

THE HIGH COURT

RECORD NO. 2003/2946P

**IN THE MATTER OF
THE PROCEEDS OF CRIME ACT 1996;
AND IN THE MATTER OF
THE COURTS OF JUSTICE ACTS 1924 TO 1961;
AND IN THE MATTER OF
THE COURTS (SUPPLEMENTAL PROVISIONS) ACTS 1961 TO 1981;
AND IN THE MATTER OF
AN INTENDED ACTION**

BETWEEN**F J McK****PLAINTIFF****AND
M B****DEFENDANT****Judgment of Finnegan P. delivered on Thursday the 26th day of May 2005.**

1. This matter comes before me by way of a Notice of Motion which seeks the following reliefs –

1. An Order dismissing the Plaintiff's claim by reason that the Plaintiff's claim is not within the jurisdiction of this Honourable Court.
2. An Order setting aside the Order obtained ex parte on the 3rd day of March 2003 entitled in the matter of an intended action.
3. An Order directing the Plaintiff to furnish the Defendant a copy of the transcript of the ex parte application made on the 3rd day of March 2003.
4. An Order declaring that the Plenary Summons has ceased to be in force pursuant to Order 8 Rule 1 of the Rules of the Superior Courts 1986 as amended by reason of the Plaintiff's failure lawfully to serve such summons in accordance with the said Rules within 12 months from the date of the summons.

2. The Plaintiff's claim herein is pursuant to the Proceeds of Crime Act 1996. The endorsement thereon seeks Orders pursuant to sections 2, 3, 4, 7 and 9 of the Act. The address of the Defendant endorsed on the summons is Her Majesties Prison, Elmley, Church Road, Eastchurch, Sheerness, Kent, England.

3. The first issue raised by the Defendant on the hearing of the motion was that the Proceeds of Crime Act 1996 does not extend to the proceeds of crime committed abroad and that accordingly the Court has no jurisdiction. The case made on Affidavit on the application pursuant to section 2 of the Act however clearly relies not just on crimes committed abroad but also on crimes committed within this jurisdiction. At this point in the proceedings accordingly I am satisfied that the Defendant fails on this issue.

4. The second and third reliefs were sought upon the basis that on the ex parte application under Order 11 Rule 1 for service out of the jurisdiction the Plaintiff had failed to disclose any criminal activity within this jurisdiction. The transcript of the proceedings on that day having been made available to the Defendant and the Defendant having received copies of the Affidavits grounding the application for section 2 Order and it being clear that the Plaintiff was relying on criminal activity within the jurisdiction of this Court these reliefs were not pursued. The Defendant also had a concern that the Court had not been informed on the application pursuant to Order 11 that the Defendant was in custody in the United Kingdom: it is clear from the summons and from the Affidavit of R B sworn on the application that this was not the case and accordingly the Defendant did not pursue the relief on this basis. Finally in the Affidavit grounding the Notice of Motion Colm MacGeehin, Solicitor to the Defendant deposes as follows –

"I further am so advised and believe that section 2 of the Proceeds of Crime Act 1996 makes no provision for the making of section 2 Orders prior to the commencement of proceedings under the Act."

5. The application for leave to serve out of the jurisdiction and the application for an Order pursuant to section 2 of the Proceeds of Crime Act 1996 were made together on the 3rd March 2003. The Plenary Summons was issued on the 4th March 2003. It has been the long established practice of the Court to exercise its discretion when appropriate to grant interim injunctions prior to the commencement of proceedings where it deems that to be necessary: *Thorneloe v Skoynes* (1873) LR 16 EQ 126, *Carr v Morice* (1873) LR 16 EQ 125. An undertaking is required from the Applicant that the writ will be issued. In these circumstances the Court regards the writ as having been issued at the time of the undertaking: thus the practice adopted in the Queens Bench Division in England and Wales is to date the writ with the date upon which it is actually issued and to add a note that it is to be treated as issued as at the date of the undertaking: see *Re (An infant)* 1967 1 All ER 161. This is consistent with the equitable maxim equity looks at that as done which ought to be done. The issue however remains as to whether this approach can be applied to the statutory jurisdiction conferred upon the Court by the Proceeds of Crime Act 1996 section 2. Section 2 reads as follows –

"2(1) Where it is shown to the satisfaction of the Court on application to it *ex parte* in that behalf ..."

6. The section confers a jurisdiction on the Court. It makes no reference to the procedure to be adopted by the Court and in particular does not purport to circumscribe the practice of the Court or the power of the Court to regulate its own procedures. In these circumstances I am satisfied that the Court is entitled to adopt the procedure which it has traditionally adopted in the case of applications for interim injunctions and to apply them to applications pursuant to the Proceeds of Crime Act 1996 section 2.

7. As to the fourth matter raised on the Notice of Motion the position is that the summons was issued on the 4th March 2003 pursuant to the Order for service out of the jurisdiction made on the 3rd March 2003. The application for leave to serve out of the jurisdiction was grounded on an Affidavit of R B sworn on the 28th February 2003. In paragraph 6 of the same he deposes as follows –

"I say that I believe that the Defendant is a citizen of Ireland. Prior to his detention in prison in England he resided in Co. Dublin."

8. In paragraph 8 of the Affidavit the Deponent prays as follows –

“8. I thereby pray this Honourable Court that the Plaintiff/Applicant be granted liberty to issue the intended Plenary Summons herein and to serve the same by way of personal service outside the jurisdiction of this Honourable Court on the intended Defendant/Respondent.”

9. Notwithstanding the foregoing the Order as drawn reads as follows –

“It is ordered that the intended Plaintiff be at liberty to serve notice of the said summons on the said intended Defendant at HM Prison, Elmley, Church Road, Eastchurch, Sheerness, Kent, England.”

10. The reason for this is that Order 11 Rule 5 requires an application for leave to serve out of the jurisdiction be supported by Affidavits stating inter alia “whether such Defendant is a citizen of Ireland or not”. As the Affidavit grounding the application for leave recited merely the belief of the Deponent and not the fact that the Defendant was an Irish citizen I considered it appropriate that notice of the summons only should be served. In fact it appears from the Affidavit of Service filed that service of the notice of the summons was effected but also service of the summons on the 13th March 2003. I am satisfied that service was effected in accordance with the Order of the 3rd March 2003. Accordingly Order 8 Rule 1 of the Rules of the Superior Courts had no application. If this were not indeed the case I would be prepared to deem the service actually effected good pursuant to Order 9 Rule 15 being satisfied that the proceedings were brought to the attention of the Defendant. In any event service outside the period of 12 months from the date of issue is not a nullity but an irregularity: *Sheldon v Brown Bayleys Steelworks Limited* 1953 2 QB 393: Accordingly Order 124 Rule 1 applies. Order 124 Rule 2 also applies – an application to set aside any proceeding for irregularity shall not be allowed unless made within a reasonable time.

11. In the course of argument Counsel for the Defendant raised three further issues with which I propose to deal. Firstly the injunction envisaged by section 2 of the Proceeds of Crime Act 1996 is not an equitable injunction but rather a statutory creation and therefore does not come within Order 11 Rule 1(g). Secondly service was effected by a member of An Garda Siochana and so is in breach of international law. I dealt with both these issues in *McK v R.M., K.M., R.M. V.M. and V.M.* 2003 3 I.R. 1 and for the like reasons therein set forth I find against the Defendant.

12. The final argument adduced on behalf of the Defendant was that the service was not effected in accordance with the Hague Convention of 15th November 1965. I am satisfied that that Convention has no relevance in the present circumstances. Order 11 of the Rules of the Superior Courts reflects what in private international law is described as assumed jurisdiction. In this jurisdiction that corresponds to the assumed jurisdiction in the United Kingdom. In both this jurisdiction and the United Kingdom the Courts have assumed jurisdiction to issue proceedings for service abroad in the circumstances set out in Order 11 and also in some other circumstances. In each case the Rules of Court require personal service but the Court may also make Orders for substituted service or notice in lieu of service. Nothing in the texts opened to me by Counsel on behalf of the Defendant suggests that these provisions of the Rules of the Superior Courts have been amended or abrogated by the Convention.

13. I refuse the Defendant the relief sought on the Notice of Motion.