

THE HIGH COURT

[2003 No. 13362 P]

IN THE MATTER OF THE PROCEEDS OF CRIME ACT, 1996

BETWEEN

F. J. MCK.

PLAINTIFF

**AND
S. G.**

DEFENDANT

Judgment of Mr. Justice Barry White delivered on the 31st day of July, 2006

1. On the morning of the 9th day of June 1997, a truck, containing a consignment of computer components valued at IR£1 million, was hijacked by armed men, at the Malahide Road, in the City of Dublin. In the course of the Garda Síochána's investigation into the hijacking, the Defendant became a suspect, and, on the 6th day of October 1997, members of An Garda Síochána searched the Defendants dwelling house at an address, in the City of Dublin. The search party was in possession of a search warrant, and, in the course search of a bedroom they found two plastic bags containing five bundles of money in both Irish and Sterling notes. The Sterling notes amounted to £12,150, and the Irish currency amounted to IR£11,330. In addition, a sum of IR£1,020 was found in the kitchen. Some of the Irish currency was counterfeit, and the valid Irish currency, when converted into Euro amounts to €11,455.40.

2. The Defendant was never charged with any offence in relation to the hijacking, and, on the 27th day of November 2003, the President of the District Court, His Honour Judge Peter Smithwick, made an order, pursuant to the provisions of The Police Property Act 1897, directing the return of the monies to the Defendant.

3. On the 1st day of December 2003 Finnegan P., being satisfied that the monies, found in the Defendant's dwelling house on the 6th day of October, 1997, constituted directly or indirectly the proceeds of criminal activity, made an order pursuant to section 2 of The Proceeds of Crime Act 1996, and an order pursuant to section 7 of that Act, in relation to these monies.

4. The matter now comes before me by way of an application for an order pursuant to the provision of section 3 of The Proceeds of Crime Act 1996.

5. In F.J. McK v. G.W.D. [2004] 2 I.R. 470, McCracken J. at 491 states:-

"It seems to me that the correct procedure for a trial judge in circumstances such as those in the present case is:-

1. he should firstly consider the position under s. 8. He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief;
2. if he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised officer is evidence;
3. only then should he go on to consider the position under s. 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the member or authorised officer under s. 8 and indeed the evidence of the other police officers;
4. he should make a finding whether this evidence constitutes a prima facie case under s. 3 and, if he does so find, the onus shifts to the defendant or other specified person;
5. he should then consider the evidence furnished by the defendant or other specified person and determine whether he is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;
6. if he is satisfied that the defendant or other specified person has satisfied his onus of proof then the proceedings should be dismissed;
7. if he is not so satisfied he should then consider whether there would be a serious risk of injustice. If the steps are followed in that order, there should be little risk of the type of confusion which arose in the present case."

6. I have received evidence from Chief Superintendent McK. and from Garda O'K. Chief Superintendent McK. has sworn that the monies in question are in the possession or control of the Defendant, and that it is his belief they constitute directly or indirectly the proceeds of crime. He relies upon Garda information, and more particularly upon the information furnished to him by Garda O'K. for his belief, and it is his belief that the monies represent part of the proceeds of sale of the computer parts stolen in the hijacking on the Malahide Road on the 9th day of June 1997.

7. Garda O'K. has sworn that he was a member of the Garda investigation team investigating the armed hijacking at the Malahide Road on the 9th day of June 1997. He was a member of the search party that searched the Defendant's dwelling on the 6th day of October 1997. He has given evidence that the Defendant was detained under s. 30 of the Offences Against the State Act 1939 and that whilst so detained the Defendant gave a number of vague and inconsistent accounts of the provenance of the monies found in his house. That, in essence, the defendant claimed that the money found in his house was all his; that it came from different deals he had done buying and selling; and that he didn't want to put it in the bank in case he would be caught for tax. The Defendant gave an explanation for his telephone calls on the morning of the crime which is demonstrably false.

8. He gave evidence demonstrating that it would be unlikely that the Defendant had saved these monies out of his earnings. He suspected that the Defendant had been involved in the armed hijacking at the Malahide Road and in four earlier similar hijackings of goods vehicles.

9. Having considered the evidence of Chief Superintendent McK. and the evidence of Garda O'K. I am satisfied that there are reasonable grounds for the belief that the monies are in the possession or control of the Defendant, and that they constitute directly

or indirectly the proceeds of crime, and I find, and so hold, that the belief is evidence that the monies in question are in the possession or control of the Defendant, and that they constitute directly or indirectly the proceeds of crime.

10. Again from a consideration of the evidence of Chief Superintendent McK. and the evidence of Garda O'K. I am satisfied that the Plaintiff has made out a prima facie case that the monies in question constitute directly or indirectly the proceeds of crime.

11. The Defendant, in his defence, through the evidence adduced before me and through his counsel raised a number of issues for my consideration and determination.

12. Firstly, the Defendant raises the issue of the Statute of Limitations 1957, as amended, and contends that the proceedings are statute barred. I do not consider this submission to be well founded. The monies were seized in the course of a Garda investigation separate and distinct from the role or function of the Criminal Assets Bureau or of an "authorised officer" within the meaning of The Proceeds of Crime Act 1996. Once this seizure took place, the monies could not be said to be in the possession of, or under the control of, the Defendant. Clearly the Garda Síochána had both possession and control of the monies, and it was only when the District Court Order under the Police Property Act 1897, had been made, that the Defendant could be said to be in possession or control of the monies.

13. Secondly, it was submitted that the Plaintiff is guilty of laches, acquiescence, and delay. Again I do not find this submission to be well founded. The Plaintiff, in my view could not have moved herein prior to the making of the District Court Order. It was the Defendant who was responsible in the delay in making an application under The Police Property Act 1897, and by so delaying prevented the Plaintiff moving sooner.

14. Thirdly, it was submitted that the matter was Res Judicata, the District Court having made an order for the return of the monies to the Defendant. Again, I do not find this submission to be well founded, it seems to me to be based on a misunderstanding of relevant legislation. The President of the District Court, in making an order for the return of the monies to the Defendant was merely making a finding that the Defendant appeared to be the owner of the monies. Such a finding falls far short of a determination as to whether the monies constitute directly or indirectly the proceeds of crime.

15. Fourthly, it was submitted that these monies were "ear marked" as legal fees due to the Defendant's solicitor, Mr. WH. and that Mr. H. has a lien over the monies. Mr. H. gave evidence of being owed legal fees, and of these monies having been pledged to him. I have the utmost sympathy for Mr. H. but I do not consider him to have a lien over these monies. The existence of a lien presupposes that the person holding or exercising the lien has possession or control of the object over which the lien is sought to be exercised, in this case money, and the solicitor cannot, in my view, be said to have possession or control of the monies in question.

16. I accept that the Defendant was never prosecuted in any respect in relation to the armed hijacking. Nevertheless this fact alone does not persuade me that the monies are not directly or indirectly the proceeds of crime, on the contrary, in all the circumstances of the case, I am more than satisfied, on the balance of probabilities that they are.

17. I do not perceive any risk of a serious injustice if I were to grant the Plaintiff the interlocutory order he seeks herein. Accordingly, I will make the order sought by the Plaintiff and dismiss the Defendant's counterclaim.