

THE HIGH COURT

2004 No. 18396P

IN THE MATTER OF
THE PROCEEDS OF CRIME ACT 1996

BETWEEN

F J McK

PLAINTIFF

S McD

RESPONDENT

Judgment of Finnegan P. delivered on the 4th day of July 2005.

1. These proceedings were commenced by Plenary Summons the relief sought being relief pursuant to the Proceeds of Crime Act 1996 section 2 and section 3 in relation to sums of money which I will mention hereafter. The Appearance entered did not require delivery of a Statement of Claim. However the facts relied upon by the Plaintiff are set out in a number of Affidavits filed in relation to the application for an Order under section 2 of the Act reliance on this application being placed on the Act of 1996 section 8(1)(b) as amended by the Proceeds of Crime Act 2005 and which permits Affidavit evidence to be relied upon for the purposes of an application pursuant to section 3 of the 1996 Act. In addition the Plaintiff relies on an Affidavit sworn by the Defendant to ground his application for legal aid under the Criminal Assets Bureau Ad Hoc Legal Aid Scheme. The Deponents in each of the Affidavits relied upon gave evidence and were available for cross examination. In addition there were two witnesses whose evidence were not on Affidavit, WP and Sergeant DD I propose to deal with the evidence in accordance with the scheme suggested by McCracken J. in *McK v D* 2004 IESC 31 (17th May 2004).

2. Detective Chief Superintendent McK gave evidence pursuant to section 8(1) in his Affidavit and in oral evidence that the Defendant was in possession or control of the property the subject matter of the claim and that the same constitutes directly or indirectly the proceeds of crime and that the amount thereof exceeds the euro equivalent of IR£10,000. He was cross examined. In reply to questions he said that he was not aware if the Defendant ever had a job or sold coal on behalf of B M and had a truck for that purpose or dealt in scrap. He was aware that the Defendant operated a horse and carriage on St. Stephen's Green up to the year 2000 but his licence to do so had expired in 2000 and the Defendant had not been involved since. It was put to him that the monies the subject matter of this application were the proceeds of legitimate business activities of dealing in coal, dealing in scrap and operating a horse and carriage and he answered that he did not accept this.

3. Detective Garda C M gave evidence. The registered owner of a Lexus motor car from June 2002 onwards was A M K, the Defendant's fiancée. The vehicle was written off in an accident in May 2004. He is aware from information obtained from the Bureau Social Welfare Officer, who will give evidence, that the Defendant is a person without a lawful or declared income. He is aware from information received by him from Inspector G. K that the Defendant engaged in criminal activities and drug dealing. He is aware of events which occurred on the 17th October 2003 which will be given in evidence by Garda D K, and during which a sum of €40,000 was found in the rear seat well of Lexus motor car. The sum of money was removed from the car. He invited Ms K to inspect the car after the sum of money had been removed and she did not remark on the absence of the money. In cross examination the witness said that he had enquired of the Bureau Social Welfare Officer as to the Defendant's previous occupations and was relying on the information which he obtained and which would be given in evidence by the Bureau Social Welfare Officer. He had enquired of B M as to whether they had employed the Defendant and was informed that the Defendant had worked for them for a period of three months some five years previously. He was not aware of the Defendant dealing in scrap. He did not know that the Defendant operated a horse and carriage. In re-examination he said that the Defendant's licence to operate the horse and carriage had expired on the 4th March 2000 and the licence in respect of the carriage had expired on the 4th March 2002.

4. The Bureau Social Welfare Officer gave evidence in accordance with his Affidavit. The Defendant had Social Welfare records both under his own name and under the name S T K. Under the name S McD the Defendant had no recorded claims history and his only record of employment is with the Matt Talbot Community Trust from the 12th September 1994 to the 12th May 1995 his recorded earnings being IR £2,542. Under the name S T K the Defendant had claimed unemployment assistance from the 16th May 1995 to the 25th April 2000. He claimed Back to Work Allowance from 26th April 2000 to 23rd December 2000. There is no record of earnings recorded against him.

5. Inspector G K gave evidence. In February 2002 he with other members of An Garda Síochána searched the premises in Dublin 22 on a warrant issued pursuant to the Offences Against the State Act 1939 section 29. In the Defendant's bedroom the sum of €16,890 and £5,720 stg. were located in a bedside locker. Also found was a small amount of cannabis resin, heroin, weighing scales and small plastic bags. These items in his opinion were indicative of the Defendant engaging in the supply of illegal drugs. The Defendant was arrested pursuant to section 15 of the Misuse of Drugs Act 1977/84 and conveyed to B Garda Station where he was detained under section 2 of the Drug Trafficking Act 1996. During the detention seven interviews were conducted with the Defendant. The Defendant made three cautioned statements two of which were relied upon. The first statement relied upon was taken by Detective Garda H in the presence of the witness, signed by the Defendant and witnessed by the witness and Detective Garda H. The relevant portion of the statement reads as follows –

"At 10.45 p.m. suspect requests that video be turned off. He asked to be let out as he wants to go home. The then states that he will give us two rifles. These are high powered rifles, one is a Remington with a tripod and the other one was what he called the brother of it. He bought both of these guns for £5,000 each off the Provos and he states that he has these in his possession still. He also told us that he had 100 rounds of ammunition for them. He describes the bullets as being about six inches long, he gesticulates their size with his hands. The prisoner asks again to be released and he had bought the guns especially for an occasion like this where he could deal with the Gardai if he was caught with something. We informed the prisoner that he would not be released as he was being detained under the Drug Trafficking Act. The prisoner then states that if he was released on the following day he would return one of the rifles to us within a week in exchange for the return of his €20,000. Again we told him this was not an option. The prisoner then informed us that he knew he would eventually get his money back as he would have no problem in getting people to go to court to claim ownership of the money and he mentioned the name V J as one who would account for the money. The prisoner begged to be let out immediately as he wanted to go home to get into his own bed and if we did him this favour he would give us two handguns one of which had a problem with the firing pin. Again I informed him that this was not an option. The prisoner also told us that he was a mate of the late N F from B and that he had possession of his guns also. The suspect demanded that when he got out, and if we came to an agreement over the money, he would hand up a Remington, he wants to be left alone by the Gardai, and things would be normal. He requested our mobile phone numbers

so that he could contact us. The prisoner requested that I make no written note of our conversation as it occurred and on his request I didn't. This memo is being read over to the suspect at B Garda Station on Thursday 14th February 2002 at 4.15 p.m. Prisoner is asked to sign it."

The second statement reads as follows –

"I know why I have been arrested and being detained at B Garda Station. I don't want to be interviewed on video. I want to tell you how I got the €20,000 and £5,700 stg.

Q. How long have you been dealing in drugs?

A. Two years on and off. I started off doing half grams of heroin. I then moved up to ounces of heroin. I would make eight batches of twelve half grams out of an ounce of gear twelve bags in each batch. I would sell twelve bags for £40 each. I would sell down at the Lawns in B. S McD and meself were selling this gear.

Q. Where did you cut up the heroin?

A. Never in my own house, always in another free house in C O.

Q. In your own words what have you been doing in the last few months?

A. I have knocked out one kilo of heroin a month in the last two months. I am number 3 in a gang that is dealing gear in Ballyfermot. I get a lay on a kilo of heroin and when I sell it I have to pay £33,000 punts. I get £10,000 punts for myself out of a kilo of gear. I have four or five fellows dealing for me and I give them one ounce at a time. I give these dealers lay ons and I collect the money from them later. It is only me that collects the money from these dealers. I would be on the mobile getting the money in.

Q. Explain the money seized from you?

A. £10,000 belongs to the drug dealing. The rest is from the coal and the fireplaces. The stg. is from the drug dealing as well. I suppose its all from drugs dealing really. Out of the £43,000 I collect I keep £10,000 and give the rest up.

Q. How much per ounce do you sell the heroin?

A. £15 an ounce.

Q. How many thirty three thousands have you handed over?

A. Two. I have handed over £66,000 in total.

Q. Have you any of this heroin left?

A. No comment.

Q. When you get one kilo of heroin what do you do?

A. The one kilo of gear comes in a solid block. I came back to a free house and cut it into four ounce bars of heroin. They are in plastic bags put into a paint tin and buried on the railway tracks. I take a bar out at a time and sell it. I remove three ounces from the bar and sell this three ounces for £4,500. I keep doing this until its all sold.

This has been read over to me and it is correct."

6. The second statement was also taken by Detective Garda H, signed by the Defendant and witnessed by the witness and Detective Garda H. In his oral evidence the witness said that the interviews had been videoed up to the point where the Defendant requested that this be ceased and this request is recorded on video. As the Defendant had requested that no notes of the first mentioned interview be made no notes were made but the notes were made afterwards and the next day read back to the Defendant who signed them the signature being witnessed by the witness and Detective Garda H. While the Defendant had said that the source of the monies was his dealing in coal and scrap and fireplaces he later admitted that the source of the monies was drug dealing. The witness was cross examined. He accepted that jewellery was found on the premises at the time of the search and that this was seized. The Defendant had said that he used the scales for weighing jewellery. The scales had not been examined forensically. Arising out of the search no charges had been brought against the Defendant the Director of Public Prosecutions having directed that charges should not be brought. He did take seriously the Defendant's statement that he had firearms. He did not re-arrest the Defendant in relation to the firearms as he had nothing of evidential value in relation to the same and had no information as to where the firearms were to be found. The request to switch off the video is recorded on the video.

7. Garda D K gave evidence. On the 17th October 2003 at 1 a.m. he saw the Lexus parked at the side of the road with one male occupant at D G, F. He became suspicious. He ascertained the name of the registered owner of the vehicle as A M K. The occupant of the vehicle was D W. Mr. W was very nervous and agitated. He declined to say who owned the car. The car was searched pursuant to the provisions of section 23 of the Misuse of Drugs Acts 1977/84. A box was found in the rear passenger side foot well which contained a large amount of cash which subsequently when counted amounted to €40,000. Mr. W made no claim to the money. The money was in forty bundles of €1,000 each.

8. Sergeant D D gave evidence that following the search of the Lexus motor car he went and spoke to A M K the registered owner. He asked her to call to F Garda Station to ascertain if the car had been damaged or if anything was missing. She did this. While he did not mention the monies to her she did not mention the monies to him.

9. W P gave evidence. In 2002 he was a partner in a used car sales business trading as Red Cow Autos. On the June bank holiday Saturday 2002 at about 5.30 p.m. he was closing up the premises and was sitting in the Lexus motor car with the passenger door open waiting for his employee, who was locking the gates, to get into the car so that he could drive him home. He was approached

by the Defendant. The Defendant wished to look at his stock of cars but this was not possible as they had been parked into the premises. The Defendant asked if the witness would sell the Lexus and if so for how much. He quoted him a price of €28,000. The Defendant offered €25,000 cash which he accepted. The Defendant proceeded to a house in Clondalkin by taxi and the witness followed in the Lexus. At a house in Clondalkin he was given €25,000 in cash. He left the vehicle and made arrangements to be taken home by his brother. He did not give a receipt for the purchase money as the office was closed. The cash was in twenty five bundles of €1,000 each. The vehicle was registered the next week. Arrangements were made the next week to register the Lexus in the name of a girl: as he has since left the garage business he has no records and could not say the name of the girl. He only ever had one Lexus.

10. Chief Superintendent McK was recalled. He gave evidence that the basis of his belief pursuant to the Proceeds of Crime Act 1996 section 8(1) as given in evidence earlier were those set out in paragraph 4 of his Affidavit sworn herein.

11. There are eight matters set out in paragraph 4 of Detective Chief Superintendent McK's Affidavit. These were as follows –

1. The Defendant is a person with a small recorded income and was in receipt of Social Welfare payments for some time but he has accrued substantial amounts of cash.
2. On the 13th February 2002 the Defendant was found in possession of prescribed drugs and equipment for the distribution of prescribed drugs together with €16,890 and £5,720 stg.
3. During questioning about the origin and source of these monies the Defendant admitted that this money represented the proceeds of criminal activities namely the sale and supply of prescribed drugs.
4. During the course of being interviewed about the monies above he admitted he was ranked third in seniority of a drugs gang which operates in the Dublin area.
5. Notwithstanding the seizure of such monies in February 2002 he was able to make a cash purchase for €25,000 of a Lexus motor car on the June bank holiday weekend 2002. This money was available to the Defendant who could call to a garage over a bank holiday weekend and he was able to obtain such money having only selected the car approximately one hour prior to payment.
6. On the 17th October 2003 the same Lexus of which the witness believed the Defendant to be the beneficial owner (notwithstanding that his fiancée A M K is the registered owner) was stopped and searched and a sum of €40,000 was located in the car.
7. The fact that the monies had obviously been carefully counted in forty bundles of €1,000 and hidden in a box in a car which car was driven by an associate of the Defendant who when questioned as to his purpose of waiting in the car answered that he was to meet a friend whose name he did not know at 1 a.m. indicates from my experience that these monies were intended for use in the drugs trade. The €40,000 was located in a car which the driver on the occasion of finding the money denied any knowledge and which the registered owner had denied similarly coupled with the fact that the registered owner of the car having stated that only she the driver are the only people having access to the car at the time the money was seized.
8. The €40,000 was located in a car which the driver on the occasion of finding the money denied any knowledge and to which the registered owner has denied similarly coupled with the fact that the registered owner of the car having stated that only she, the driver and the defendant are the only people having access to the car at the time the money was seized.

12. Insofar as each of these grounds 1 to 6 are concerned they were proved by admissible evidence. With regard to ground 7. there was no admissible evidence in relation to the portion thereof reading as follows –

“which said car was driven by an associate of the Defendant who when questioned as to his purpose of waiting in the car answered that he was to meet a friend whose name he did not know at 1 a.m. indicates from my experience that these monies were intended for use in the drug trade”.

13. With regard to Ground 8. Counsel for the Defendant objected to hearsay evidence being given as to statements made by the driver of the car: this objection was correctly made. However there is admissible evidence that the driver of the car made no claim to the money found in the car. There is also evidence that the registered owner of the car did not report the money as missing when she inspected the car.

14. As to reasonable grounds for the Plaintiff's belief I do not think that anything need be said about the monies discovered upon the search carried out on the 13th February 2002. In relation to the monies found in the car on the 17th October 2003 there is evidence that the Defendant purchased the car and paid for the same and accordingly was the beneficial owner of the car. The driver of the car at the time of its search made no claim to the money. The registered owner of the car did not report the money as missing when she inspected the car. There is a similarity between the manner in which the purchase price of the car was paid with notes in bundles of €1,000 and the manner in which the monies found in the car were similarly bundled to suggest a connection between the Defendant and the monies so found. This is fortified by the circumstance that no claim has been made to the monies either by the driver of the car or the registered owner. The foregoing represents reasonable grounds for the required belief. Further in support of his application for legal aid in an Affidavit sworn herein on the 19th January 2005 the Defendant deposed as follows –

“I say and believe that as a consequence of the involvement of the Criminal Assets Bureau in my affairs and specifically the seizure of the monies referred to in the Schedule of the Plenary Summons herein I have not been in a position to continue in business and am currently unemployed.”

15. Among the monies referred to in the Schedule to the Plenary Summons is the sum of €40,000 seized from the Lexus motor car on the 17th October 2003. This circumstance alone is sufficient *prima facie* to establish reasonable grounds for the belief that the said sum of €40,000 is in the possession or control of the Defendant.

16. Counsel for the Defendant rightly objected to reliance being placed on hearsay evidence and I have excluded hearsay from my consideration as a basis for determining whether or not the Plaintiff had established the necessary belief based on reasonable grounds for the purposes of section 8 of the Proceeds of Crime Act 1996. I am satisfied that the Plaintiff has indeed discharged the onus. The

Defendant did not give oral evidence. However Counsel for the Defendant relied on three submissions on the law the first relying on the Offences Against The State Act 1939 section 29(4), the second relying on the construction to be placed on the Proceeds of Crime Act 1996 section 8(1) and the third on the admissibility of the two statements signed by the Defendant.

The First Submission

17. The Offences Against The State Act 1939 section 29(4) provides as follows –

29(4) Any document seized under this section may be removed and retained for so long as the Minister for Justice thinks proper, and any other thing so seized may be removed and retained for a period of one month from the date of its seizure, or if proceedings are commenced within such period for an offence under any section or sub-section of this Act or for treason, until the conclusion of such proceedings, and thereafter the provisions of the Police (Property) Act, 1897, shall, subject to the provisions of this Act in relation to the forfeiture of certain property, apply to the thing so seized in the same manner as that Act applies to property which has come into the possession of the Garda Síochána in the circumstances mentioned in that Act.

18. In this case no criminal proceedings were commenced and accordingly it is submitted that after one month had elapsed from the date of seizure pursuant to search warrant there was an obligation on the Garda Síochána to comply with the provisions of the Police (Property) Act 1897 and no application pursuant to the Act was brought. Accordingly, it was submitted, that there was an illegality or in the alternative an unconstitutionality which affected the Plaintiff's case and which illegality affected the original search and as a result reliance could not be made upon the fruits of the search.

19. Section 29(4) in its terms does not require the Garda Síochána to bring an application pursuant to the 1897 Act: it merely provides that the provisions of that Act shall apply. Section 1 of the 1897 Act provides as follows –

1.(1) Where any property has come into the possession of the police in connexion with any criminal charge or under section sixty-six of the Metropolitan Police Act, 1839, section forty-eight of the Act of the session of the second and third years of Her present Majesty, chapter ninety-four (local), for regulating the Police in the city of London, section one hundred and three of the Larceny Act, 1861, or section thirty-four of the Pawnbrokers Act, 1872, a court of summary jurisdiction may, on application either by an officer of the police or by a claimant of the property, make an order for the delivery of the property to the person appearing to the magistrate or court to be the owner thereof, or, if the owner cannot be ascertained, make such order with respect to the property as to the magistrate or court may seem meet.

20. The 1897 Act does not impose an obligation upon the Garda Síochána to make an application pursuant to the Act: it merely provides that they may do so. In these circumstances I am satisfied that there has not been a non compliance with the Offences Against The State Act 1939 section 29(4). Accepting that the 1897 Act applies to property coming into the possession of the Garda Síochána on foot of a search pursuant to section 29 the 1897 Act does not oblige the Garda Síochána to bring an application pursuant to the 1897 Act but merely empowers them to do so. I hold against the Defendant on this submission.

The Second Submission

21. The Proceeds of Crime Act 1996 section 8(1) provides as follows –

8(1) Where a member or an authorised officer states –

(a) in proceedings under section 2, on affidavit or, if the Court so directs, in oral evidence, or

(b) in proceedings under section 3, on affidavit or, where the respondent requires the deponent to be produced for cross-examination or the court so directs, in oral evidence,

that he or she believes either or both of the following, that is to say:

(i) that the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, proceeds of crime,

(ii) that the respondent is in possession or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime.

and that the value of the property or, as the case may be, the total value of the property referred to in both paragraphs (i) and (ii) is not less than €13,000, then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matter referred to in paragraph (i) or in paragraph (ii) or in both, as may be appropriate, and of the value of the property.

22. The submission made on behalf of the Defendant was that it is insufficient evidence in accordance with section 8(1) simply to recite his belief that the Respondent is in possession or control of specified property and that the same constitutes directly or indirectly the proceeds of crime: if no more than this is done it goes to the weight of the evidence. Section 8 it is argued contemplates, clear unambiguous and precise evidence. It seems to me that the effect of section 8(1) once evidence of belief is given together with evidence as to the grounds of that belief is to shift the evidential burden to the Defendant. The witness is available for cross examination and this provides a means whereby a Defendant without going into evidence can undermine the belief deposed to. The witness in the present case Detective Chief Superintendent F J McK gave evidence as to his belief and the grounds upon which that belief was based and was subjected to cross examination. Upon that evidence and following cross examination I was satisfied that the witness held the belief and that there were reasonable grounds for the belief and the evidential burden then shifted to the Defendant who did not give evidence. In these circumstances I am satisfied that the Plaintiff duly discharged the onus of proof.

The Third Submission

23. It was submitted on behalf of the Defendant that the statements taken by the Gardai and signed by the Defendant are not admissible in evidence. This is not the case. In civil cases statements by a party to the proceedings made otherwise than by way of testimony in court are evidence against him of the truth of the facts asserted. Where the admission is contained in a written document that document must be produced: the statements in issue here were produced. The circumstances of the admission may affect its weight and it is always open to the person against whom the admission is sought to be relied upon to introduce evidence of

such circumstances on cross examination or in evidence in chief. Thus he can introduce evidence to show that the admission was made under an erroneous view of the law or in ignorance of the facts or when his mind was in an abnormal condition or as a result of duress. Any document which a party has signed or otherwise recognised, adopted or acted upon may be tendered against him as an admission. The Defendant's Affidavit in support of his application for legal aid is likewise admissible on this basis. The Defendant signed the two statements. I had evidence from Inspector G K who wrote out an account of the off video statements by the Defendant and had the same signed by the Defendant and witnessed the Defendant's signature and who also was present during the interview recorded in the second statement and who witnessed the signature of the Defendant to the same. I am satisfied that each of these documents represents admissible evidence in a civil case.

24. Having regard to the foregoing the Plaintiff is entitled to the relief which it seeks that is an Order pursuant to section 3 of the Proceeds of Crime Act 1996.