

THE HIGH COURT

[2023] IEHC 618
Record No. 2017 4234P

BETWEEN

THOMAS BROWNE

PLAINTIFF

AND

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

DEFENDANTS

Judgment of Mr. Justice Brian O'Moore delivered the 10th day of November 2023

1. In this action, the Plaintiff (Mr. Browne) claims damages arising from an incident which he alleges occurred at his farm on the 14th of December 2015. It is pleaded that, while he was inspecting a fuse board in a shed on his farm, Mr. Browne was attacked by a group of armed men, who ultimately transpired to be gardai. The Defendants plead that the gardai identified themselves as such, had a search warrant in respect of the premises, and that Mr. Browne “failed to obey the lawful instructions of the gardai on the said occasion and as a result of the said failure [he] was restrained by as much force as was reasonably necessary”; paragraph 7 of the Defence.

2. There is a further specific, and important, plea at paragraph 17 of the Defence;

“17. It is further pleaded that the Defendants...were authorised to use reasonable force to search [Mr. Browne’s] premises because they had reasonable grounds to suspect that evidence relating to the commission of a serious offence, namely possession of a firearm, was to be found in [Mr. Browne’s] premises. Given the level of risk assessed as being involved in searching [these] premises, the Defendants...at all material times, acted in accordance with standard operation procedure for searches of that nature.”

With regard to the search warrant, the Reply to the Defence (at paragraph 4) states that;

“The Plaintiff awaits proof of said search warrant and its validity.”

3. Paragraph 4 goes on to claim that the search warrant did not cover Mr. Browne’s premises for a number of very specific reasons (such as the colour of the roof of the shed covered by the warrant). These pleas are, however, subject to this reservation;

“Without prejudice to the foregoing and pending sight of the evidence grounding the alleged search warrant (proof of the validity of which is awaited).”

There is also, at paragraph 6 of the Reply to the Defence, a full joinder with the pleas at paragraph 17 of the Defence.

4. This judgment deals with a motion for discovery brought on behalf of Mr. Browne. In that motion, 21 categories of discovery are sought. For the purpose of this ruling, it is not proposed to set out each category as the motion can be decided by grouping the 21 categories

into 5 types. This is possible because of the active engagement by the Defendants in respect of Mr. Browne's discovery requests.

5. Firstly, there are categories where the Defendants have agreed to make discovery but "subject to the condition that any personal details relating to third parties not involved in the within proceedings would be redacted prior to the documentation being furnished." The relevant categories are 1,2,5,6,8,9,10,14,16 and 17. I am going to direct discovery in respect of each of these categories. If, for any reason, the documents responsive to these categories are redacted by the Defendants it is open to the solicitors for Mr. Browne to challenge the redactions. If that is done, the Defendants must justify each and every redaction by reference to the ordinary principles applicable to the making of discovery and the inspection of discovered documents. I am not making these categories conditional in the way suggested I the Defendants' replying affidavit. I am satisfied that the discovery sought I respect of each of these categories is relevant, necessary and proportionate. Indeed, the Defendants do not seriously suggest the contrary.

6. Secondly, there are categories where discovery is agreed but the Defendants state that they will not furnish any documentation produced in contemplation of litigation. The categories are 7, 12 and 13. I will direct discovery of these categories, as again their relevance is not disputed nor is the necessity that the Defendants make discovery of them. The Defendants may, of course, claim privilege in respect of documents listed in the affidavit of discovery; this entitlement does not relieve the Defendants of listing documents over which privilege will be claimed.

7. Thirdly, there are categories relating to the issuing of the search warrant. These are categories 3 and 4. The Defendants, in the replying affidavit of Inspector Niall O'Connell, make the case that the validity of the search warrant (as opposed to its scope) is not in issue in the case, and that Mr. Browne is not entitled in these proceedings to go behind the decision of the District Court to grant the search warrant. On balance, I accept this submission. Even were it possible to do so in these proceedings, no order is sought setting aside or challenging the validity of the search warrant. Indeed, the guarded language of Mr. Browne's pleadings on this point makes that clear. Importantly, no submission was made to me by counsel for Mr. Browne as to why the argument on this point by the Defendants is not well made. On the contrary, counsel appeared to accept that he was not seeking to go behind the search warrant. Instead, quite properly counsel for Mr. Browne sought these categories in order to obtain information as to the danger that the gardai expected to face during the search, which in turn may shed light on the level of force actually used by them. The fresh discovery category, which I formulate at the end of this judgment, will cover such documentation inasmuch as it is relevant. In those circumstances, I will not order categories 3 or 4.

8. Fourthly, there are categories where there is simply no dispute between the parties.

9. Fifthly, there are categories 18, 19 and 20. It is correctly accepted by Mr. Browne's counsel that categories 18 and 19 cover very similar types of documents. Both involve documents which record communications relating to Mr. Browne and his premises either specifically by reference to the search of the 14th of December 2014 (category 18) or by reference to covert operations (category 19). Inasmuch as these documents are designed to entrench upon the correctness of the decision to grant the search warrant, I am not inclined to order that they be discovered. However, these documents may also be relevant to what

happened on the night in question and what the gardai felt was going on at Mr. Browne's farm as pleaded at paragraph 17 of the Defence. These two matters are very much at issue on the pleadings. At least one of these matters (what happened during the search) is also covered by category 20.

12. Category 20 reads;

“ All Garda records relating to the incident in question.”

I accept the submission of the Defendants that this category is a very broad one. However, as I outlined at the hearing of the motion, it should be possible to recast these 3 categories to produce a more focused discovery order which will provide Mr. Browne with the documents to which he is entitled under the principles set out by the Supreme Court (Clarke C.J.) in *Tobin v Minister for Defence* [2019] IESC 57. To replace categories 18, 19 and 20, an appropriate category may be;

“All documents relating to;

The grounds upon which the Defendants, their servants or agents, suspected that evidence relating to possession of a firearm was to be found on the Plaintiff's premises;

The level of risk assessed by the Defendants, their servants or agents, as being involved in searching the Plaintiff's premises;

What happened in the course of the search of the Plaintiff's premises on the 14th of December 2015.”

As this is a new formulation on which I have not heard counsel for either side, I will if requested fix a date for brief oral submissions on this part of this ruling.

13. Finally, given the understandable security concerns on the part of the Defendants about the documents which may be made available on foot of this order, I propose that confidentiality club type arrangements be put in place. The discovered documents will be made available only to a named solicitor and named counsel acting for Mr. Browne. Of course, subsequent applications can be made to widen the confidentiality club or dispense with it entirely. While any such motions will be brought before a different judge, I will hear any application with regard to the establishment of the confidentiality club on foot of this order.

14. Because of the potential for dispute about categories 18, 19 and 20 no final order will be made at this time other than to grant the parties liberty to apply. In the event that no application is notified to the Chancery Registrar on or before the 30th of November 2023 I will proceed on the basis that discovery will be ordered in the terms set out in this judgment and the parties will be afforded an opportunity to address me on outstanding matters such as costs and the time within which discovery is to be made