

THE HIGH COURT

[2022] IEHC 186

[Record No. 2020 6741 P]

BETWEEN

MODULARTECH LIMITED TRADING AS SATWORLD

PLAINTIFF

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA, SKY IRELAND LIMITED, ACTAVO
(IRELAND) LIMITED, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 21st day of March, 2022

Introduction

1. This is an application by the second named defendant ("Sky") to dismiss the plaintiff's claim pursuant to O. 19, r. 28, for failure to disclose a reasonable cause of action, and pursuant to the inherent jurisdiction of this court to dismiss the plaintiff's case as one which is bound to fail. The proceedings arise out of the execution by An Garda Síochána ("the Gardaí") of a search warrant issued by the District Court on 18 November, 2019, pursuant to s. 143 of the Copyright and Related Rights Act, 2000, as amended ("the 2000 Act"). Section 143 of the 2000 Act, as amended, provides:

"(1) Where a judge of the District Court is satisfied by information on oath that there are reasonable grounds for suspecting—

- (a) that an offence under section 140 has been, or is about to be, committed in, on or at any premises or place, and*
- (b) that evidence that such an offence has been, or is about to be, committed is in on or at those premises or that place,*

the court may issue a warrant authorising a member of the Garda Síochána, accompanied by such other members of the Garda Síochána or other person or persons as that member thinks proper, at any time or times within 28 days from the date of the issue of the warrant on production, where requested, of that warrant, to enter and search the premises or place specified in the warrant using reasonable force where necessary, and to do all or any of the following acts:

- to seize any copies of any works, articles or devices in respect of which he or she has reasonable grounds for suspecting that an offence under section 140 has been or is about to be committed;*
- (ii) to make an inventory or prepare other evidence of infringement of copyright or potential infringement of copyright;*
- (iii) to seize anything found there which he or she believes on reasonable grounds may be required to be used in evidence in any proceedings brought in respect of an offence under this Act;*
- (iv) to require any person found there to give his or her name and address.*

- (2) *A warrant issued under this section may authorise persons, including the copyright owner or designated representative thereof, to accompany and assist any member of the Garda Síochána in executing the warrant or in collating any inventory or other evidence."*
2. The warrant of 18 November, 2019, recited that the information sworn before the District Judge by Detective Garda Christopher O'Sullivan of Clondalkin Garda Station had satisfied the judge that there were reasonable grounds for suspecting that an offence under s. 140 of the 2000 Act had been, or was about to be, committed at a specified premises or place, namely Satworld, Unit 1C, Citylink Business Park, Old Naas Road, Bluebell, Dublin 12.
 3. The warrant authorised Detective Garda Christopher O'Sullivan, accompanied by such other members of An Garda Síochána and/or such other person(s) as he thought proper at any time or times, within 28 days from the date of the warrant, to enter and search the said premises, to seize any copies of any works, articles or devices in respect of which he had reasonable grounds for suspecting that an offence under s. 140 of the 2000 Act had been or was about to be committed, to make an inventory or prepare other evidence of infringement of copyright or potential infringement of copyright, and to seize anything found there which he believed on reasonable grounds might be required to be used in evidence in any proceedings brought in respect of an offence under the Act, and to require any persons found there to give his or her name and address.
 4. As envisaged by subs. (2), the last paragraph of the warrant stated as follows:

"And without prejudice to the generality of the foregoing, said member may be accompanied by Mr. David O'Rourke being the designated representative of SKY IRELAND the owner of copyright, who is hereby authorised to accompany and assist said member in executing this warrant or in collating any inventory made or other evidence prepared hereunder."
 5. The plaintiff's case against the defendants, including Sky, is that their actions exceed what was authorised by the warrant, resulting in a trespass to the plaintiff's goods. The validity of the warrant is not questioned. The plaintiff also claims an order compelling the defendants to return the items seized and itemised in the inventory prepared by the plaintiff, as well as damages. Further reliefs are claimed against the first named defendant, but these are not material to this application.

Consideration of the application to strike out

6. The basis on which an application such as this may be acceded to by a court are well known. As regards the application pursuant to O. 19, r. 28, it must appear from the pleadings themselves that no reasonable cause of action is set out therein, and no analysis of the underlying facts or evidence is conducted. By contrast, so far as the application pursuant to the inherent jurisdiction of this court is concerned, the court may engage in a very limited analysis of the facts as disclosed in the affidavits. However, it is recognised that this aspect of the court's jurisdiction will be exercised only sparingly.

Preliminary issue

7. The statement of claim is directed to the events of 19 November, 2019, and concerns the execution of the search warrant and the transportation of the seized goods to Clondalkin Garda Station. Further particulars of the claim in relation to the actual execution of the search warrant were directed by this court on 12 April, 2021, and these were provided on 18 May, 2021.
8. Sky brought this motion on 6 August, 2021, grounded on the affidavits of Mr. O'Rourke and Mr. Damien Gilmore. Mr. O'Rourke was, at the time of issue and execution of the warrant, an investigator employed by a company related to Sky at the time and he acted as agent of Sky in relation to the events complained of. He left his employment in February, 2020. Mr. Gilmore seems to have commenced employment with another company related to Sky shortly after that, and deposes to his involvement with the seized goods from late July, 2020, again acting as agent of Sky. Arising out of his affidavit, the plaintiff had served further particulars of claim dated 8 November, 2021.
9. Sky has objected to any consideration of the particulars dated 8 November, 2021, for the purposes of this application on the basis that they post-date the making of the application and even the issue of these proceedings.
10. However, by letter dated 2 December, 2021, Sky's solicitors have already informed the plaintiff's solicitors that they will consent to the furnishing of those particulars of 8 November, 2021, provided the plaintiff consents to the amendment of Sky's defence, and provided that the plaintiff did not attempt to use the late "amendment of pleadings" to delay the hearing of this application. The letter also indicated that Sky had already prepared a draft amended defence and also informed the plaintiff's solicitors that:

"If at the hearing of the motion to dismiss your client submits that the recent Further Particulars of Claim remedy the deficiencies in its claim against our client, our client will submit that your client should not be permitted to amend its claim in that manner in order to response (sic) to the motion to dismiss, and that the motion to dismiss should be determined on the basis of the claim as originally pleaded."
11. By letter dated 7 December, 2021, the plaintiff's solicitors confirmed that they had served the further particulars of claim on the other defendants and had sought confirmation from the other defendants that they would agree to the further particulars being admitted. This letter also indicated that in default of such consent from the other defendants a motion would be brought to amend the statement of claim. I understand from counsel at the hearing of the motion that the application has not been brought pending the outcome of this application.
12. It is well established that there is a very broad jurisdiction in this court to amend pleadings so as to permit the trial of the real issues between the parties. It seems to me that, if the affidavits in support of this application revealed new grounds, which from the plaintiff's point of view support its claim, they are more than likely entitled to amend their

claim to include them. In fact, I note that the second defendant has, in effect, consented to such amendment and has prepared a draft amended defence. Accordingly, I do not see any legitimate basis for not looking at the further particulars in the course of this motion.

(i) The application pursuant to O.19, r.28

13. Insofar as the original claim is concerned, the essential complaint against Sky is that Mr. O'Rourke, who attended the plaintiff's premises on 19 November, 2019 at the time of the execution of the warrant, did not act at all times within the authority granted to him by the warrant. It is of course acknowledged that Mr. O'Rourke was authorised to accompany and assist Detective Garda O'Sullivan in executing the warrant and in collating any inventory made or other evidence prepared thereunder.
14. However, it is alleged that, in arranging for the transport of the goods seized in the course of the search by the third defendant, a commercial partner of Sky, the plaintiff's goods were not invigilated or supervised by the Gardaí. It appears to be accepted by all sides that Mr. O'Rourke arranged for the third defendant to transport the goods and that, while the goods were in the van, and while the van was in transit to Clondalkin Garda Station, no member of the Gardaí was in the van. The complaint against Mr. O'Rourke is that he deposited the seized items with a third party by, in effect, handing over possession and control of those goods to the third defendant without ensuring that the third defendant's servant or agent was supervised by the Gardaí.
15. The essential complaint of the plaintiff is that this constituted a departure from what was lawfully authorised by the warrant as it only authorised Mr. O'Rourke to "accompany" the detective or other members of the Gardaí. However, as no member of the Gardaí was in the van while the goods were being transported, it is claimed that the actions of the second and third defendant went beyond what was authorised by the warrant and constituted a trespass to the plaintiff's goods.
16. Sky relied heavily during the course of this application on the statement at para. 7 of the plaintiff's replies to particulars of 18 May, 2021, as follows:

"[T]he plaintiff is not privy to the communications and allocation of roles between the first, second and third named defendants but will seek discovery of all such communications in due course including all communications giving rise to the appearance of the third named defendant, an unauthorised party, at the scene."
17. Sky says that it is clear as a matter of law that the Gardaí can hand over possession of seized goods to a third party without parting with the custody of those goods, and that this is routinely done in criminal investigations where evidence is transferred to private third parties such as Forensic Science Ireland and the Medical Bureau of Road Safety for analysis.
18. The only authority produced to me was *Youshchenko v. An Garda Síochána* [2020] IEDC 4, a judgment delivered by District Judge O'Shea at Limerick District Court on 5 October,

2020. This detailed and authoritative judgment was delivered in the context of an application pursuant to the Police (Property) Act, 1897 (“the 1897 Act”).

19. Section 1 (1) of the 1897 Act provides that where any property has come into the possession of the police in connection with any criminal charge, the District Court may, on application, either by an officer of police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as the court may see fit. It is clear from *Donoghue v. O’Donoghue* [2018] IECA 26, that the word “owner” in s. 1 (1) of the 1897 Act does not include a person who can merely show that they were in possession of the property at the time it was seized by the police. They have to show that they are in fact the owner. The Court of Appeal in *Donoghue v. O’Donoghue* approved as good law in this jurisdiction the dictum of Widgery C.J. in *Lyons & Co. Ltd v. Metropolitan Police Commissioner* [1975] 1 Q.B. 321, that “owner” should be given its ordinary meaning as “a person who is entitled to the goods in question, a person whose goods they are, not simply the person who happens to have them in his hands at any given moment.”
20. The issue in *Youshchenko v. An Garda Síochána* was whether a claimant in that case has shown that he was the owner of materials seized by the Gardaí in the course of execution of a search warrant pursuant to s. 143 of the 2000 Act, which remained in the physical possession of the second defendant at the time of the application. Like this case, the criminal investigation in that case was completed and there was no prosecution arising out of the Garda investigation.
21. Counsel for Sky relies on para. 20 of Judge O’Shea’s judgment, which states as follows:

“Property in issue is currently in the physical possession of SKY. This possession is purely practical, as SKY carried out the analysis and was in a position to securely store the property. The actual possessor of the property is the Respondent, who is presently the only party in a position to exercise control over it. This is because the property was seized by the respondent as part of the law of the search and seizure on foot of a validly issued warrant. On the facts of this case, possession is not important. Ownership, as opposed to possession, is at the core of applications of this nature.”
22. Counsel for Sky relies on this to say that, although Sky also retains possession of the seized goods in this case, only the Gardaí have custody of the goods and are in a position to exercise control over them. However, I do not see this judgment as authority for that proposition. The District Judge in that case was considering whether the claimant had established that he was the “owner” so as to recover his goods. It was accepted at para. 13 of District Judge O’Shea’s judgment that, on the authority of *R. (Curtis) v. the Justices of County Louth* [1916] K.B. 616, s. 1 applied whenever the property was “in the possession of the police for the purpose of criminal prosecution, no matter from whom or in what way it comes into their hands.” The passage of the judgment of District Judge O’Shea relied upon by Sky in this case appears to be directed at establishing that the

application was validly made pursuant to s. 1(1), which, as set out above, is applicable where goods are in the possession of the Gardaí.

23. However, it is abundantly clear from the *Youshchenko* decision as a whole that the judge entered into no detailed analysis of the lawfulness of the actions of the Gardaí in parting with possession of the goods and leaving them in the possession of Sky. That issue was simply not raised in those proceedings, the main focus of which was whether the claimant could be said to be the “owner” of the goods in question, presumably because it was in the interests of the claimant to rely on s. 1 of the Police Property Act, 1897. Indeed, it possibly would not have been in the interests of the Gardaí to argue that they had handed over full custody and control of the goods to the complainant, and Sky were not even a party to the proceedings. In any event, while this court might well, at hearing, adopt the analysis in *Youshchenko*, it is of course the case that it is not bound to do so.
24. Insofar, therefore, as it is suggested that para. 20 establishes, as a matter of law, that the goods seized from the plaintiff in this case on 19 November, 2019 are in the possession of An Garda Síochána, I do not think that is the case. At the very least, it is not sufficiently clear to justify striking out the proceedings.
25. It seems to me that there is very much an issue to be tried as to whether goods seized in this fashion and retained for a number of years where there may never be a criminal investigation are correctly regarded as being in the custody of An Garda Síochána or whether, when retained in this fashion, they are regarded as having been handed over by the Gardaí into the custody of a third party such as Sky. It is notable that in this case, the person retaining physical possession of the goods is in fact also the complainant against the plaintiff. That in itself may be a material distinction between this situation and those concerning Forensic Science Ireland or the Medical Bureau of Road Safety, who may be regarded as independent experts assisting the police with their investigation.
26. It cannot be said on the face of the statement of claim that there is no cause of action pleaded as to trespass to the plaintiff’s goods. It is, in my view, clearly pleaded that the goods were seized and retained in excess of lawful authority and that is a cause of action known to law, as is evident from the extract (paras. 28.14 to 28.18) from McMahon and Binchy, *The Law of Torts in Ireland*, (4th Edn., Bloomsbury Professional, 2013) which was handed up at the hearing of this application.
27. Accordingly, I would refuse the relief sought pursuant to O. 19, r. 28 of the Rules of the Superior Courts.

(ii) Application pursuant to the inherent jurisdiction.

28. Insofar as this jurisdiction is concerned, it is well established that the court can look at the affidavit evidence but can only engage in a very limited analysis of the facts. As stated by Clarke J. (as he then was) in *Salthill Properties Limited v. Royal Bank of Scotland plc* [2009] IEHC 207 (“*Salthill*”), it is difficult to envisage a case dependent on oral evidence where an application of this type could succeed: see para. 3.9. As elucidated in that judgment, the cases where this type of application will succeed are ones

where it is possible to say, from documents alone, that the plaintiff's case is bound to fail, such as where no note or memorandum exists for the purposes of s. 51 of the Land and Conveyancing Law Reform Act, 2009, or where the interpretation of a written contract contended for by a plaintiff is wholly unsustainable when looking at the document as a whole.

29. It is, however, the case that a plaintiff's case would expect to be taken at its height. It is only where a defendant can show that any factual assertion on the part of the plaintiff cannot be established at trial that the application should succeed.
30. In this case it is clear that the court is not dealing with a "documents" case, in the sense of one where the interpretation of a finite number of documents, already available to both parties, is the sole basis of the plaintiff's claim. It is clear that there will be oral evidence about the events of 19 November, 2021, and some exploration of the degree to which the second and indeed the third defendants were acting under the control and direction of the Gardaí, as alleged, and whether they remained within the lawful authority provided by the warrant, or indeed, insofar as the events complained of post-date the matters authorised by the warrant, within the authority of the general law relating to the custody of goods retained as evidence for a possible criminal prosecution.
31. Mr. O'Rourke says in his grounding affidavit for the purposes of this motion that at all times on 19 November, 2019, he acted under the supervision of and subject to the directions of, Detective Garda O'Sullivan. He also says at para. 13 of his affidavit that he in fact travelled in the third named defendant's van with the seized items, an averment which appears to be contrary to what is pleaded, and that this vehicle was escorted by Garda vehicles on the journey.
32. Sky points, in particular, to the fact that the plaintiff has admitted that he is not privy to the communications between the defendants. However, that does not mean that the facts are undisputed, which is what Sky must show in order to succeed in this application. The plaintiff asserts, and hopes to prove, that the second and third defendants did not in fact act under the control and direction of the Gardaí and were not in form or in substance accompanied by them at the material time. It is true that the plaintiff cannot give direct evidence about these matters, but he can test the evidence tendered on behalf of the defendants in cross examination. Furthermore, he can prove other collateral facts, such as the statements of the Gardaí and the actions of all parties in the course of the execution of the warrant which may tend to undermine the assertions of Sky that its agent acted at all times under the direction and control of the Gardaí. It may be that the straightforward description of the manner in which the second and third defendants and their representatives interacted with the Gardaí on the day of the search is not at all as straightforward when explored in more detail at trial. In particular, as highlighted by Clarke J. in *Salthill*, at para 3.13, discovery or interrogatories may well unearth some evidence to support the plaintiff's contention and to undermine the position of the defendants on this issue.

33. Insofar as the further particulars of claim of the 8 November, 2021 are concerned, these arise out of the fact that it is now clear from the affidavit of Mr. Gilmore, filed in support of this application, that he collected a sample of eight devices from Clondalkin Garda Station on 21 November, 2020 for testing, and has since retained them. On 15 March, 2021, he collected a further sample of 22 devices, and also tested and retained them. He deposes at para. 12 of his affidavit that:

"An Garda Síochána asked me to retain physical possession of the tested devices to keep them separate from the untested devices so that no confusion would arise as to which devices had been tested and which hadn't. At all times I acted subject to the directions of An Garda Síochána."

34. It was submitted at the hearing of the application that the court could take judicial notice of the fact that, in the course of a Garda investigation, various matters were sent for specialised testing, such as blood samples and other materials which might require forensic examination by Forensic Science Ireland or the Medical Bureau of Road Safety. It was submitted that it is well established that where items are transferred for forensic testing in this matter, they remain in the custody of the Gardaí, even though physical possession has been handed over.

35. However, counsel for the second defendant was not able to produce any written authority of the Superior Courts which identifies, as a matter of law, the basis on which evidence of this kind is transferred to the temporary possession of a third party for forensic testing. In particular, there is no authority on the degree to which such evidence may be left on an open-ended basis in the physical possession of a private party who has been retained, in effect, to analyse it for the purposes of giving evidence in a criminal prosecution.

36. At the date of the hearing of the application, no prosecution had been brought against the plaintiff and this delay is also an aspect of the claims of the plaintiff against the first defendant. The plaintiff has in fact been complaining about the failure to return its goods since delivery of the statement of claim: see para. 17.

37. It seems to me that Sky may well be entirely correct that the Gardaí can hand over material to a private party such as Sky for forensic analysis and testing. However, the legal basis on which this is done does not appear to have been established, and furthermore, perhaps more importantly, the limits (if any) on how this is done and in particular how long the material can be retained, have not been established, as no authority on the topic could be identified. Sky says that this is a matter for the criminal trial, but that may be simply a feature of the fact that it is usually only the accused in a criminal trial who has a sufficient interest in challenging the basis on which evidence is transferred and stored pending a criminal trial and this translates, for the purposes of a criminal trial, into a requirement to prove the chain of custody. Furthermore, there is potentially a key difference as to retention by forensic laboratories of DNA type evidence taken by Gardaí at the scene of a crime, for example, and the retention by a private corporation of material such as the goods at issue here.

38. The plaintiff may well have a weak case in relation to some or all aspects of the matter, but it cannot be said with confidence that he has no case. It cannot be said that the issues in this case are so clearly settled in favour of the second defendant that the plaintiff's case is doomed to fail. I will accordingly refuse the application.