted, might make it more likely that he would recall the matters pleaded in the Statement of Claim or, to put it another way, might undermine the claim of prejudice on the basis that his memory is not what it was and therefore would probably have an important influence on the underlying motion.

25. It was submitted on behalf of the defendant that the Court, when deciding whether to admit the evidence or not, must focus on the issues to be determined and that the evidence which is sought to be admitted has no bearing on whether the delay is inordinate or inexcusable and therefore its only possible relevance is to the question of prejudice. The defendant vigorously contests its relevance to this issue. In the first place it was submitted that the heart of the plaintiff's case is set out in paragraph 51 of the Statement of Claim and that the affidavit which is sought to be admitted has nothing to do with this but rather is an attempt by the plaintiff to ventilate matters concerning what the plaintiff claims was his involvement in covert Garda operations. Paragraph 51 pleads: "*The actions of the Defendants and/or any of them in forcing the Plaintiff to be medically examined without any lawful basis and/or acting on foot of a report of such an examination without providing the Plaintiff with the contents of same and an opportunity to comment thereon and/or in purporting to terminate the Plaintiff's employment were contrary to law, in breach of the Plaintiff's constitutional rights and contrary to natural and constitutional justice and violated the Plaintiff's rights as at the time a serving member of An Garda Síochána.*" At its height, it is submitted, the evidence is extremely tangential, is hearsay and almost everything that is said relates to the time after the plaintiff was a member of

An Garda Síochána. It was emphasised that the Court must assess the evidence's potential impact on the case and in this context the "*case*" is the motion to dismiss. It was also submitted that it would have no impact on this "*case*" because there is nothing in the application that what is said about Detective Sergeant A is wrong, and even if Detective Sergeant A was involved in the matters set out in the affidavit which is sought to be adduced, it does not follow that it makes it more likely that Detective Sergeant would remember the matters pleaded in the Statement of Claim. It was also underlined that the reference to Detective Sergeant A in paragraph 37(a) of the grounding affidavit is not the only reference to him.

Conclusion

26. I agree that this proposed evidence does not go to the questions of whether the delay is inordinate or inexcusable. That case was not made by the plaintiff.

27. I also have some sympathy for the submission made on behalf of the defendant that the evidence does not relate to the heart of the plaintiff's substantive case. It can only relate to the contents of the Statement of Claim in respect of Detective Sergeant A (and in fact can really only relate to the claim that Detective Sergeant's memory of these matters is impaired). I have previously referred above to the lack of clarity as to the link between these matters and the reliefs sought by the plaintiff (which relate to the lawfulness of the termination of the plaintiff's employment). However, as things stand, the matters pleaded in relation to Detective Sergeant A are a very significant part of the plaintiff's case and it seems to me that the current application must be determined on that basis.

28. The submission that the Court must assess the evidence's potential impact on the motion to dismiss rather than on the substantive case is correct.

29. It is to that issue that the principles set out above must be applied.

30. I am satisfied having regard to those principles that leave to admit the further evidence should be granted.

31. The defendant did not suggest that this evidence was available to the plaintiff or could have been available with the exercise of reasonable diligence at the time of the original hearing of the motion. Indeed, it is clear from the evidence at paragraph 3 of the plaintiff's solicitor's grounding affidavit, which sets out how and when the information from this individual came to the attention of the plaintiff, that it was not available and could not have been available even with the exercise of reasonable diligence at the time of the hearing.

32. Nor is it suggested or is there any basis upon which I could conclude safely at this stage that the evidence is not credible.

33. The real issue is what impact that evidence might have on the result of the case, i.e. on the result of the motion. I am of the view that it would probably have an important influence on the Court's assessment of whether Detective Sergeant A's lack of memory of these matters is as significant as claimed and therefore on the claim of prejudice to the defendant. It is essential to point out that this does not constitute a finding that Detective Sergeant A's lack of memory is not as significant as claimed; nor could it, because the defendants must have an opportunity to address the new evidence. It is true, as pointed out by the defendant, that the matters contained in the affidavit which is sought to be adduced do not relate to the plaintiff, relate to a period after he had left An Garda Síochána, and in fact relate to different events and many different people. However, there are similarities between the types of operations and events described in the Statement of Claim and those described in this proposed evidence. It would amount to evidence of an ongoing type of practice or operation which continued through the plaintiff's time into a subsequent period extending up to 2013, and of a degree of formality attaching to those operations, all of which go to an assessment of whether it is likely that Detective Sergeant A would have a better memory of the events and which would have to be factored into the Court's consideration of the extent of the prejudice which would be suffered by the defendant if the proceedings were permitted to continue. As noted, of course, this does not amount to a conclusion by the Court that Detective Sergeant A has a better memory than is claimed in the affidavit or that the prejudice which might be suffered is less than claimed. All the Court has to consider is whether the evidence would probably have an important influence on the Court's assessment of this and therefore of the motion to dismiss itself and I am satisfied that it would. I am reinforced in this conclusion by a consideration of the balance of paragraph 37(a) of Detective Superintendent Healy's

affidavit where it is stated that Detective Sergeant A "*is not in a position to consult any contemporaneous notes or other reference material.*" It is not explained why the Detective Sergeant is not in a position to consult such notes or reference material. That is a matter for the substantive motion. More relevant to this application is that if the type of operation discussed in the Statement of Claim and the proposed affidavit was an ongoing type of operation on a more formal or systematic basis then, in the absence of evidence to the contrary, it would seem to make it more likely that there would be contemporaneous records which, in turn, would be inclined to reduce, at least to some extent, the potential prejudice caused by Detective Sergeant A's inability to remember the events. Again, these are matters to be considered in the substantive motion but they do reinforce my view that the evidence would probably have an important influence on my consideration of that substantive motion.

34. It is also important to note that the evidence only relates to Detective Sergeant A and therefore only to one part of the prejudice claimed by the defendant. That would in some cases lead to the conclusion that it could not have an important influence on the result of the case. However, I remain of the view it would probably have such an influence because, while Detective Sergeant A's lack of memory is just one part of the prejudice claimed, he plays a central part in the matters pleaded by the plaintiff.

35. In those circumstances, it is appropriate that the plaintiff should be given leave to adduce this additional evidence and the affidavit should therefore be admitted. It is essential that the defendant be given an opportunity to reply to that affidavit and that the parties would be given an opportunity to make further submissions. I therefore propose to make directions for the exchange of affidavits and to have the matter heard. I will list the matter before me in order to discuss these matters with the parties. I was informed at the hearing of this application that a further witness who would have been called by the defendant has died. It seems to me that where the underlying motion is being reopened to consider the evidence to be adduced on behalf of the plaintiff the defendant must be given the opportunity to adduce evidence of any relevant change of circumstance which has occurred since the hearing of the motion.