

THE HIGH COURT

[2020/ No. 3036 P.]

BETWEEN

EDMUND ANTHONY O'NEILL

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA,  
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

**JUDGMENT of Mr. Justice Allen delivered on the 11th day of September, 2020**

**Introduction**

1. This is an application for an interlocutory injunction requiring the Commissioner of An Garda Síochána to restore to duty a Garda Superintendent who has been suspended on pay pending the outcome of two ongoing criminal investigations, a disciplinary enquiry upon which a Board of Inquiry has been convened, and a further disciplinary investigation into further allegations.
2. Mr. Louis McEntagart S.C., for the plaintiff, prefers to characterise the application as - or insists that it is, as it is formulated in the notice of motion - an application for an injunction restraining the Commissioner from continuing the suspension and for an order "*mandating and directing the [Commissioner] to forthwith lift the suspension*", but it seems to me that it amounts to the same thing.
3. The plaintiff is critical of the progress of both criminal investigations and of the disciplinary investigation, but the motion is directed only to the suspension. The order if made would entitle the plaintiff to resume his duties. At the time of the hearing of the motion the plaintiff's case was that he was medically unfit for duty and that there was no clear prognosis as to when he would be fit for duty. The immediate effect of the order sought would be that the plaintiff would move from his current status to sick leave, but it would mean that upon his recovery he would be restored to duty.

**The evidence**

4. The plaintiff is a member of An Garda Síochána of about 30 years standing. He rose through the ranks to Superintendent, in which rank he has served since 2016. Superintendent O'Neill has served in a number of stations, mostly in the Limerick Division.
5. On the morning of 15th May, 2019 Superintendent O'Neill was arrested at home, pursuant to s. 4(3) of the Criminal Law Act, 1997, on suspicion that he had committed an offence contrary to s. 62 of the Garda Síochána Act 2005 - the disclosure of information obtained in the course of carrying out his duties which was likely to have a harmful effect - and taken to Athlone Garda Station. At the same time, on the authority of a warrant signed by a judge of a District Court, his home was searched, and a number of electronic devices were seized.
6. The suspicion that had fallen on Superintendent O'Neill was that he had disclosed information relating to an investigation which was being conducted by the Garda National

Bureau of Criminal Investigation into alleged criminal activities of a member of An Garda Síochána of Garda rank, attached to the Limerick Division. The affidavits of Superintendent O'Neill show that his belief – presumably by reference to a question or line of questioning asked in the course of his detention – is that he is suspected of having tipped off the Garda that he was under investigation, but it is not at all clear that the investigation into the alleged disclosure is so confined.

7. The investigation into the activities of the Garda had commenced in November, 2018 and had been given the code name Operation Foray. In the course of that investigation, Superintendent O'Neill had been observed on 9th January, 2019 in a public house called Hurlers Bar at Dublin Road, Castletroy, Co. Limerick, in the company of the Garda and another member of the force of Inspector rank. The suggestion is that Superintendent O'Neill arrived at the public house in his car and that over the course of a little less than two and a half hours, while on duty, drank a number of pints of beer before leaving the bar and driving away. It is further suggested that on the same occasion the member of Inspector rank, while in the company of Superintendent O'Neill, was seen to place something on the back of his left hand, balance it, and, placing his right index finger to his nostril, to lean forward and sniff it. The surmise of the Detective Garda who viewed the CCTV footage of the meeting was that what the Inspector was shown to have done was indicative of cocaine use.
8. When Superintendent O'Neill arrived in Athlone Garda Station at 7.45 a.m. on the morning of 16th May, 2019, he was detained pursuant to s. 4 of the Criminal Justice Act, 1984 – initially for a period of six hours on the authorisation of the member in charge, and then for further periods of six hours and twelve hours on the direction of a Superintendent and a Chief Superintendent – for the investigation of the suspected offence contrary to s. 62 of the Act of 2005.
9. At 5.15 p.m. on 16th May, 2019 Superintendent O'Neill was suspended from duty pursuant to regulation 7 of the Garda Síochána (Discipline) Regulations, 2007 by Assistant Commissioner Michael Finn, who had been authorised under s. 31 of the Garda Síochána Act, 2005 to perform the functions of the Commissioner under the Regulations.
10. The suspension order showed the reasons for the suspension as being the plaintiff's alleged disclosure of information relating to Operation Foray and his alleged presence at Hurlers Bar in the company of another member of An Garda Síochána who allegedly consumed a substance suspected of being a controlled drug. The suspension order first served erroneously showed the date of the incident in Hurlers Bar to have been 1st February, 2019 rather than 9th January, 2019 but no complaint is made of that mistake, which was promptly corrected when Superintendent O'Neill's solicitor, Mr. Daniel J. O'Gorman, suggested that the date on the order should be checked.
11. Meanwhile, on 16th May, 2019, on the authority of a warrant signed by a judge of the District Court, a search was conducted of Superintendent O'Neill's office and office safe at Roxboro Garda Station and a number of mobile telephones were taken away for forensic examination.

12. The suspension order signed by Assistant Commissioner Finn on 16th May, 2019 took effect from 5.15 p.m. that day and was effective until 6.00 a.m. on 1st August, 2019. Assistant Commissioner Finn signed three further suspension orders: on 24th July, 2019 effective from 6.00 a.m. on 1st August, 2019 to 6.00 a.m. on 1st November, 2019; on 25th October, 2019 effective from 6.00 a.m. on 1st November, 2019 to 6.00 a.m. on 1st February, 2020; and on 24th January, 2020, effective from 6.00 a.m. on 1st February, 2020 to 6.00 a.m. on 1st May, 2020. In each case the stated grounds for the suspension were the alleged disclosure of information relating to Operation Foray and the alleged incident in Hurlers Bar.
13. On 29th June, 2019 Chief Superintendent Michael Gubbins was appointed as Investigating Officer pursuant to regulation 23 of the 2007 Regulations to investigate the alleged disclosure of information in relation to Operation Foray and the alleged incident in Hurlers Bar and, in accordance with regulation 24, a formal notice of that appointment, Form I.A. 32, was served on Superintendent O'Neill on 16th July, 2019.
14. In the meantime, on 12th July, 2019, Mr. O'Gorman had written a long letter to the Garda Commissioner. On the one hand, he complained bitterly at the allegedly heavy handed and disrespectful manner in which Superintendent O'Neill had been arrested and his home searched, and on the other disclaimed any suggestion "*at this time*" that those involved in the search had acted illegally. Mr. O'Gorman protested his client's innocence, asserted his client's right to expedition in the conduct of the investigation, and complained that information had been leaked to the media. The letter concluded with a nine paragraph request for information and documents, said to have been made pursuant to Superintendent O'Neill's right to information under articles 5(4), 6(1) and 6(3) of "*EHCR*" Directive 2012/13/EU of 22nd May, 2012. I will come in due course to the detail of the information and documents requested.
15. By letter dated 17th July, 2019 Superintendent O'Neill, by Mr. O'Gorman, declared himself to be ready, willing and able to engage with Chief Superintendent Gubbins. Chief Superintendent Gubbins acknowledged that letter and Superintendent O'Neill's position by letter of 9th August, 2019 and indicated that he would be in contact in due course to arrange an interview. Chief Superintendent Gubbins invited Superintendent O'Neill, in the meantime, to provide him with any information, document or thing which he, Superintendent O'Neill, felt might be relevant to the investigation or would assist Chief Superintendent Gubbins in establishing the facts.
16. In a memorandum of 9th August, 2019 to Superintendent O'Neill and a letter to Mr. O'Gorman of the same date, Chief Superintendent Gubbins advised that his investigation of the first aspect of his appointment - the alleged disclosure of information relating to Operation Foray - was being put in abeyance because it was the subject of an ongoing separate criminal investigation. However, said Chief Superintendent Gubbins, he would be progressing the remaining aspect of his appointment and would be in contact in due course to arrange an interview. Chief Superintendent Gubbins renewed his invitation to

Superintendent O'Neill to provide, in the meantime, any information, document or thing which Superintendent O'Neill felt might be relevant or might assist.

17. On 2nd September, 2019 Mr. O'Gorman (who had been on leave for a good part of August) acknowledged Chief Superintendent Gubbins's letter of 9th August, 2019 and noted its contents. He wrote:-

*"I understand that part of your investigation is being held in abeyance as a criminal investigation is still 'developing'. My client looks forward to such developments that will create circumstances which will involve you meeting with my client with a view to progressing and finalising your investigation.*

*In relation to the second aspect of your investigation, my client is only too pleased to meet with you and participate in your process. While we understand that your process is entirely separate from any criminal investigation you may be aware that my client was arrested and brought to the Garda Station in Athlone and interviewed for many hours. During that interview questions were put to him of the matters the subject of your enquiry. My client has no difficulty whatsoever in you being provided with whatever information he provided at Athlone Garda Station. My client is only too ready, willing and able to assist you. For the purpose of arranging the regulation 24 interview, please contact Georgina Beacom of this office who will be able to arrange a meeting with you at a mutually suitable time and place. We have no difficulty with the interview taking place in our offices, subject to your own level of comfort and convenience."*

18. Chief Superintendent Gubbins's interview of Superintendent O'Neill took place at Ennis Garda Station on 30th September, 2019. Superintendent O'Neill was accompanied by Mr. O'Gorman and Chief Superintendent Gubbins was assisted by Superintendent Gerard McGrath.
19. In a letter of 10th October, 2019 to Chief Superintendent Gubbins Mr. O'Gorman in one breath said that he had no difficulty with the manner in which the interview had been conducted or with the professionalism exhibited by Chief Superintendent Gubbins or Superintendent McGrath, and in the next complained that the questioning had been unfair and oppressive, specifically because two statements from senior Garda officers had been put to Superintendent O'Neill which, it was said, were not evidence. Mr. O'Gorman demanded that Chief Superintendent Gubbins should "put to" Superintendent O'Neill such evidence as he had in relation to the Hurlers Bar issue or abandon his inquiry altogether.
20. On 11th October, 2019 Mr. O'Gorman wrote to the Superintendent in Athlone asking for a copy of Superintendent O'Neill's custody record for 16th and 17th May, 2019 and in reply was asked to refer all correspondence to Detective Inspector Mick McNulty of GNBCI at Garda Headquarters, who provided the custody record under cover of a letter of 22nd October, 2019.

21. Mr. O’Gorman’s letter to the Garda Commissioner of 12th July, 2019 was passed to the office of Head of Civil Legal of An Garda Síochána. Mr. Kenneth Ruane of that office, by letter dated 6th September, 2019 acknowledged receipt of Mr. O’Gorman’s letter and indicated that instructions had been sought from the relevant sections of An Garda Síochána and that a more substantive response would follow. On 15th October, 2019 Mr. O’Gorman further pursued his request of 12th July, 2019 by writing directly to the Garda Commissioner protesting the lack of a substantive response and asserting the existence of a specific legal requirement that inquiries into a member of An Garda Síochána under suspicion, a fortiori a member of a senior rank, should be resolved as quickly as possible. Mr. O’Gorman protested that Superintendent O’Neill had not been furnished with “*any information of any description governing the enquiries which apparently necessitated the invasion of his family home at a very early hour, his arrest and interview at Athlone Garda Station*”. While on the one hand protesting that Superintendent O’Neill had not been provided with the information to which he was said to be entitled, Mr. O’Gorman, on the other, citing anecdotal media coverage, suggested that the investigation appeared to be bogged down on affairs of hugely reduced importance and significance, bordering on the mundane, and had the characteristics of a witch hunt. Mr. O’Gorman’s letter of 15th October, 2019 was forwarded by the Commissioner’s office to the Head of Legal Services.

22. On 13th November, 2019 Mr. Ruane replied to Mr. O’Gorman’s letter of 12th July, 2019. Mr. Ruane set out the queries and the answers:-

*“(a) Is it intended to renew the Suspension Order on or before the date of its expiration which we believe is the 1 August 2019? If so, please furnish details of reasons.*

I am instructed that at all times your client will have been served directly with documentation in respect of the current position regarding his suspension and accordingly it is not necessary to address this issue through correspondence.

*“(b) Please provide confirmation that the investigation into my client has now been concluded and if not, please explain the delay in bringing matters to a conclusion.*

Whilst limited for operational reasons as to what information can be disclosed I am instructed that the investigation into your client is ongoing.

*“(c) If it is alleged that my client is guilty of any alleged criminal activity or wrong doing to which some reference was made at interview, please provide us with full and detailed particulars and provide an immediate opportunity for my client to respond.*

I am instructed that Chief Superintendent O’Sullivan GNBCI fully informed your client on arrest [of] the reason for his arrest and the offence concerned. Your client was arrested on suspicion of having committed an offence contrary to section 62 of An Garda Síochána Act 2005 by Detective Chief Superintendent O’Sullivan GNBCI.

- (d) *Please confirm that the computers and phones have been examined, that the data has been analysed and there is (as my client believes) no evidence whatsoever forming any basis for the allegations. Please state the precise date upon which the examination of my client's computers and phone(s) and data was examined.*

Whilst limited for operational reasons as to what information can be disclosed I am instructed that the investigation into your client is ongoing.

- (e) *Please confirm that the media leaks are being investigated.*

I am taking further instructions on this matter and will revert to you in early course.

- (f) *Please outline the specific measures (having regard to my client's rank) that have been taken by the investigation team to bring this matter to a speedy conclusion.*

I am instructed that the investigation into your client is being progressed appropriately.

- (g) *Please provide this office with a copy of the search warrant and a copy of the sworn information.]*

I am instructed that a copy of the search warrant and sworn information will not be provided at this juncture as this is a live investigation.

- (h) *Please provide copy of the interview notes.*

I am instructed that a copy of the interview notes taken after caution will not be provided at this juncture as this is a live investigation.

- (i) *Please state the reason why there has occurred no contact between the Garda Síochána authorities and my client subsequent to his arrest. Further, why no liaison has been appointed, to my client's knowledge, information and belief, to replace Chief Superintendent Michael Gubbins who appears to be no longer in that role.*

I have passed your query to Chief Superintendent Limerick who can deal directly with any queries you have in that regard."

23. At a time which is not clear from the evidence, the devices seized at Superintendent O'Neill's home and office were forensically examined. The data so recovered and analysed prompted a further module in the Limerick investigation which was referred to in evidence as the "Fixed Penalty Notice/Summons module".

Superintendent O'Neill came under suspicion that he had been somehow involved with fixed charge penalty notices and District Court summonses arising out of detected road traffic offences in a way which amounted to interference with the administration of justice and attempting to pervert the course of justice. Detective Inspector McNulty was

instructed to investigate. Between the time, whenever it was, that the data was recovered and analysed and the end of 2019 a number of persons of interest and potential witnesses were interviewed, and a list was compiled of 35 names, dates and incidents in which Superintendent O'Neill was under investigation of having intervened in circumstances which amounted to an attempt to pervert the course of justice.

24. As his suspension continued Superintendent O'Neill became increasingly unwell and he eventually required in-patient treatment between October, 2019 and January, 2020. By January, 2020 Detective Inspector McNulty's investigation into the fixed penalty notices and summonses had progressed to the point where he wished to interview Superintendent O'Neill under caution.
25. On 9th January, 2020 Detective Inspector McNulty met with Mr. O'Gorman at Mr. O'Gorman's offices to explain that he wished to interview Superintendent O'Neill, and why. Superintendent O'Neill was then in hospital and over the course of the following months Detective Inspector McNulty spoke and wrote to Mr. O'Gorman on a number of occasions with a view to establishing when Superintendent O'Neill would be available for interview. Detective Inspector McNulty sought to reassure Mr. O'Gorman that due account would be taken of Superintendent O'Neill's state of health, but Mr. O'Gorman steadfastly maintained that he was unfit for interview. Mr. O'Gorman made a proposal to Detective Inspector McNulty that Superintendent O'Neill might deal with the list of allegations in writing, which Detective Inspector McNulty declined.
26. In a long letter of 28th February, 2020 Mr. O'Gorman sought to rehearse with Detective Inspector McNulty the circumstances in which Superintendent O'Neill had been arrested on 16th May, 2019; the lack of progress, or alleged lack of progress, in the investigation of the suspected offence contrary to s. 62 of the Act of 2005; and the alleged failure of the investigation team to provide the information to which Superintendent O'Neill was said to be entitled and otherwise comply with the provisions of Directive 2010/13/EU of 22nd May, 2012. With a view, it was said, to assisting Detective Inspector McNulty in his investigation, and pursuant to the provisions of Directive 2012/13/EU, Mr. O'Gorman asked to be provided with:-
  - "1. *A copy of the search warrant and a copy of the information surrounding the search of our client's private home and seizure of his phone(s), computers or data of any kind.*
  2. *A copy of the authority, permission or consent whereby (it would appear) the investigation team have accessed data on our client's mobile phone(s) or computer.*
  3. *Please provide a broad indication of the matters that you require our client to address – relative to any phone data that you have allegedly obtained.*
  4. *In the event that you have any specific telephone data or message(s) of interest to your investigation in relation to the two matters as they were originally alleged, please provide a copy of the data and your enquiry in the context of such data.*

5. *In the event that you have any specific telephone data or message(s) of interest to your investigation beyond the scope of the issues originally alleged, please provide a copy of the data and your enquiry in the context of such data."*
27. By letter dated 5th March, 2020 Detective Inspector McNulty declined to provide the information sought at paras. 1, 2, 4 and 5 but he did provide a pre-disclosure list of the suspected offences in relation to which he wished to interview Superintendent O'Neill and asked for confirmation that Superintendent O'Neill was willing to present himself for interview.
28. By letter dated 26th March, 2020 Chief Superintendent Margaret Nugent of Garda Internal Affairs notified the Chief Superintendent at Henry Street, Limerick, of the establishment of a Board of Inquiry which would convene on 20th April, 2020 to determine whether Superintendent O'Neill had committed a breach or breaches of discipline, the particulars of which, as well as a statement of facts and copies of statements made during the investigation, would be notified to Superintendent O'Neill by the Presiding Officer at least 15 days before the Board was due to convene, and asked the Chief Superintendent at Henry Street to ensure that the member was informed. Superintendent O'Neill was duly informed of the order convening the Board of Inquiry, and shortly after, that it had been adjourned *sine die* by reason of Government Covid-19 restrictions.
29. On 20th April, 2020 Mr. O'Gorman wrote to the Presiding Officer protesting that Superintendent O'Neill's rights had been compromised and that "*he has yet to find out what exactly the Board of Inquiry is about*". That letter appears to have crossed with a letter of the same date from the Presiding Officer to Mr. O'Gorman enclosing (as the Presiding Officer had previously promised in a letter to Mr. O'Gorman of 9th April, 2020) the notice, Form I.A. (S) 35, required to be served by the Presiding Officer by regulation 27 of the Regulations; a statement of facts; 34 exhibits; 19 statements; and a CCTV USB stick.
30. On the same day, 20th April, 2020, Mr. O'Gorman wrote to the Garda Commissioner requesting or requiring confirmation that no further suspension order would issue either on or before 1st May, 2020 when the then current suspension would expire, failing which an emergency application would be made to the High Court for an order restraining any further suspension. As to the allegation that Superintendent O'Neill had disclosed information in relation to Operation Foray, Mr. O'Gorman protested his client's innocence and insisted that the facts supporting his innocence or guilt could and should have been established within a number of weeks at most. As to the incident in the Hurlers Bar, it was suggested that the allegation primarily related to the Garda of Inspector rank, against whom Mr. O'Gorman understood that the Director of Public Prosecutions had directed no prosecution. As to the Board of Inquiry, Mr. O'Gorman protested that the order convening the Board had not been served on his client for six weeks after it was made, and that Superintendent O'Neill still did not know what the Board would be enquiring into.



31. Although the plenary summons was not issued until 28th April, 2020, the affidavit of Superintendent O'Neill was sworn on the previous day. Perhaps after that affidavit was sworn, Mr. O'Gorman had a call from Chief Superintendent Sean Colleran to say that a further suspension order had been made and arrangements were made to have it served on Superintendent O'Neill. That further order was signed by Assistant Commissioner Orla McPartlin on 27th April, 2020 and gave, in addition to the reasons which had been given in support of the previous suspensions, the alleged inappropriate interference in the administration and processing of fixed charge penalty notices and related summonses in 2016, 2017, 2018 and 2019. That further development was the subject of a short affidavit of Mr. O'Gorman, also sworn on 27th April, 2020.
32. A number of affidavits were filed on behalf of the defendants.
33. Detective Chief Superintendent Walter A. O'Sullivan is the officer in charge of the Garda National Bureau of Criminal Investigation which has within its remit responsibility for investigating suspected cases of criminal wrongdoing by members of An Garda Síochána. Detective Chief Superintendent O'Sullivan has explained how a very extensive investigation started in November, 2018 into suspected criminal activity on the part of a member of Garda rank gave rise to two further investigations arising from the meeting on 9th January, 2019 in Hurlers Bar, one of suspected misuse of drugs on the part of an Inspector and the other of suspected disclosure of confidential information on the part of Superintendent O'Neill. The arrest of Superintendent O'Neill on 16th May, 2019 and the analysis on information recovered from his electronic devices which were then seized gave rise to a further investigation into suspected interference with the administration of justice. The first investigation has been completed and the subject Garda has been charged and returned for trial. On completion of the investigation into the conduct of the Inspector a file was sent to the Director of Public Prosecutions who decided that there should be no prosecution. The s. 62 investigation is said to be almost completed and at the time I heard this application on 25th and 26th June, 2020 it was expected that a file would be ready for submission to the D.P.P. by the end of the month. The investigation into the fixed charge penalty notices and summonses has identified 35 cases in respect of which Detective Inspector McNulty has been endeavouring to arrange an interview of Superintendent O'Neill. Quite pointedly, Detective Chief Superintendent O'Sullivan would not be drawn on the detail of the evidence gathered but he emphasised that the investigations have been very demanding and have required a great deal of time, attention and resources.
34. One of the complaints made in the grounding affidavit was that Superintendent O'Neill's suspension did not comply with a "*Policy Document on the Suspension from Duty of Members of An Garda Síochána under the Garda Síochána (Discipline) Regulations as Amended*", specifically because there had been no consultation with his Divisional Officer. Detective Chief Superintendent O'Sullivan explained that in the course of the criminal investigation into the leaking of information a statement was obtained from Superintendent O'Neill's Divisional Officer, Chief Superintendent Roche, and that in those circumstances it was thought inappropriate that Chief Superintendent Roche should be

involved in the decision to suspend him. Detective Chief Superintendent O'Sullivan has said that he was careful to ensure that all of the relevant material was before Assistant Commissioner Finn when he made the first suspension order on 16th May, 2019. Detective Chief Superintendent O'Sullivan makes the point that the four suspension orders made by Assistant Commissioner Finn are spent and that Superintendent O'Neill is currently suspended on foot of the order made by Assistant Commissioner McPartlin on 27th April, 2020. The defendants' position is that the continued suspension is in accordance with the Regulations of 2007.

35. Assistant Commissioner Finn has deposed that prior to signing the suspension orders which he signed he was fully briefed in relation to the investigations, both criminal and disciplinary, and was satisfied that the making of the orders was warranted by operational considerations and for the purpose of maintaining confidence in An Garda Síochána.
36. Assistant Commissioner McPartlin has deposed to her authority under s. 31 of the Garda Síochána Act, 2005 to perform the functions of the Commissioner under the Regulations and that she made the decision to renew Superintendent O'Neill's suspension and signed the order on 27th April, 2020 because, in her opinion, the circumstances were such as to render that course desirable in the interests of An Garda Síochána. In Assistant Commissioner McPartlin's opinion, all three disciplinary matters are serious and the investigation onto the fixed charge penalty notices and summons is at an advanced stage.
37. Chief Superintendent Nugent has deposed to the appointment on 15th May, 2020 of Chief Superintendent John Gordon pursuant to regulation 23 of the 2007 Regulations to conduct a disciplinary investigation into the alleged inappropriate interference with fixed penalty notices and associated summonses, and to the service on Superintendent O'Neill of the associated Form I.A. 31.
38. Chief Superintendent Gubbins has deposed to his appointment to investigate the alleged disclosure of information in relation to Operation Foray and the incident in Hurlers Bar and to the assignment to him of a team of five members. He has outlined in general the progress of his investigation and rejects that allegation that the Garda Commissioner or An Garda Síochána has allowed matters to remain unresolved.
39. Superintendent McNulty has sworn an affidavit outlining his investigation into the fixed charge penalty notice and related summonses and his efforts, through Mr. O'Gorman, to arrange an interview. On Superintendent McNulty's promotion he was replaced as senior investigating officer on that investigation by Detective Inspector Karen Clifford.
40. Detective Superintendent Kenneth Keelan, whose role is to superintend and oversee serious criminal investigations at the GNBCI, swore an affidavit giving an overview of the genesis and progress of the investigations into Superintendent O'Neill. He pointed to a specific assertion in the affidavit of Superintendent O'Neill that "*it is also clear that*" those in the GNBCI who were investigating the fixed charge penalty notices and related summonses were unaware of the contents of what was described as the O'Mahoney Report as it relates to the exercise of discretion. The O'Mahoney Report is a report of

28th March, 2013 to the Garda Commissioner by Assistant Commissioner John O'Mahoney of his findings following an investigation into alleged irregularities in the operation of the fixed charge processing system of certain offences under the Road Traffic Acts.

Detective Superintendent Kenneth Keelan has deposed that Superintendent O'Neill's assertion is not correct.

41. In response to the several affidavits filed on behalf of the defendants Superintendent O'Neill swore a second affidavit on 12th June, 2020. He protested that the defence was "*primarily verbalised and is devoid of supporting or corroborating documentation, reports or materials*". Therefore, he suggests, there is little if any substance to the response. Superintendent O'Neill suggests that because the defendants' response has not been vouched, it seem that there are no reports, memoranda or documents relating to his suspension and that there was no proper policy consideration prior to his first suspension.
42. In his second affidavit Superintendent O'Neill recalled that he had noted Chief Superintendent Gubbins' appointment as investigating officer with surprise, shock and amazement. Without saying how or why, he suggests that that appointment was inappropriate and a contributing factor to his welfare. He asserts that the appointment on 8th May, 2020 of Detective Chief Superintendent Anthony Howard to investigate the alleged leaking of information to the media, the notification to him on 12th May, 2020 of the appointment of Detective Inspector Clifford to replace formerly Inspector, now Superintendent, McNulty, and the appointment of Chief Superintendent Gordon on 15th May, 2020 were all part of "*a process in a bid to correct irregularities ... which have added a layer of chaos to a process which is already lacking in coherence, fairness and clarity*".
43. Finally, on 12th June, 2020 affidavits were filed on behalf of Superintendent O'Neill from Mr. Gerard Mahon and Mr. John Kerin, who are retired Garda Chief Superintendents. Messrs. Mahon and Kerin served with Superintendent O'Neill and offer testimonials to his professional competence and honesty. They both point to the dangers of relying on information obtained from confidential sources.
44. Mr. Mahon "*notes with alarm*" the refusal to provide Superintendent O'Neill with a copy of the search warrant and sworn information which, he says are routine documents which are "*ultimately*" disclosed as a matter of routine. He surmises that the s. 62 investigation has moved no further since Superintendent O'Neill was released from custody on 17th May, 2019 in which circumstances, coupled with reliance on information from confidential sources, it is Mr. Mahon's professional opinion that the suspension on 1st August, 2019 could not have been reasonable. He offers the view that each of the following suspensions was unjustified, oppressive, and in some unspecified way, in breach of policy. He suggests that Superintendent O'Neill's health and welfare have been disregarded.
45. Mr. Kerin's affidavit comprises, in the main, an expression of support for Superintendent O'Neill's case and a critique of the defendants' response.

46. A second affidavit of Detective Chief Superintendent Walter A. O' Sullivan is largely argumentative, but he does aver that since a Garda HQ Directive 048/2014 issued on 11th June, 2014, no fixed charge penalty notice ought to have been cancelled by any member other than the Superintendent or Chief Superintendent of the Garda National Roads Policing Bureau.

**The application**

47. The application now before the court appears to have been prepared in some haste. It was certainly prepared before the suspension order of 27th April, 2020 was made and served for the first relief claimed in the *ex parte* docket and the notice of motion issued on 29th April, 2020 (pursuant to an order of the court made on that date granting liberty to the plaintiff to give short service) is an order restraining the Garda Commissioner from making a suspension order on 1st May, 2020 or any order pending the determination of an interim or interlocutory application. There is no direct or focussed challenge to the order of 27th April, 2020.
48. The summons is endorsed with a claim for 32 reliefs, starting with a declaration that the continued suspension of the plaintiff as a member of An Garda Síochána is unlawful or alternatively has been rendered unlawful. Eleven of the reliefs sought are declarations and injunctions directly relating to the plaintiff's suspension and four, in various iterations, to discovery in relation to the suspension orders. While the summons claims a variety of declarations as to the conduct of the investigation of the allegations against the plaintiff, the motion is confined to the suspension: so that if the orders sought were to be made, the suspension would be lifted while the criminal investigations, the Board of Inquiry and the disciplinary investigation would continue.
49. Superintendent O'Neill, in his grounding affidavit, deals extensively with his career as a member of An Garda Síochána, his sporting career, the events of 15th May, 2019, the incident in Hurlers Bar, and the effect on his health of the stigma of his suspension. His evidence is not always easy to follow but the substance of his case appears to me to be that because the investigation into the alleged disclosure of confidential information has gone on too long it can no longer justify the suspension, and that otherwise there are no grounds for his continued suspension.
50. The case made in oral argument was that the affidavits filed on behalf of Superintendent O'Neill raised fair issues to be tried as to his suspension, to which, it was said, the affidavits filed on behalf of the defendants showed no defence, and that the balance of justice required that the suspension should be lifted.
51. In support of the application, or in the hope that the application would thereby be supported, counsel for Superintendent O'Neill filed written submissions – called outline submissions - which ran to thirty pages of close type. The submissions are replete with hyperbole and indignation and comprise in the main extracts from the Regulations, the Policy Document and a wide range of judgments and textbooks without, as far as I can discern, any indication as to how they are said to be relevant to the application to lift Superintendent O'Neill's suspension. For example, many of the cases referred to are

cases which concerned suspensions without pay. Others dealt with suspensions made otherwise than in accordance with prescribed or agreed procedures.

52. The first case referred to in the written submission and in oral argument, under the heading "*Focus of this Application*" was *Rajpal v. Robinson* [2005] 3 I.R. 385. That was a case in which the Supreme Court, in judicial review proceedings, quashed the suspension without pay of a medical consultant, who was a permanent officer of a health board, which had been made otherwise than in compliance with the requirements of the Health Act, 1970 under which he was employed and without any consideration of a written response prepared by the doctor in response to the complaints which had been made against him. The circumstances of Dr. Rajpal's suspension were completely different to this case. No less to the point, the substance of Dr. Rajpal's case had been heard and determined. In my opinion the observations of Hardiman J. in relation to that suspension are no avail to the plaintiff and of no assistance to the court in this case.
53. The second case relied upon under this heading was *Wallace v. Irish Aviation Authority* [2012] 2 I.L.R.M. 345 in which Hogan J. enjoined the defendant from putting the plaintiff on administrative leave on full pay pending the determination of her appeal against a decision to dismiss her for an unexplained absence from work. Hogan J. found that the plaintiff had made out a particularly strong case that she was entitled under her contract of employment to remain *in situ* pending her appeal and made the order sought in which he described as the very special circumstances of the case. Ms. Wallace's case was that her contract of employment precluded suspension. The Garda Disciplinary Regulations expressly permit suspension.
54. The observations of Noonan J. in *Bank of Ireland v. Reilly* [2015] IEHC 241 are more to the point. That was a decision on an appeal from the Circuit Court of a claim for unfair dismissal. Noonan J. said, at paras. 40 and 41:-
  - "40. *The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her future career. As noted by Kearns J. (as he then was) in Morgan v. Trinity College Dublin [2003] 3 I.R. 157, there are two types of suspension, holding and punitive. However, even a holding suspension can have consequences of the kind mentioned. Inevitably, speculation will arise as to the reasons for the suspension on the premise of there being no smoke without fire. ...*
  41. *Thus, even a holding suspension ought not to be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question. It will normally be justified if seen as necessary to prevent a repetition of the conduct complained of, interference with evidence or perhaps to protect persons at risk from such conduct. It may perhaps be necessary to protect the employer's own business and reputation where the conduct on issue is known by those doing business with the employer. In general, however, it ought to be seen*

*as a measure designed to facilitate the proper conduct of the investigation and any consequent disciplinary process. ..."*

55. *Bank of Ireland v. Reilly* was obviously a private employment case. It occurred to me that slightly different considerations might apply in the case of public servants in general and members of An Garda Síochána in particular, in respect of whom the liability to be suspended derives from regulation 7 and is founded on the opinion of the Garda Commissioner that such a course is desirable in the interests of the Garda Síochána, but the defendants also relied on *Bank of Ireland v. Reilly* and – while reference was made to a number of cases, notably, I think, the judgment of Baker J. in *Canavan v. Commissioner of An Garda Síochána* [2016] IEHC 225 – the case was fought on the basis that the plaintiff had not made out a case that the suspension was not necessary or that the investigation had continued for longer than it should have.
56. The substantive claim, then, is that the suspension was made otherwise than in accordance with the requirements of the Garda Síochána (Discipline) Regulations, 2007; that the suspension is invalid because the investigation into the alleged disclosure of confidential information has continued for longer than it should; and that it is not justifiable by reference to the Board of Inquiry into the events in Hurlers Bar, or either the criminal or disciplinary investigation into the fixed penalty notices/summons, which are also said to have gone on too long.

#### **The applicable test**

57. The starting point is to identify the applicable threshold test. I accept the submission of Mr. Frank Callanan S.C., for the defendants, that no matter how framed, this is an application for mandatory interlocutory relief. The criteria for the grant of such an injunction were set out in the judgment of the Supreme Court in *Maha Lingam v. Health Service Executive* [2006] 17 E.L.R. 137:-

*"...in substance what the plaintiff/appellant is seeking is a mandatory interlocutory injunction and it is well-established that the ordinary test of a fair issue to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case it is necessary for the applicant to show at least that he has a strong case that is likely to succeed at the hearing of the action, so that it is not sufficient for him simply to show a prima facie case..."*

58. I also accept the submission on behalf of the defendants, on the authority of *Carroll v. Bus Átha Cliath/Dublin Bus* [2005] 4 I.R. 184 and *Minnock v. Irish Casing Co. Ltd.* [2007] 18 E.L.R. 229, that the court should be reluctant to intervene, particularly at an interlocutory stage, in an incomplete disciplinary process, and will do so only where a clear case has been made out that there is a serious risk that the process is seriously flawed and incapable of being cured, and that the continuation of the process might cause irreparable harm to the plaintiff.

#### **Analysis**

59. This is in form a private law action, but in substance it appears to me to be an attack on a decision made by the Garda Commissioner in the exercise of a statutory power to suspend.
60. The grounding affidavit complains of heavy handedness at the time of Superintendent O'Neill's arrest, the alleged leaking of information to the press at the time of the arrest, and a failure on the part of the Garda Commissioner to order an enquiry into the circumstances of the alleged leak of information but I cannot see that any of this goes to the validity of the decision to suspend. It is not alleged that the arrest, or anything done at the time of or in connection with the arrest, was unlawful. While Superintendent O'Neill complains that the fact of his arrest and related matters were deliberately leaked and were the subject matter of sensational front page reporting, what he points to are three newspaper reports of the arrest of an unidentified Garda Superintendent, Inspector and Garda, without any indication of the station or county in which they were based. I am sure that news of the arrest spread rapidly within and beyond the force, but I do not see how his could go to the validity of the suspension which immediately followed the arrest or the later continuation of the suspension.
61. The challenge to the validity of the suspension on what I will characterise as procedural grounds is threefold. First, it is said, there was no consultation with Superintendent O'Neill's Divisional Officer at the time of his initial suspension. Second, it is said, Chief Superintendent Gubbins ought not to have been appointed as investigating officer because he had previously acted as liaison officer. Thirdly, it is said, Chief Superintendent Gubbins ought not to have put his disciplinary investigation into the alleged disclosure of confidential information into abeyance pending the outcome of the criminal investigation into that aspect.
62. The complaint that there was no consultation with Superintendent O'Neill's Divisional Officer was first made in the affidavit which he swore to ground this application. The requirement for such consultation is to be found in the policy document rather than in the regulations. While complaint was made that there was no such consultation, and that this was a departure from policy, it was not argued that the failure to canvass the views of the Divisional Officer invalidated the suspension. There was no engagement with the explanation given by Detective Chief Superintendent O'Sullivan that Chief Superintendent Roche was a witness in the criminal investigation.
63. The complaint that Chief Superintendent Gubbins was appointed as investigating officer was first made in the second affidavit of Superintendent O'Neill sworn on 2nd June, 2020 in which he expressed surprise, shock and amazement that Chief Superintendent Gubbins had been appointed as investigating officer. I must say that I have great difficulty in reconciling this evidence with Mr. O'Gorman's correspondence in July, August and September, 2019 which culminated in the interview in Ennis Garda station on 30th September, 2019.
64. The complaint in this regard is based on regulation 23(4) which requires the Commissioner to ensure that the investigating officer should not have been involved in

any capacity in relation to an earlier aspect of the case. Superintendent O'Neill deposed that "*the appointment was wholly inappropriate and a contributing factor to my welfare*" but did not suggest, nor was it argued, that the appointment invalidated the investigation or the suspension.

65. The requirement for a liaison officer is also to be found in the policy document, rather than the regulations. The role of the liaison officer is to liaise with the suspended member during the period of suspension and to handle matters such as the service of papers and any other such matters. The evidence of Superintendent O'Neill is that he met Chief Superintendent Gubbins on 5th June, 2019 in the car park of Ennis Garda station when he was handed the amended suspension document: which, it will be recalled, was the first suspension order on which, at the prompting of Mr. O'Gorman, the date of the incident in Hurlers Bar had been corrected. If the complaint is that the service of the suspension order amounted to involvement in any earlier aspect of the case, it was not argued that this invalidated subsequent investigation, or the suspension.
66. The complaint that Chief Superintendent Gubbins did not pursue the alleged disclosure of information in relation to Operation Foray as part of the disciplinary investigation which he was appointed to carry out appears to have been first made in the written submissions. This is founded on regulation 24 which requires the investigating officer to carry out the investigation which he or she has been appointed to carry out and to submit to the Commissioner a written report. The case now made is that there is no provision in the regulations which permits the suspension of a disciplinary investigation by reason of a parallel criminal investigation and that regulation 8 expressly provides that disciplinary proceedings may be taken against a member notwithstanding that proceedings for an offence have been or may be instituted against the member arising out of the same circumstances. The point, it is said, is put beyond doubt by the decision in *McNeill v. Commissioner of An Garda Síochána* [1997] 1 I.R. 469.
67. I pause here to observe that while Superintendent O'Neill complains on the one hand that the disciplinary investigation of the alleged disclosure of confidential information was put in abeyance pending the completion of the criminal investigation into that issue, he later complains that an attempt to dispose of disciplinary matters before the file was sent to the D.P.P. is unprecedented.
68. It will be recalled that when, by letter dated 9th August, 2019 Chief Superintendent Gubbins advised Superintendent O'Neill and Mr. O'Gorman of his intention to put that element of his appointment in abeyance because it was the subject of an ongoing criminal investigation, there was no objection. Mr. O'Gorman, indeed, said at the time that he understood. In the affidavit which was sworn on 27th April, 2020 to ground this application there was a general complaint that the investigation had not been progressed as it should have been but not, specifically, that Chief Superintendent Gubbins had not pursued that element of his investigation.
69. There was some discussion in argument as to whether regulation 8 of the Regulations of 2007 – which provides that disciplinary proceedings (which includes an investigation)



"*may*" be taken against a member notwithstanding that proceedings for an offence have been or may be instituted against the member arising out of the same circumstances – requires, at least where the member insists, that any disciplinary investigation be conducted in parallel with a criminal investigation but it seems to me that in the instant case the issue simply does not arise. In the first place Superintendent O'Neill acquiesced in what was done. More to the point, perhaps, the justification relied on for the renewal or continuation of Superintendent O'Neill's suspension is the ongoing criminal investigation. Different considerations might arise in a case in which a deferred disciplinary investigation was reactivated after the conclusion of a criminal investigation and the disciplinary investigation so revived relied on to justify a further period of suspension: but that is not this case.

70. The core complaint in relation to the continuing suspension is that the investigation into the disclosure of information has gone on too long and that the suspension is not and never was justifiable by reference to the other issues which have arisen.
71. While it is not unreasonable for Superintendent O'Neill to take the view that he has been the subject of a continued suspension since 17th May, 2019, the fact is that he has been the subject of successive orders, all but the last of which have expired and are spent. To the limited extent to which the application is focussed, it is focussed on the investigation into the alleged disclosure of confidential information in breach of s. 62 of the Act of 2005. The premise of the application is that the other reasons given in support of the suspensions are invalid or that the investigations are not of sufficient seriousness as to warrant suspension.
72. In my view, the case made on behalf of Superintendent O'Neill fails to recognise or sufficiently engage with the fact that the basis for his suspension at the time the application was made was the order made by Assistant Commissioner McPartlin on 27th April, 2020.
73. Section 123 of the Garda Síochána Act, 2005 empowered the Minister for Justice, in consultation with the Garda Commissioner and with the approval of the Government, to make regulations concerning the maintenance of discipline in An Garda Síochána. On 2nd May, 2007, in exercise of that power, the Minister made the Garda Síochána (Discipline) Regulations, 2007.
74. Regulation 7(1) provides that where, in the opinion of the Commissioner, the circumstances render such a course desirable in the interests of An Garda Síochána, he or she may suspend a member from duty. By regulation 7(2), a member who is suspended remains suspended until the Commissioner decides that the suspension should cease. By regulation 7(3) the Commissioner must review the suspension of a member every three months or at such shorter intervals as he or she considers necessary, but any non-compliance with that requirement does not of itself invalidate a suspension.
75. The decision of Assistant Commissioner McPartlin to suspend Superintendent O'Neill is amenable to judicial review. There is no issue as to the delegation to her pursuant to s.

31 of the Act of 2005 of the functions of the Commissioner under the Regulations of 2007 so, in judicial review terms, the basis of any challenge to the suspension order can only be that it was irrational or that there was no proper basis upon which Assistant Commissioner McPartlin might have come to the opinion, to which she has deposed, that the suspension was desirable in the interests of the Garda Síochána.

76. At para. 30 of his grounding affidavit Superintendent O'Neill says that "*I wish to make it clear in this affidavit that I am not inviting the court to make any determination in relation to the matters as they are now alleged in the context of the discipline matters.*" This statement correctly recognises the constraints within which the court must operate in determining an interlocutory application: but if the court cannot on this application determine that there is no substance to the suspicions as to Superintendent O'Neill's conduct or the allegations which are the subject of the Board of Inquiry, it follows that the premise of the application must be that there may be substance to the investigations and the inquiry. Similarly, if the court is not asked to decide that the allegations which are the subject of the Board of Inquiry or the fixed charge penalty notices investigation could not justify the suspension, the premise of the application is that they at least might.
77. I pause here to observe that Superintendent O'Neill and his advisers appear to have utterly failed to understand what is suggested or suspected in relation to the fixed charge penalty notices. It is not merely a failure to comply with a headquarters circular or an unwise or unwarranted exercise of discretion but, as repeatedly spelled out in the pre-disclosure list which was provided to Mr. O'Gorman on 5th March, 2020, at that time 33 instances of attempting to pervert the course of justice. Superintendent O'Neill might have been able, or may yet be able, in interview, to refute or explain his involvement in the identified cases but I cannot see how it could sensibly be argued that the Commissioner of An Garda Síochána was not entitled to consider whether the suspension from duty of a member suspected of having been involved in attempting to pervert the course of justice was desirable in the interests of the force and then to decide that it was.
78. It is common case that the Regulations of 2007 require – as the Garda Síochána (Discipline) Regulations 1989 previously required – that alleged breaches of discipline by members of An Garda Síochána will be dealt with expeditiously and as a matter of urgency. See for example *McNeill v. Commissioner of An Garda Síochána* [1997] 1 I.R. 469.
79. I accept that the investigation into the suspected unauthorised disclosure of information in connection with Operation Foray has taken a long time, particularly in circumstances in which the substantive investigation that was Operation Foray was completed some time ago. However, I also accept the argument made on behalf of the defendants that in circumstances in which Superintendent O'Neill does not know (and Messrs. Mahon and Kerin do not know) what the investigation into his suspected involvement in leaking information has entailed, he cannot lay the ground for an argument that there has been a want of due expedition or, in the language used on behalf of the plaintiff, inordinate or

inexcusable delay, or that the Garda Commissioner has not investigated the suspicion to a conclusion or has been "*causing matters to remain unresolved*".

80. The extent of the investigative work done in relation to the Hurlers Bar is evident from the statements and exhibits provided to Superintendent O'Neill by the Presiding Officer and exhibited by Chief Superintendent Nugent.
81. The affidavit of Detective Superintendent Keelan gives some insight into the investigation into the fixed charge penalty notices and related summons – identifying the seizure under warrant, examination and analysis of other telephones, the number of Gardai and civilians interviewed and so forth.
82. The affidavit of Chief Superintendent O'Sullivan gives some insight into the complexity and extent of Operation Foray but little or none into the investigation into the alleged leaking of information. Consistently with the position taken in correspondence with Mr. O'Gorman that Superintendent O'Neill was not entitled to information gathered in the course of an ongoing criminal investigation, the defendants declined to be drawn. While it is, perhaps, a little surprising that the investigation into the alleged leak is ongoing long after the substantive investigation that was Operation Foray was concluded and some months after the subject of that operation has been returned for trial, I am not satisfied that Superintendent O'Neill has sufficiently made out a case that calls for explanation or justification.
83. The onus is on the plaintiff to make out his case that there has been a lack of expedition. He is not entitled to simply point to a passage of time, assert that it was unreasonably long, and thereby attempt to shift the onus to the defendants to justify the time taken.
84. I accept the argument made on behalf of the defendants that the proposition that because the Board of Inquiry is not to inquire into the suspected leak of information the s. 62 investigation has gone away is wishful thinking. In my view the suggestion that because the s. 62 allegation is not before the Board of Inquiry it must be taken to have been abandoned is simply inconsistent with the evidence.

It follows that the ground has not been laid for the assertion that the Hurlers Bar disciplinary charges and the investigation into the fixed charge penalty notices and summonses are part of a witch hunt or vendetta against Superintendent O'Neill.

85. The several affidavits filed in answer to the motion give a general account of the reasons for the suspensions and the nature of the investigations but do not go into the detail of precisely what was done or when. I reject the argument that because the defendants have elected not to exhibit any memoranda or reports generated in connection with the suspensions or the investigations that it can be inferred that there are no such memoranda or reports.
86. Superintendent O' Neill, in his grounding affidavit, acknowledges that his suspension from duty may have been initially justified having regard to the magnitude of the allegations of

breach of s. 62 of the Act of 2005 but suggests that his suspension in relation to the alleged breaches of discipline was not.

87. It is unquestionably the fact that the s. 62 allegation is much more serious than the disciplinary charges arising out of the meeting in Hurlers Bar, but I reject the assertion that the Garda Commissioner is not entitled to take the view that the disciplinary charges on their own would justify a suspension. Part of Superintendent O'Neill's case is that because the D.P.P. decided not to prosecute the Inspector there is no evidence of cocaine use at the Hurlers Bar. I am quite satisfied that that simply does not follow. There may or may not be sufficient evidence before the Board of Inquiry to sustain that alleged breach of discipline against Superintendent O'Neill, but that will be a matter for the Board to consider. The decision of the D.P.P. not to charge the Inspector is no bar to the continuation of the disciplinary inquiry.
88. The truth or falsity of whatever did or did not happen in Hurlers Bar on 9th January, 2019 will be a matter for the Board of Inquiry. For present purposes, the proposition is that the Garda Commissioner is not entitled, in the interests of the force, to suspend from duty a Superintendent who is reported to have been seen, while on duty, in a public house in which he was known, drinking a number of pints of beer in the company of an Inspector who is said to have taken cocaine, before driving himself away. In my view that does not even reach the threshold of arguability.
89. I have dealt already with the proposition that the Commissioner would not be justified in suspending a member who is under investigation on suspicion of perverting the course of justice.
90. Another of Superintendent O'Neill's complaints is that the Garda Commissioner has failed to comply with his request for information, said to have been made "*by virtue of the provisions of articles 5(4) and 6(1) and 6(2) ECHR Directive 2012/13/EU*". Again there was no indication as to how this alleged failure might be linked to the validity of the suspension or the interlocutory orders sought. Directive 2012/13/EU of 22nd May, 2012 is a Directive of the European Parliament and of the Council on the right to information in criminal proceedings. It was invoked in Mr. O'Gorman's correspondence and Superintendent O'Neill's affidavit in support of the proposition that there is no reasonable or lawful basis supporting the suspension, but it is unnecessary to read beyond the title to the measure to see that the reliance on it is misplaced. Counsel for Superintendent O'Neill cite *Minister fir Justice v. E.P.* [2015] IEHC 662 but it is plainly against their argument that the Directive applies to anyone other than a person who is the subject of domestic criminal proceedings. Superintendent O'Neill is not the subject of criminal proceedings. The reliance on the D.P.P.'s Guidelines for Prosecutors is similarly misguided. The stated aim of those guidelines, in the first sentence, is to set out the principles to guide the initiation and conduct of prosecutions. There is no prosecution. As the subject of two ongoing criminal investigations Superintendent O'Neill is not entitled, whether under the Directive or otherwise, to demand an update from time to time on the progress of the criminal investigations.

91. In the written submissions and in oral argument a good deal of time was spent on the effect of the suspension on Superintendent O'Neill's health.
92. It was first of all submitted that Superintendent O'Neill's continued suspension was manifestly unnecessary given his medical unfitness to undertake active duty. To my mind this makes no sense. The unspoken premise is that the Garda Commissioner's power of suspension is limited to members who are medically fit for duty.
93. Secondly, it was submitted that where the fact of the suspension had led to a significant impairment of the plaintiff's health, that must be taken into account in considering the merit of the suspension. Doing the best I can, the proposition appears to be that the Garda Commissioner, when considering whether to suspend a member, or to renew a suspension, owes a duty of care to the member to avoid distress and upset or, possibly, psychological injury. It was submitted that "*an employer who is on notice of the effects of the potential or fact of their conduct causing physical harm to an employee is enjoined from the continuation of such conduct...*". There is said to be a fair issue to be tried as to whether, or perhaps the extent to which, the deterioration in Superintendent O'Neill's health is attributable to his suspension such as would justify the court in making the orders sought. What this boils down to is a proposition that the Garda Commissioner's power of suspension is limited to those members who will not be upset or distressed. That makes no sense.
94. The Policy Document on the Suspension from Duty of Members of An Garda Síochána, in chapter 5, sets out in two lists thirteen matters on which the view of the member's Divisional Officer are to be sought in the consideration of a long term suspension. "*Risk to officer/welfare considerations*" is the seventh of seven secondary considerations. The first two primary considerations are "*Strength of evidence*" and "*Seriousness of allegation.*" It seems to me that it is axiomatic that a suspension from duty will cause upset and distress. The extent of that upset and distress may depend to some extent on the disposition of the subject but it must also depend on the seriousness of the issue on which the suspension is based. I cannot accept that the potential impact of a suspension could possibly trump the necessity for it, still less that the Garda Commissioner owes a duty of care to a member to avoid distress and upset by not making a suspension that is otherwise warranted.

#### **Discovery**

95. Besides the orders directed to the lifting of the suspension, the notice of motion seeks various orders for discovery by the Garda Commissioner of all documents and records in relation to the making of the several suspension orders, but no intelligible argument was made in support of that application. As Mr. Callanan observed, citing *Law Society v. Rawlinson* [1997] 3 I.R. 592, the power of the court to order discovery before the delivery of a statement of claim will be exercised only in exceptional circumstances.

#### **Injunction**

96. The notice of motion seeks an interlocutory injunction restraining the Garda Commissioner or his servants or agents from publishing or communicating any

information concerning the plaintiff to any third parties, including the media, save only as may be required by law or permitted by order of the court.

97. The written submissions assert that members of the GNBCI leaked information to the media, that the matter was then widely reported and became national headlines. The evidence, however, is limited to the headline of an *Irish Times* article dated 16th May, 2019 that an unnamed Superintendent and Garda had their periods of detention extended; the headline of an undated Irish Mirror article which reported that three unnamed Gardaí, including a Superintendent and an Inspector, had been arrested after an early morning operation; and what appears to be the first line of a report in an undated Irish Independent article that the arrest of an unnamed Garda Superintendent and Inspector as part of a corruption investigation had sent shockwaves through the force. It was asserted that the plaintiff was entitled to an injunction as a matter of course but there was no evidence that the Garda Commissioner was responsible for the leak and no assertion of any threat or apprehension that he would publish any information concerning the plaintiff to any third party, or to the media.
98. I find that the plaintiff has not established any entitlement to or necessity for an injunction.

#### **Summary and conclusions**

99. On 16th May, 2019 Superintendent O'Neill was suspended from duty pursuant to regulation 7 of the Garda Síochána (Discipline) Regulations, 2007 by reason of his alleged disclosure of confidential information relating to a Garda operation contrary to s. 62 of the Garda Síochána Act, 2005 and his alleged presence in Hurlers Bar in the company of another member who had allegedly consumed a substance suspected of being a controlled drug.
100. It is not contended that that suspension was not then justified by reason of the ongoing criminal investigation into the alleged disclosure of information. I do not accept that the plaintiff has made out a fair issue to be tried, still less a strong case that is likely to succeed, that the suspension was not also justified, or would not have been independently justified, by what was alleged to have happened in Hurlers Bar.
101. The details of the plaintiff's service as a member of An Garda Síochána, his community involvement, his sporting career, and the circumstances in which he was arrested and questioned, and his home searched, are completely irrelevant to the validity of his suspension.
102. The plaintiff has not made out a *prima facie* case, still less a strong case that is likely to succeed, that his suspension was invalidated by the fact that the view of his divisional officer was not canvassed.
103. The suspension was not invalidated by the disclosure to the media – by whomever it was might have made any such disclosure – that a Garda Superintendent, or, if he was identified, the plaintiff, had been arrested and detained, or by any delay on the part of

the Garda Commissioner in ordering an inquiry into the plaintiff's complaint that there had been a leak.

104. The plaintiff has not made out a *prima facie* case, still less a strong case that is likely to succeed, that the suspension was invalidated by the appointment of the officer who had acted as liaison officer was later appointed as investigating officer.
105. The plaintiff has not made out a *prima facie* case, still less a strong case that is likely to succeed, that the suspension was invalidated by the postponement of the disciplinary investigation of the alleged disclosure of confidential information pending the outcome of the criminal investigation. In any event, the defendants have not sought to justify the suspension by reference to that element of the disciplinary investigation.
106. The plaintiff was entitled to expect that the investigations would be conducted with expedition, but the onus is on him to show that it was not. The plaintiff's criticism of the time which the investigation has taken is largely based on surmise that the only allegation or suspicion against him is that he told the subject of Operation Foray on the telephone that the GNBCI had a listening device in his car. That surmise may or may not be correct.
107. The suspension was renewed on 24th July, 2019 at which time the criminal investigation was continuing and by which time an investigating officer had been appointed to investigate the two allegations as alleged breaches of discipline. The plaintiff has not made out a fair issue to be tried that the investigation into the alleged disclosure of information ought to have been completed by then. In any event, the continued suspension was justified by the ongoing disciplinary investigation.
108. The plaintiff's complaints as to the conduct of his interview by the investigating officer are completely irrelevant to the validity of the suspension.
109. The suspension was further renewed on 25th October, 2019 and 24th January, 2020 at which time the disciplinary investigation was progressing and the criminal investigation ongoing. The plaintiff has not made out even an arguable case that the decision of the D.P.P. not to prosecute the Garda Inspector who had been suspected of taking cocaine in Hurlers Bar concluded or ought to have concluded the disciplinary investigation into his presence there.
110. On dates which are not disclosed the investigation into the activities of the member of Garda rank was completed, a file sent to the D.P.P., a decision made to prosecute, and the Garda was charged and returned for trial. It is surprising that the investigation into the alleged leaking of information to the subject of Operation Foray was not completed before, or at the same time, or shortly after, the completion of the substantive investigation. The evidence of the complexity and difficulty of the substantive investigation does not explain why the investigation into the leaking of information in relation to it has taken so long. On a judicial review of the suspension or the duration of the investigation, or both, the Garda authorities might have been expected to justify the

apparent delay but in these private law proceedings I think that the defendants are entitled to have taken the approach which they have. In any event, the continuation of the suspension was justified by the ongoing disciplinary investigation.

111. The suspension order of 27th April, 2020 was made on the original two grounds and an additional ground of alleged inappropriate interference in the administration and processing of fixed charge penalty notices and related summonses. That third issue had been the subject of an ongoing and painstaking criminal investigation since whenever it was in 2019 that the data on the plaintiff's electronic devices was analysed and which, by January, 2020, to the plaintiff's knowledge, had been brought to the point at which the leading detective wished to interview him under caution. By then the Board of Inquiry had been established to determine whether any breach of discipline had been committed in Hurlers Bar and the necessary particulars and statements furnished. That suspension order was followed by the appointment of an investigating officer under the regulations on 15th May, 2020.
112. If by the time the suspension order of 27th April, 2020 was made the criminal investigation into the disclosure of confidential information ought to have been concluded, the suspension was abundantly justifiable by the allegations in relation to the incident in Hurlers Bar and the alleged inappropriate interference with the administration and processing of fixed charge penalty notices and related summonses. The bald assertion that the cancellation of such notices cannot amount to a crime of any sort fails to recognise the seriousness of the allegations. The submission that if what is alleged against the plaintiff could be a crime, so also would any and every cancellation in accordance with the procedures set out in HQ Directive 048/2014 by those officers duly authorised to do so is ridiculous.
113. The plaintiff has failed to establish a fair question to be tried that the Garda Commissioner owed him a duty of care not to order a suspension that would otherwise have been warranted by reason of the apprehended impact of the suspension on his health.
114. The plaintiff's reliance on Directive 2012/13/EU is entirely misplaced.
115. The plaintiff has not established any entitlement to an order for discovery or an injunction restraining the publication of information.
116. The motion must be refused in its entirety.
117. If agreement cannot be reached in relation to the costs of the motion, the parties should file brief written submissions within three weeks of the date of this judgment.