THE HIGH COURT

[2010 No. 11 CAB]

IN THE MATTER OF THE CRIMINAL JUSTICE (MUTUAL ASSISTANCE) ACT, 2008

BETWEEN

THE MINISTER FOR JUSTICE AND LAW REFORM

APPLICANT

AND

BERNADETTE MARGARET ROSE DEVINE

RESPONDENT

Judgment of Mr. Justice Feeney delivered on 18th day of April, 2012.

1. Bernadette Devine (the respondent) was charged in England with five separate offences relating to the years from 1996 to 1999, of fraudulent evasion of Value Added Tax (VAT) contrary to s. 72(1) of the United Kingdom Value Added Tax Act 1994. She was tried in the Middlesex Crown Court and was convicted by the jury of all five counts on 6th July, 2001. She was sentenced to six years imprisonment.

2. The fraud of which the respondent was convicted was a fraud which operated on the basis of overseas purchases of goods, outside the United Kingdom, and the subsequent importation into the United Kingdom of those goods without the payment of VAT. When those goods were sold within the United Kingdom, VAT at the relevant rate was charged which resulted in the fraudulent traders being left with the full amount of VAT for which they subsequently failed to account. Traders who were involved in such schemes operate what is known as "missing trader companies" and those companies are essential to the fraudulent scheme.

3. Pending the trial of the respondent in the United Kingdom she was subject to a restraint order in that country which was obtained pursuant to the provisions of s. 77 of the Criminal Justice Act 1977 made by the Court on the 22nd July, 1999. That order, *inter alia,* prohibited the respondent from in any way disposing of or dealing with or diminishing the value of any of her assets whether within or outside England and identified certain assets in particular to which the order applied. A number of properties held by the respondent and a number of companies which it was claimed were set up by the respondent for her use and which it was claimed she was the beneficial owner were expressly identified in the order of the 22nd April, 1999.

4. Following the respondent's conviction on the 6th July, 2001, confiscation proceedings were commenced and following a hearing in the Middlesex Crown Court an order was made on 5th August, 2003. The Court determined that the respondent had benefited from her criminal activities, which was the fraudulent scheme in respect of which she was convicted, to the value of £18,759,430 Sterling. A confiscation order was made on the 5th August, 2003, against the respondent in the sum of €1,446,368.68 Sterling. A schedule of the respondent's assets had been agreed by the defence and the contested matter at the confiscation proceedings hearing related to the valuations of lands and property located at certain locations, namely, at Grayfield House and lands, Stone Parks land and Stone Parks Garages which are shown on page 3 of the schedule of assets attached to the order. The valuations of those properties were agreed at the confiscation hearing on 5th August, 2003, as is apparent from pages 8 and 9 of the transcript of the confiscation hearing which is exhibited before this Court.

5. At the confiscation hearing it was ordered that the respondent satisfy the confiscation order in full by 31st August, 2004 and that, in default of payment by that date, the respondent was liable to serve a term of five years imprisonment should she fail to discharge the sum identified in the confiscation order. Following the making of the confiscation order on the 5th August, 2003, the matter was further before the High Court in London on the 21st July, 2004, when an order was made appointing a management receiver to preserve and manage the assets of the respondent. The respondent lodged an appeal against both her imprisonment and the confiscation order. On receipt of that appeal, no further action could be or was taken by the United Kingdom authorities on foot of the confiscation order as an appeal was pending.

6. On 27th January, 2005 the respondent was refused leave to appeal her conviction and an application for leave to appeal against the confiscation order was adjourned, pending the outcome of another appeal which raised a similar point of law which was then current before the House of Lords. By the 21st December, 2005, that appeal had been dealt with by the House of Lords and on the 21st December, 2005, leave to appeal the confiscation order was refused by the Court of Appeal and the respondent notified the United Kingdom authorities of her intention to discontinue her appeal against the confiscation order.

7. On 27th November, 2006 the High Court in England made an order converting the management receivership order into an enforcement receivership order with power to realise the respondent's assets in satisfaction of the outstanding confiscation order.

8. On 26th July, 2007 the enforcement receiver paid the sum of £317,000 Sterling into the Magistrates Court representing the realisation of the respondent's assets in England and Wales. Enforcement proceedings were commenced against the respondent for non-payment of the outstanding amount in May 2007 and the respondent failed to attend at a number of hearings and was subject to a bench warrant. Finally, on 2nd October, 2007 the respondent attended Court and was requested to sign a power of attorney enabling the enforcement receiver to realise the respondent's assets which were outside of England and Wales including assets within this jurisdiction. The respondent refused to do so and, as a result thereof, the Judge activated the default sentence of five years imprisonment which formed part of the confiscation order of 5th August, 2003. By the date that the default sentence was activated, the respondent had completed her initial sentence and had been released from custody. The respondent was imprisoned as a result of the default sentence being activated and, after she had served fifty per cent of the five year sentence, she was released from prison on 1st April, 2010.

9. Notwithstanding the fact that the respondent has served the default sentence, the debt identified in the confiscation order

remains due and owing and the balance, with due allowance for the payment of £317,000 Sterling paid into Court by the enforcement receiver, remains due and owing and continues to accrue interest. The entire amount paid as of August 2010 was £317,658 Sterling leaving a balance on the original amount together with accrued interest of £1,738,900 Sterling. Interest continues to accrue thereafter at a daily rate of £247.39 Sterling.

10. The first proceedings in this jurisdiction arising out of the conviction and orders made against the respondent resulted from an application by the United Kingdom authorities in Ireland for a restraint order over the respondent's property in this jurisdiction. That order was sought in support of the United Kingdom restraint order. On 7th March, 2005, an order was granted *ex parte* by the High Court pursuant to the provisions of the Criminal Justice Act 1994, as modified by the provisions of the Criminal Justice Act 1994 (s. 46(6) Regulations 1996). The restraint order made within this jurisdiction identified various items of property which were claimed to be the respondent's property including a bank account, various properties and land and assets held by companies of which it was claimed that the respondent was the beneficial owner.

11. By motion dated 15th December, 2005 the respondent sought an order from the High Court in this jurisdiction seeking to set aside the restraint order made on the 7th March, 2005. That motion was grounded on an affidavit sworn by the respondent's solicitor, James Orange, on 14th December, 2005 and the basis upon which the order was sought to be set aside was the absence of an undertaking as to damages. That motion was heard by the High Court in June 2006. O'Sullivan J. delivered judgment wherein it was held, *inter alia*, that at the *ex parte* stage of an application for a restraint order the Court ought to require an undertaking as to damages in the absence of an adequate explanation as to why it should not be given. The Court also held that the Court had statutory jurisdiction to make the order and that the failure by the applicant to furnish an undertaking as to damages did not, *per se*, invalidate the order or constitute a reason without more for setting it aside. The judgment of O'Sullivan J. in relation to the undertaking as to damages related to the steps taken by the applicant in this jurisdiction.

12. The order of the High Court on 27th June, 2006 was appealed and that appeal was delayed as the order was not perfected until 2nd April, 2007. A notice of appeal was served by the applicant on 23rd April, 2007. Due to difficulty in obtaining a certified or an attested copy of the judgment, there was a further delay and an attested copy of the judgment was not available until February 2008. Thereafter the books of appeal were lodged.

13. On 1st September, 2008 the Criminal Justice (Mutual Assistance) Act 2008 (the Act of 2008) came into force and thereafter is the legislation governing international co-operation and mutual assistance.

14. The restraint order of 7th March, 2005 granted under the Criminal Justice Act 1994, as modified, remained in force. That order had been made on foot of a letter of request of 20th September, 2004 which identified that, as of that date, the proceedings against the respondent as defendant in the United Kingdom proceedings relating to the confiscation of her assets had not been concluded. Those proceedings concluded on the 21st December, 2005 when the respondent notified the United Kingdom authorities of her intention to abandon her appeal.

15. On 20th May, 2010 the respondent brought a motion seeking to strike out the proceedings, Record No. 2005/16 MCA, which were the proceedings in which the *ex parte* restraint order had been made by the High Court in this jurisdiction. The motion of 20th May, 2010 sought an order striking out those proceedings for want of prosecution and when those proceedings came on before the Court on 19th July, 2010, the Court was advised by counsel for the applicant that a request from the United Kingdom authorities for a confiscation co-operation order pursuant to the Act of 2008 was anticipated and on that basis the respondent's motion was adjourned.

16. A letter of request dated the 18th August, 2010 was received from the United Kingdom authorities directed to the Irish Central Authority and the Minister for Justice, Equality and Law Reform. That letter sought the assistance of the Irish authorities in securing a court order in support of the United Kingdom confiscation order. On foot of the request contained in that letter of request, the applicant commenced the present proceedings on 15th October, 2010 and on that date the applicant sought an *ex parte* order by way of motion grounded on affidavit seeking a confiscation co-operation order pursuant to the provisions of s. 51 of the Act of 2008. An *ex parte* order was made on 15th October, 2010 and the matter was made returnable for the 1st November, 2010. The respondent did not file any affidavit in response to the application for a confiscation co-operation order and a hearing date of 14th January, 2011 was set. On that date the respondent, through counsel, indicated that the respondent intended to rely on a number of legal matters and, in particular, on the Statute of Limitations. The matter was adjourned to enable written submissions to be delivered by the parties.

17. In the respondent's legal submissions three matters were raised in relation to the applicant's proceedings under the Act of 2008, that is in respect of proceedings Record No. 2010/11 CAB. The respondent confirmed in the written submissions that no affidavit was to be filed on her behalf and sought to rely upon a claim based upon the Statute of Limitations that the proceedings were statute-barred pursuant to the provisions of s. 11(7) of the Statute of Limitations Act 1957. In the written submissions the respondent also raised two other matters, namely, an issue in relation to abuse of process and an issue in relation to hearsay. At the hearing of the matter before this Court counsel for the respondent indicated that the respondent was not seeking to rely on either of those two matters, that is, on either a claim based upon an abuse of process or a claim that hearsay evidence had been relied upon by the applicant and was not admissible. The hearing therefore proceeded on the sole issue as to whether or not the application herein is statue-barred.

18. The restraint order made by this Court on 7th March, 2005, was made pursuant to the provisions of Part 7 of the Criminal Justice Act 1994. That part of the Act deals with international cooperation and Part 7 of the Act updated existing criminal procedural powers which facilitated international mutual assistance. The enactment of Part 7 of the Act of 1994 enabled Ireland to ratify a number of international Instruments and provided a legislative framework to enable cooperation across national boundaries. The restraint order made on 7th March, 2005, was made pursuant 8 to the provisions of the Criminal Justice Act 1994, as modified by the Criminal Justice Act (1994)(S.46)(6) Regulations made pursuant to s. 46(6) of the Act of 1994.

19. The Criminal Justice (Mutual Assistance) Act 2008, repealed Part 7 of the 1994 Act, and re-enacted a number of its provisions, with amendment. Part 4 of the Act of 2008 dealt with seizing, confiscation and forfeiture of property and Chapter 3 of that Part dealt with confiscation of property and provided in s. 51 for confiscation cooperation orders. The Act of 2008 came into operation on 1st September, 2008, and thereafter, the provision of mutual assistance to other jurisdictions is governed by its provisions. Section 6(3) of the Act of 2008 provided that:

> "(3) Requests received and not executed before the date on which they would fall to be dealt with under this Act shall be dealt with, or continue to be dealt with, as if this Act had not been passed."

20. The application under consideration is an application for a confiscation cooperation order in circumstances where there is already in place a pre-existing restraint order. The issue raised by the respondent is that the application made for a confiscation cooperation order is statute-barred. The making of a confiscation cooperation order does not result in any order of the Court being capable of enforcement without further court proceedings. It is for the Director of Public Prosecutions to apply for realisation of property subject to a confiscation cooperation order where the order has not been satisfied and where the order is for the confiscation of property other than a sum of money.

21. It is central to the issue raised by the respondent in this Court that applications for confiscation cooperation orders fall within the provisions of s. 11 (7)(b) of the Statute of Limitations Act 1957. The respondent contends that confiscation cooperation orders fall within the ambit of that section of the Statute of Limitations Act 1957, and further contend that all proceedings fall within the Statute of Limitations unless they are plainly excluded from falling within any of the provisions of that statute. The respondent contends that the application for confiscation cooperation orders cannot be brought after the expiry of two years from the date upon which the cause of action accrued. The confiscation cooperation order in this case was made against the respondent on 15th October, 2010.

22. The date claimed by the respondent as the date upon which the cause of action accrued was identified in the written submissions as being the 25th January, 2005, which was the date upon which it was claimed that the UK confiscation order became final. During the course of oral argument, the date relied upon on was altered to the 21st December, 2005, which was the date upon which the respondent notified the UK authorities of her intention to abandon her appeal against the confiscation order resulting in the confiscation order thereby becoming final. The applicant argued that insofar as the accrual of the cause of action was relevant, it being contended that it was not relevant due to the fact that the Statute of Limitations Act 1957 did not apply, that the cause of action for a confiscation cooperation order did not and could not accrue until a request to the Central Authority for the enforcement of an external confiscation order was received. That request was made on 18th August, 2010, and is therefore the applicant's contention that even if the provisions of the Statute of Limitations Act 1957 apply, that the application made in this case was made within two years from the date upon which the cause of action accrued.

23. Section 11(7)(b) of the Statute of Limitations Act 1957, provides in the section dealing with actions in contract and tort and certain other actions:

> "11(7)(b) An action to recover any penalty or forfeiture, or sum by way of penalty or forfeiture, recoverable by virtue of any enactment shall not be brought after the expiration of two years from the date on which the cause of action accrued."

24. Central to the respondent's claim that the application for a confiscation cooperation order is statute-barred pursuant to the provisions of the 1957 Act is that an application under s. 51 of the Act of2008 amounts to an action to recover a penalty or a forfeiture or a sum by way of either. The first basis upon which such a claim is asserted is that all proceedings must come within the Statute of Limitations unless expressly excluded. A similar argument was made in relation to the provisions of s. 3 of the Proceeds of Crime Act 1996. That matter was considered by the Supreme Court in the case of *F. McK. v. A.F. (Proceeds of Crime)* [2005] 2 I.R. 163. Geoghegan J., in giving the judgment of the court, held (at p. 171, para. 17):

> "17 There is, however, a wider argument being made by counsel for the defendant in relation to the Statute of Limitations which I am quite satisfied is misconceived. He appears to take the view that unless a cause of action is expressly, as he puts it 'disapplied' by the Statute of Limitations there is then some provision in the Statute covering it. As counsel for the plaintiff points out in their submissions this is a fallacy and there is no such principle in law ... The position as to statute bar in relation to s. 3 applications is quite simple. There is no statute bar provision in the Act of 1996 itself. There is no section in the Statute of Limitations 1957 that could conceivably cover them. Accordingly, s. 3 applications are not subject to any statute bar provisions."

This Court is satisfied that there is no legal basis for the contention that unless a cause of action is expressly disapplied by the Statute of Limitations that there is then some provision in the Statute of Limitations covering it.

25. The second ground relied upon by the respondent is that an application for a confiscation cooperation order under s. 51 of the 2008 Act, is an action to recover a penalty or a forfeiture, or a sum by way of either, and is therefore expressly covered by the provisions of s. 11(7)(b) of the Statute of Limitations. In addressing that argument, the Court must consider the nature of the relief being sought in a confiscation cooperation order. The respondent claims that an application for a confiscation cooperation order is an application seeking both the recovery of a penalty and also an action for forfeiture. In making that argument in relation to forfeiture, the respondent combines the concepts of confiscation and forfeiture. The respondent fails to recognise the distinction between confiscation of property and forfeiture of property. Chapter 3 of the Act of 2008, deals not with the forfeiture of property, but with confiscation of property and the sections within that Chapter cover both domestic and external confiscation orders. Section 31 in Part 4 of the Act provides a statutory definition of a confiscation order and in s. 31(1), a confiscation order is defined in the following terms:

> "confiscation order' means a confiscation order within the meaning of the Act of 1994."

Section 4 of the Act of 1994 identifies the nature of a confiscation order in relation to drug trafficking offences and s. 9 of the same Act deals with confiscation orders in relation to offences other than drug trafficking offences. Section 9(1) of the 1994 Act provides:

> "9.(1) Where a person has been sentenced or otherwise dealt with in respect of an offence, other than a drug trafficking offence, of which he has been convicted on indictment, then, if an application is made, or caused to be made, to the court by the Director of Public Prosecutions the court may, subject to the provisions of this section, make a confiscation order under this section requiring the person concerned to pay such sum as the court thinks fit."

Section 9 enacts a separate and distinct confiscation regime in cases of non-drug trafficking offences. Section 9 provides within its sub-sections the nature and extent of the regime to be applied in relation to a court determining whether or not to make a confiscation order, and if so, the amount to be recovered under an order. In the Act of 2008, an external confiscation order is defined in s. 31 as meaning:

> "An order made by a court in a designated state for the purpose of-
>
> (a) recovering property in the State which was received or obtained as a result of or in connection with conduct which would, if it occurred in the State, constitute an indictable offence,

(b) recovering the value of such property,

(c) depriving a person of a pecuniary advantage so received or obtained."

Section 51 of the Act of 2008 provides that:

> "51. (1) The Central Authority, on receipt of an external confiscation order and accompanying documents, may cause an application to be made to the High Court for an order (a 'confiscation co-operation order') for the confiscation of the property in the State to which the external confiscation order relates."

The High Court cannot make a confiscation cooperation order unless the requirements laid down in s. 51 are met and this Court has already ruled that the matters in respect of which a court must be satisfied, as set out in s. 51(4), have been satisfied.

26. Section 9 of the Act of 1994 lays down the legislative provisions in this jurisdiction which have to be satisfied before a confiscation order under s. 9 can be made. Those provisions mirror the analysis of the provisions in England considered by Lord Bingham in the case of *R. v. May* [2008] 1 A.C. 1028. Lord Bingham considered the central structure of a confiscation order and the regime under the 1986 UK Act (at p. 1034) and he stated in relation to that regime that:

> "It requires the court, before making a confiscation order, to address and answer three questions ...The first question is: has the defendant (D) benefited from the relevant criminal conduct? If the answer to that question is negative, the inquiry ends. If the answer is positive, the second question is: what is the value of the benefit defendant has so obtained? The third question is: what sum is recoverable from the defendant?"

Section 9 of the Act of 1994 requires the court to address the identical issues whether the convicted defendant has benefited from the relevant criminal conduct, what is the value of the benefit and if that value is less than the amount that might be realised at the time that an order is made, the amount of such benefit that is recoverable. Lord Bingham went on later in the judgment (at p. 1034, para. 9) to hold:

> "Although 'confiscation' is the name ordinarily given to this process, it is not confiscation in the sense in which schoolchildren and others understand it. A criminal caught in possession of criminally-acquired assets will, it is true, suffer their seizure by the state. Where, however, a criminal has benefited financially from crime but no longer possesses the specific fruits of his crime, he will be deprived of assets of equivalent value, if he has them. The object is to deprive him, directly or indirectly, of what he has gained. 'Confiscation' is, as Lord Hobhouse of Woodborough observed in *In re Norris* [2001] 1 WLR 1388, para 12, a misnomer."

The Committee of the House of Lords in the *R. v. May* case, added an end note and (at p. 1045) stated:

> "Recognition of the importance and difficulty of this jurisdiction prompts the committee to emphasise the broad principles to be followed by those called upon to exercise it in future. (1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine."

The committee went on to identify that the exercise of the jurisdiction to make a confiscation order involved (at p. 1045):

> "No departure from familiar rules governing entitlement and ownership."

27. This Court is satisfied that an examination of the provisions of the Acts of 1994 and 2008 identify and confirm that a confiscation order is not a penalty. The making of a confiscation order, and accordingly, a confiscation cooperation order, is not a punitive measure imposed by law for the performance of a prescribed Act and is not a fine or a penalty. The statutory regime is intended to deprive wrongdoers of the benefit that they have gained from particular criminal conduct. The making of a confiscation order is not a punitive measure imposed by a court of law for the performance of a prescribed Act, nor is it a punishment imposed for an offence. It is true that an offence must be committed before a confiscation order can be made, but the imposition of a confiscation order is not a punishment for that offence. The punishment is the penalty or sanction which is imposed at the trial in the form of imprisonment and/or fine following on from the conviction and the making of a confiscation order is a separate and distinct matter from the punishment or penalty. It is a matter determined following a court hearing which determines that the confiscation order shall not exceed either the sum of the financial benefit or the amount to be realised, whichever is less and the standard of proof which applies is the standard applicable in civil proceedings.

28. A court does not come to consider the making of a confiscation order until the penalty or sentence has already been imposed. The fact that a confiscation order cannot exceed the amount that might be realised at the time that the order is made identifies the true nature of a confiscation order. A confiscation order or confiscation cooperation order, is recoupment. It is not the imposition of a penalty or a punitive sanction. This Court is satisfied that the respondent's claim that a confiscation cooperation order is, in the nature of a penalty, is incorrect and inconsistent with the provisions of the Acts of 1994 and 2008 Act, and the regime therein identified. A confiscation order or a confiscation cooperation order is not a penalty and therefore does not come within the use of that term as set out in s. 11(7)(b) of the Statute of Limitations Act 1957.

29. Section 51 of the Act of 2008, provides for confiscation cooperation orders and s. 51(5) provides that the court (a) may vary or discharge a confiscation cooperation order on the application of any person claiming to have an interest in the property concerned ... and (b) shall (i) vary a confiscation cooperation order in accordance with any variation made in the external confiscation order and (ii) if satisfied that the external confiscation order has been revoked or has been set aside in accordance with the law of the designated State concerned, discharge it". The following section in the 2008 Act deals with enforcement of confiscation cooperation orders and provides that where the High Court makes a confiscation cooperation order for the payment of a sum of money that order in the absence of an application to vary or discharge it, can thereafter be enforced by "the Director of Public Prosecutions at any time after it is made ... as if it were a judgment of the court for the payment to the State of the sums specified in the order". An application under s. 52 of the 2008 Act, is made by the Director of Public Prosecutions and is not made by the Minister whose role is simply to act on foot of a properly constituted request to seek a confiscation cooperation order. Part of the effect of a confiscation cooperation order is to preserve the relevant property in the State to satisfy any enforcement application that may or may not be made at a later stage. For confiscation to arise another application must be made. It follows that the relief granted by way of an application for a confiscation cooperation order is different and separate from forfeiture. It does not amount, as is claimed by the respondent, to the forfeiting of assets.

30. An order under s. 51 of the 2008 Act is an order for a confiscation cooperation order and that order can be thereafter varied or discharged and s. 51(5) expressly provides for such variation or discharge. The following section in the 2008 Act, s. 52 provides that where the High Court has made a confiscation cooperation order for the payment of a particular sum that a separate application must be made to enforce the confiscation order, that application being made by the Director of Public Prosecutions. The statutory scheme provided in the Act of 2008, is similar to the scheme which exists under the Proceeds of Crime Act 1996, as amended. Under that legislation a s. 3 order made under the Proceeds of Crime act 1996, as amended, is not and cannot be equated with an order for forfeiture.

31. The respondent in this case relies upon a statement by Keane C.J. in *Murphy v. G.M*. [2001]4 I.R. 113, at (p. 137) where he stated in relation to s. 3 orders under the proceeds of Crime Act 1996:-

> "The orders which the court is empowered to make accordingly, under the Act, may equate to the forfeiture of the property in question and the appellants contend that such a procedure cannot be deprived of its essentially punitive and criminal nature by being given a statutory vesture appropriate to civil proceedings."

In a later Supreme Court decision of *F.McK. v. G. W.D (Proceeds of Crime Outside the State)* [2004] 2 I.R. 470, Fennelly J. considered the statement from Keane C.J. in *Murphy v. G.M* and following an analysis of the context of the dictum identified that the context included the statement (at p. 136) of the judgment of Keane C.J. in *Murphy v. G.M* that:-

> "However, in the interval between the making of the interlocutory order (a s. 3 order) and the expiration of that seven year period, the court may discharge the order on the application either of the garda officer or the person to whom it was directed or who claims an interest in the property. In the latter case, the order is to be made by the court where it is satisfied that the property was not, directly or indirectly, the proceeds of crime or that it would cause 'any other injustice'."

The judgment of Keane C.J. went on to identify that the statutory scheme in the proceeds of crime legislation in effect provided a scheme to freeze property and that the scheme also was such that unless an order was made under s. 4 of the Act, that the expiration of a seven year period for the disposal of the property, the owner of the property does not cease to be its owner by anything done in exercise of the powers conferred by the Act. He or she is, however, in effect is deprived of the beneficial enjoyment of the property even before such a disposal order is made. Having considered the context of the dictum from Keane C.J. relied upon by the applicant in this case within the *Murphy v. G.M* case, Fennelly J. went on in the *F.Mc.K. v. G.W.D*. case to hold at (p. 484), that it was clear that the court in the *Murphy v. G.M*. case did not say that a s. 3 affected a forfeiture and Fennelly J. held:

> "It is sufficient to say that the effect of an s. 3 is, as stated in *Murphy v. G.M* to freeze the interest of the property owner but not to deprive him of it. It allows the court to make an order restraining the owner 'from disposing of or otherwise dealing with the whole or, if appropriate specified part of the property or diminishing its value'. Such an order is not, in any normal sense, an order of forfeiture."

32. This Court is satisfied that as. 51 order under the Act of 2008, is similar in effect to an order under s. 3 of the Proceeds of Crime Act 1996, as amended and that it can be equally said of a s. 51 order, as it was said by the Supreme Court in relation to as. 3 order that it is not in any normal sense an order of forfeiture. It follows that a s. 51 order is not to be treated as being within the ambit of the provisions of s. 11(7)(b) of the Statute to Limitations Act 1957, as is it not an order for forfeiture. The making of a s. 51 confiscation cooperation order does not without further court proceedings operate to deprive the respondent of any right or interest in property as is the case when a s. 60 forfeiture cooperation order is made. Section 60(5) of the Act 2008, expressly provides that a forfeiture cooperation order operates to deprive a defendant (or a respondent) of any right or interest in the property, the subject matter of a s. 60 order. There is a clear distinction between a confiscation cooperation order and a forfeiture cooperation order and that distinction is similar to the distinction between a s. 3 order and a s. 4 order under the Proceeds of Crime Act 1996 as amended. In both cases, that is in the case of a s. 51 order and a s. 3 order, an order freezes property but does not deprive an owner of it. It follows that a s. 51 order is not and cannot be identified as a forfeiture order.

33. As a s. 51 order under the Act of 2008, is neither a penalty nor a forfeiture, it follows that the provisions of the s. 11(7)(b) of the Statute of Limitations Act 1957, can have no application.

34. In the *F. McK v. G. W.D* case, Fennelly J. in his judgment expressly identified (at p. 484) that given his finding in relation to the nature of a s. 3 order that it was unnecessary in that case to decide whether an order made under s. 4 of the Proceeds of Crime Act 1996, amounted to a forfeiture for the purposes of the Act of 1957. In the case of *McK v. H* (Unreported, Finnegan J., High Court, 12th April 2002), the Court held that the provisions of the Statute of Limitations s. 11(7) have no application to actions taken under the Proceeds of Crime Act 1996, having held (at p 8):

> "I am satisfied from an examination of the legislative history including an examination of the enactments that are repealed by the Statute of Limitations 1957, in the schedule Part 2, that the legislative intention behind s. 11(7) of the . Statute of Limitations 1957, is to re-enact the provisions of the Common Law Procedure Amendment Act Ireland 1853, s. 20 in relation to actions by common informers".

35. As an action under the Proceeds of Crime Act is not an action by a common informer and was not an action brought for the benefit of the applicant the provisions of the Statute of Limitations Act 1957, s. 11(7) had no application to any actions taken under the Proceeds of Crime Act 1996. Finnegan J. revisited the same issue in his later judgment in *McK v. M and Others* (Unreported, Finnegan P., High Court, 12th February, 2003), and following an analysis set out at pp. 10 to 14 of that judgment came to the conclusion that the Court's earlier finding in *McK v. H* in relation to the non applicability of the Statute of Limitations Act 1957, s. 11(7) to the Proceeds of Crime was correct. Finnegan P. held (at p. 13):

> "thus insofar as counsel for the defendant argued that there was at the commencement of the Statute of Limitations 1957, no statute limiting the time within which a forfeiture action could be commenced in Ireland, I am satisfied that this is not the case. The premise for this argument is incorrect."

36. Finnegan P. went on, on the following page (p. 14) to hold:

> "The second basis upon which it was suggested is the decision in McKenna v. H. should not be followed was that forfeiture had been abolished by the Forfeiture Act 1870, and that therefore the 1957 Act could not have been intended to apply for actions for forfeitures formerly lying at the suit of the crime.... It is quite clear that the Act (the Forfeiture Act 1870) had very limited application- applying only to forfeiture for treason or felony and was not of general application.

> Forfeiture consequent upon outlawry was expressly preserved and other forfeitures not thereby affected. Actions by common informers whether for forfeiture or penalty were not abolished in the United Kingdom until the Common Informers Act 1951, which Act also applies to the Crown acting as a common informer. In these circumstances the premise upon the defendant's second submission is based is false."

37. Finnegan P. went on to conclude (at p. 15):

> "The Statute of Limitations 1957, s. 11(7) does not apply to proceedings under the Proceeds of Crime Act 1996."

38. Adopting and applying the same analysis it equally follows that the Statute of Limitations 1957 s. 11(7) does not apply to proceedings under the Criminal Justice (Mutual Assistance) Act 2008, or to the Criminal Justice Act 1994. The plaintiff or a moving party under the 2008 Act in either a s. 51 application or in a s. 60 application is not a common informer and such action is not brought for the moving party's benefit. Such proceedings are not actions by common informers and following and adopting the approach identified by Finnegan P in the two judgments of *McK. v. H* and *McK. v. M and Others*, this Court is satisfied that the Statute of Limitations Act 1957, s. 11 (7) does not apply to any proceedings under either the Criminal Justice Act 1994 or the Criminal Justice (Mutual Assistance) Act 2008.

39. Even if the provisions of s. 11(7) of the Statute of Limitations Act 1957, did apply to an application for a confiscation cooperation order such proceedings or action would not be statute barred until two years from the date on which the cause of action accrued. The respondent contends that the cause of action accrued on the 21st December, 2005, which was the date upon which the respondent notified the UK authorities of her intention to abandon her appeal against the confiscation order and when the confiscation order thereby became final. The applicant in this case contends that if the provisions of s. 11(7)(b) of the Statute of Limitations Act 1957, apply that the cause of action did not and could not accrue until a request was made under s. 50 of the Act of 2008. That request was made on the 18th August, 2010, and the proceedings for as. 51 cooperation order were commenced within two years of that date and that it therefore follows that even if the provisions of the Statute of Limitations Act 1957 applied, that the action was brought within two years from the date upon which the cause of action accrued.

40. An accrual of a cause of action has been identified and defined by reference to a statement of Lord Esher M.R. in *Read v. Brown* (1888) 22 Q.B.D. 128, 131, applying *Cooke v. Gill* (1873) L.R. 8C.P. 107 at 116, as arising when "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court" has occurred. The approach provided for in the Statute of Limitations Act 1957, is that time commences to run from the date of accrual of the cause of action until the date upon which an action is commenced. An action is defined in s. 2(1) of the 1957 Act as including "any proceeding ... in a court established by law". The cause of action accrues when every fact which is necessary for an applicant to prove, if traversed, in order to support his right to judgment has occurred. In this case, no application for a confiscation cooperation order can be made until a request has been made to the State for its enforcement. Under s. 51(4), the High Court cannot grant a confiscation cooperation order unless it is satisfied that an application is made with the consent of the Minister and that consent cannot be made until a request is received. The Minister cannot commence proceedings for a confiscation cooperation order until the receipt of a formal request and as the Minister's consent is a necessary proof to support the making of a confiscation cooperation order, this Court is satisfied that the date of accrual of the cause of action for a confiscation cooperation order could not have accrued until the receipt of the letter of the 18th August, 2010, at the earliest. Since the application for a confiscation cooperation order was commenced within two years from that date it follows that even if the provisions of s. 11(7)(b) of the Act of 1957 did apply, that the application for a confiscation cooperation order was made within two years from the date upon which that cause of action accrued. Any question of delay is a separate and distinct matter.

41. For the reasons set out above, this Court is satisfied that the application for a confiscation cooperation order under the Act of 2008, is not statute barred and since that is the only matter relied upon, over and above certain proofs, it follows that the applicant is entitled to the order sought. The court has already, in an ex tempore 23 judgment, ruled that it is satisfied that the proofs necessary for the granting of a confiscation cooperation order have been established. The court will therefore make the order sought by the applicant.