THE HIGH COURT

[2013 No. 9813P]

BETWEEN

JOHN GILLIGAN, GERALDINE GILLIGAN, TRACEY GILLIGAN AND DARREN GILLIGAN

PLAINTIFFS

AND

CRIMINAL ASSETS BUREAU,IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 20th day of December 2013.

1. The matter before the court sees the defendants seeking *inter alia* the following orders, as set out in notice of motion of the 8th November, 2013:

> 1. An Order striking out the instant proceedings by reason of the plaintiffs' default in delivering a statement of the plaintiffs claim;
>
> 2. Further and/or in the alternative an Order striking out the instant proceedings as disclosing no cause of action or no cause of action which does not amount to an abuse of the processes of this Honourable Court;
>
> 3. Further and/or in the alternative, an Order striking out the instant proceedings by reason of the delay in their institution;
>
> 4. Further and/or in the alternative an Order vacating a *lis pendens* registered by the plaintiff and/or each of them

2. The background to the present application is that on the 13th September, 2013, a plenary summons was issued by the plaintiffs. It is convenient to set out the indorsement of claim in full. The plaintiffs claim is for:

> "1. A declaration that the freezing order imposed on the plaintiffs' properties (being the properties specified in the first schedule attaching hereto) in favour of the first named Defendant pursuant to s. 3 of the Proceeds of Crime Act 1996, without trial was, and is, unconstitutional and has violated and continues to violate, the property rights of the plaintiffs.
>
> 2. A declaration that the taking and/or forfeiture of the plaintiffs assets by disposal order pursuant to s. 4 of the Proceeds of Crime Act 1996 without trial was, and is unconstitutional and has violated, and continues to violate, the property rights of the plaintiffs.
>
> 3. A declaration that the plaintiffs' natural and constitutional rights have been unjustly interfered with by the defendants; the defendants have failed to allow the plaintiffs the opportunity to vindicate their property rights by denying them any trial of the issues.
>
> 4. Damages for breach of the plaintiffs' constitutional rights and their rights as protected by the European Convention on Human Rights Act 2003.
>
> 5. Such further or other order as this Honourable Court shall deem fit in all the circumstances.
>
> 6. Costs of the within proceedings.

First Schedule

Properties the subject of the within proceedings

Folio: Address:

KE 23407F Mucklon, Enfield, Co. Meath.

KE 25800F 13 Meadowbrook Court, Maynooth, Co. Kildare.

DN 97423F 6 Westfield Green, Weston Park, Lucan, Co. Dublin

DN 95512F 1 Willbrook Park, Willbrook View, Lucan Co. Dublin

DN 97423F 6 Westfield Green, Lucan, Co. Dublin

KE 27201F Mucklon, Enfield, Co. Kildare.

KE 18881F Mucklon, Enfield, Co. Kildare

KE 26282F Mucklon, Enfield, Co. Kildare

KE 40003F Mucklon, Enfield, Co. Kildare.

KE 25800F Timahoe East, Clane, Co. Kildare

KE 23407F Mucklon, Enfield, Co. Kildare

DN 109800F 13 Corduff Avenue, Blanchardstown, Dublin 15

KE 12391 Timahoe East, Clane Co. Kildare"

3. Firstly, so far as the issue in relation to the failure to deliver a statement of claim is concerned, the position is that by letters dated the 26th September, 2013, and the 22nd October 2013, the defendants sought delivery of a statement of claim. No statement of claim has, in fact, been delivered but a document dated the 22nd November, 2013, described as a "grounding statement" has been provided. The document is some ten pages long. It is set out in sections: (i) relief sought by the plaintiff; (ii) grounds upon which the relief is sought; and (iii) particulars of the breach of the plaintiff's constitutional right. While the style and layout of the document is somewhat different than would be expected of a statement of claim it in fact possesses many of the characteristics of a statement of claim and certainly serves to expand upon and elaborate upon the contents of the indorsement of claim.

4. In the ordinary course of events when applications are brought following a failure to deliver a pleading within the time stipulated while as a matter of form the application may be for judgment in default of defence or to strike out proceedings for failure to comply with an order for discovery or whatever, in reality the application is designed to compel delivery of the delayed pleading. In the ordinary way the notion of striking out proceedings because of a delay of some weeks in delivering a pleading would seem all but unthinkable, that is all the more so given that the plaintiff has gone some distance down the road towards the provision of a statement of claim by delivering a "grounding statement". Of course, the present application to strike out by reason of the failure to deliver a statement of claim does not stand alone and has to be seen in a wider context, however, the mere delay in serving a statement of claim would not of itself justify a dismissal of the proceedings.

5. The application to dismiss invokes O. 19, r. 28 of the Rules of the Superior Court (RSC) and also invokes the inherent jurisdiction of the court. Order 19, rule 28 is in these terms:-

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

6. The wider background to the present proceedings and the present application is that on the 21st November, 1996, a plenary summons was issued by Michael F. Murphy, then Chief Bureau Officer, against the plaintiffs in the present proceedings seeking orders under s. 2 and thereafter under s. 3 of the Proceeds of Crime Act 1996, freezing the property referred to in the schedule and also an order under s. 7 appointing Mr. Barry Galvin, Solicitor and Chief Bureau Legal Officer as receiver.

7. An *ex parte* application was made pursuant to s. 2 and on the 21st November, 1996, Costello P. made the order that had been applied for. A motion seeking a s. 3 order was issued returnable for the 5th December, 1996. On that date, Costello P. made what has since been categorised as a temporary s. 3 order which was to be in force until the 19th December, 1996. Then, on the 19th December, 1996, Costello P. made the following order:-

> "It is Ordered pursuant to s. 3 of the Proceeds of Crime Act, 1996 that the defendants or any of them or any person having notice of this order be prohibited until further order of the court in this regard from disposing or otherwise dealing with the whole or if appropriate a specified part of the property set forth in the Schedule hereto or diminishing its value otherwise than by order of this honourable court.
>
> And it is Ordered that the motion do thereupon stand adjourned generally with liberty to re-enter."

8. Thereafter, the matter then came before Moriarty J. on the 16th July, 1997. The order made by him in its operative part reads as follows:-

> "It is Ordered pursuant to section 3 of the Proceeds of Crime Act, 1996 that the defendants or any of them or any person having notice of this order be prohibited until further order of the court in this regard from disposing or otherwise dealing with the whole or if appropriate a specified part of the property set forth in the schedule hereto or diminishing its value otherwise than by order of this honourable court
>
> And it is Ordered that the motion do thereupon stand adjourned until Monday, 28th July at 10.30."

9. Such were the multiplicity of challenges that followed on the part of the plaintiffs, individually and collectively that as described by Mr. O'Reilly, the Bureau Legal Officer, in the affidavit grounding the current application, the Bureau found it necessary to set about gathering together and seeking to have determined a large number of procedural challenges that had been issued but not prosecuted to a conclusion before the Supreme Court. This saw the Supreme Court delivering a judgment in December 2008 which dismissed a substantial number of such applications.

10. Following on from the Supreme Court decision, the plaintiffs in the present proceedings brought an application pursuant to s. 3(3) of the Proceeds of Crime Act 1996. Section 3(3) it will be recalled is the section which makes provision for persons affected by s. 3 orders to apply for the discharge or variation of the order. The s. 3(3) hearing took place before Feeney J. and on the 27th January, 2011, he delivered judgment in relation to that application. Feeney J. concluded that with a partial exception in the case of the fourth named plaintiff, Tracey Gilligan in respect of one property, 1 Willsbrook View, Lucan that the plaintiffs had failed to discharge the onus that rested on them.

11. Then, on the 20th December, 2011, Feeney J. delivered a further judgment following a s. 4 hearing and proceeded to make a disposal order under s. 4 in respect of all the properties, save that in the case of 1 Willsbrook View, he directed that 20% of the net proceeds of sale should be paid out to the fourth named plaintiff, Tracey Gilligan.

12. The judgments and orders of Feeney J. following the s. 3(3) and s. 4 hearings have been appealed to the Supreme Court. It is clear from the written submissions, which the plaintiffs in the present case have made available, that the way in which the s. 3 aspect was dealt with by the courts in 1996 and 1997 is central to the appeal.

13. Against this background, Mr. O' Reilly in his affidavit contends as follows at para. 14:-

> "As appears from the judgment of the Supreme Court delivered in December 2008, the decision of Mr. Justice Feeney in respect of the Section 3(3) Application and the Section 4 Application, the constitutional and European Convention on Human Rights challenges, the Appeals Pending before the Supreme Court, the submissions delivered in relation thereto and the record of the proceedings involving the plaintiffs generally, the issues raised by the instant plenary summons have either been ventilated already or ought to have been ventilated already (the contention of the Bureau) or are in the process of being ventilated in the Appeals Pending before the Supreme Court."

14. There is no doubt that it is clear that the alleged inadequacies of the s. 3 hearing have been central to the plaintiffs' complaints from an early stage and that those complaints have been ventilated time and time again. The plaintiffs have made the point that their state of knowledge as to the procedure that is being followed or rather as to the significance of the procedure that had been followed and the implications that had for what was to happen next was at various stages incomplete or imperfect and in that regard a distinction appears to be drawn between when the plaintiff first became aware of matters and when the plaintiff became fully aware of matters.

15. The plaintiffs, in fairness to them have acknowledged the existence of a degree of overlap between the recently launched proceedings and the appeals now pending in the Supreme Court but they say that the matters before the Supreme Court do not take the form of constitutional challenge. Mr. Gilligan in the course of his affidavit, comments that it was only following the delivery of the decision in *Damache v. Director of Public Prosecutions & Ors* [2012] 2 I.L.R.M. 153, that the plaintiffs formed the view that the only certain course for challenging the s. 3 orders was by way of a constitutional challenge. Mr. Gilligan also comments, somewhat surprisingly, that it is the belief of each of the plaintiffs that s. 3 of the Proceeds of Crime Act 1996, has never been the subject of a constitutional challenge. I say "surprisingly" in a situation where para. 11 of the statement of claim in the case of *Geraldine Gilligan v. Michael Murphy & Ors* [2005] No. 2628P is in these terms "a declaration that the Proceeds of Crime Act 1996 and in particular ss. 2, 3, 4 and 8 thereof is contrary to the Constitution and void". Moreover, a statement of claim in the case of *John Gilligan v. Ireland & Ors* [2006] No. 1118P at para. 17(a) pleaded as follows. "By reason of the aforesaid, the plaintiff has suffered loss and damage (entry of final judgment against him, notwithstanding that there never was a trial of any kind) and he seeks the following orders and reliefs; (a) a declaration that all or part of s. 3 of the Proceeds of Crime Act 1996, is repugnant to the Constitution and/or incompatible with the European Convention on Human Rights (*inter alia*) guarantees of a fair hearing, equality, private property, right to privacy, and effective remedy within the meaning of s. 5 of the European Convention on Human Rights Act 2003 insofar as;…". What is described as a draft amended statement of claim deletes the words "repugnant to the Constitution and/or" and included the reference to right to privacy and the reference to s. 5 of the European Convention on Human Rights Act 2003".

16. It may be that there has been such a multiplicity of proceedings that Mr. Gilligan simply forgot about these proceedings and I am prepared to give him the benefit of the doubt in that regard. I also take into account that Mr. Gilligan's counsel has indicated that, as it was put, there may have been a certain infelicity of language in para. 25 of Mr. Gilligan's affidavit where the statement about what was the belief of each of the plaintiff's appears. However, what is certain is that it cannot be said that the question of a constitutional challenge to s. 3 of the Proceeds of Crime Act is only now being considered for the first time. The complaint about the adequacy of the hearing before Moriarty J. has been litigated and re-litigated over the years. That happened during the s. 3(3) hearing, during the course of an application brought by Mrs. Gilligan seeking discovery and delivery of a statement of claim, a matter that was taken all the way to the Supreme Court and again raised in a specific constitutional context. Moreover, as I have pointed out the nature of the hearing before Moriarty J. is central to the submissions that have been prepared for the pending Supreme Court appeal. Indeed, the significance of the Supreme Court appeal that is pending emerges particularly clearly if one has regard to the suggestion by counsel for the plaintiffs that refusing to strike out the present proceedings at this stage need not see the High Court list clogged as the present constitutional challenge could be adjourned to await the conclusion of the Supreme Court appeal.

17. I have referred to the history of the dispute between the parties only in outline and indeed I have not been referred during the course of argument to the details of all the very many applications that have been made, but even on the basis of the brief summary by way of overview that I have offered the issue of the appropriateness of the procedures that were followed in 1996 and 1997 has been litigated and re-litigated over and over again. In saying that, I do accept that the core complaint that there was no hearing at which oral evidence was put before the court is a point of some substance but there has to be a limit to how often the same point, any point can be raised.

18. That being so I am driven to the conclusion that the present proceedings constitute an abuse of process. Particularly in the situation where the matters now sought to be raised yet again, are already before the Supreme Court, not, some might think, for the first time, I am in no doubt that the proceedings fail to disclose any reasonable cause of action and that they are vexatious and as such ought to be dismissed, pursuant to O. 19, r.28 RSC and pursuant to the Court's inherent jurisdiction.

19. While I am firmly of the view that the present proceedings seek to litigate what has already been decided, I do not lose sight of the submissions of leading counsel for the plaintiffs that there has never been a constitutional challenge to the mechanisms by which the provisions of the Proceeds of Crime Act were applied to his clients. Insofar as it might be suggested that the issues as now presented had not previously been formulated in the current form, then, in my view, this is classically a situation where *Henderson v Henderson* [1844] 6 Q.B. 288 applies. In that regard, even if what is now sought to be argued does not fall four square within what has gone before, it is of considerable significance that there was not just one occasion when the arguments could and on this scenario should have been advanced, but several such occasions.

20. I am driven to the conclusion that the present proceedings have been launched because it was seen to be tactically advantageous to issue proceedings which could offer support to the registration of a *lis pendens*.

21. In a situation where the High Court and the Supreme Court had both been asked to consider whether there should be a stay on the s. 4 disposal order and where both had concluded that there should not be, the appropriateness of registering a *lis pendens* has to be open to question. It is this consideration which has prompted the defendants to include the vacating of the *lis pendens* as a free standing relief in the notice of motion. However, in a situation where I am disposed to dismiss the proceedings in their entirety, pursuant to the Rules of the Superior Courts and pursuant to the courts inherent jurisdiction, it is unnecessary to decide what the position would have been if the proceedings had been allowed remain in existence.

22. The history of proceedings between the plaintiffs and the defendants is by any standards a long and tortuous one. As Dr. Paul

McDermott points out in the introductory chapter to *Res Judicata and Double Jeopardy*, the notion that there should be some finality to litigation is a fundamental principle of the common law. It is also, as he points out to be found in Roman Law, Hindu Law, African Tribal Law, Native American Indian Law, Canon Law, and many modern civil codes. I do not doubt that the plaintiffs are greatly distressed at what the Criminal Assets Bureau (CAB) has been seeking to achieve. That they would seek to resist and indeed frustrate CAB in their endeavours is scarcely surprising. In a situation where they believe they have identified a point of major significance, that they would wish to pursue it and would be reluctant to let go of it is entirely to be expected. However, there is a limit to how often and in how many different ways the same point can be argued. There is a limit to how long and how often any drum can be banged. That limit has now been reached, if indeed not exceeded. In the circumstances I propose to make the orders sought in terms of paras. 2, 3 and 4 of the notice of motion.