

THE HIGH COURT

2003/5417P

IN THE MATTER OF
THE PROCEEDS OF CRIME ACT 1996

BETWEEN

F. M. K

PLAINTIFF

AND
G. H.

DEFENDANT

Judgment of Finnegan P. delivered on the 15th day of April 2005.

1. Among the reliefs sought in the Plenary Summons herein are orders pursuant to the Proceeds of Crime Act 1996 section 2 (an interim order) and section 3 (an interlocutory order). By order made on the 30th April 2003 an interim order pursuant to section 2 of the Act was made. The Plaintiff delivered a Statement of Claim on the 11th July 2003. A Defence and Counter Claim was delivered on the 22nd November 2004. A Reply and Defence to Counter Claim was delivered on the 6th December 2004. The matter comes before me on foot of two Notices of Motion the first seeking an Order for Discovery pursuant to Order 31 Rule 12 of the Rules of the Superior Courts and the second seeking an Order pursuant to Order 40 Rule 12 of the Rules of the Superior Courts and/or the inherent jurisdiction of the Court striking out such of the content of an Affidavit of T.F. sworn on the 30th April 2003 and set out at paragraphs 9 and 10 thereof. I propose dealing with the second Motion first as if the same is determined in favour of the Defendant it will not be necessary to deal with the first.

2. The Proceeds of Crime Act 1996 section 8 provides in relation to proceedings under section 2 of the Act that where a member or an authorised officer states on Affidavit that he believes either or both of the following –

(i) That the Respondent is in possession or control of specified property and the property constitutes directly or indirectly the proceeds of crime.

(ii) That the Respondent is in possession of 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 the proceeds of crime.

3. The Court if it is satisfied that there are reasonable grounds for the belief the statement shall be evidence of the said matters.

4. On the application for an Order under section 2 the Plaintiff relied upon an Affidavit of Thomas Feighery in which it was deposed as follows –

"(9). In the course of my investigations, I have obtained information that on the 26th February 2002, a short time prior to this incident, a sum of approximately €26,000, also the proceeds of drug trafficking, was stolen from the same vehicle. Following that incident, the same J.M. went to the home of one R.L. with a firearm and threatened to kill him. It is understood that Mr. M. suspects Mr. L. of having taken that money. Mr. M. and his cousin D.L. were arrested and charged in relation to the events at Mr. L's home. While in the precincts of the District Court for the purpose of a subsequent remand hearing in respect of that charge (and after the date of the vehicle search which has given rise to the present proceedings) Mr. M. commented to this Deponent that he was aware of the seizure of the monies at issue and that Mr. H. would be making a Police Property Act application in respect of them.

(10). The trial of J.M. and D.L. on the charges arising from the incident at Mr. L's home was originally fixed for the 18th February 2003. It did not go ahead on that date because the two key prosecution witnesses failed to appear. Neither would make a formal statement to the Gardai concerning the reason for that failure. However from information available to me I am satisfied that both witnesses were threatened not to attend."

5. In the Affidavit grounding the application Claire O'Regan, Solicitor, deposes in relation to paragraph (9) aforesaid that at the date of the theft on the 26th February 2004 the motor vehicle in question was not owned by the Defendant. She further deposes that the threats and intimidation of R.L. by J.M. and the failure of witnesses to attend the trial of J.M. and D.L. in the belief of the Deponent that they were intimidated bear no relevance to the Plaintiff's claim against the Defendant, that they are prejudicial and scandalous and represent an abuse of process.

6. The scheme of section 8 of the Proceeds of Crime Act 1996 is that evidence on Affidavit may be given of the matters set out at (i) and (ii) above on an application under section 2: however on an application under section (iii) oral evidence is required. Accordingly the Affidavit of T.F. while admissible on the application under section 2 of the Act is not admissible or relevant on the application under section 3 of the Act. At the time the Affidavit was sworn and at the time it was relied upon in Court the averments complained of were relevant to the application for an Order under section 2 of the Act. They were not then prejudicial or scandalous. In these circumstances that proceedings having now advanced to the stage where the Plaintiff is seeking an Order under section 3 of the Act this does not make them irrelevant, prejudicial or scandalous: they have no relevance to the section 3 application but form part of the proceedings to date.

7. However the Defendant raised a Notice for Particulars on the 25th July 2003. The Plaintiff replied to the same on the 6th October 2003 and in its reply, without prejudice to a contention that six of the seven matters raised were not appropriate matters for particulars, incorporated the Affidavit of T.F. into the Pleadings. It is quite legitimate whether in a Pleading or in a Reply to Particulars to incorporate another document by reference. It is necessary therefore to consider whether in so incorporating the averments objected to into his Reply to Particulars it is appropriate to grant to the Defendant the relief sought on the Notice of Motion. Section 8 of the Act provides that on an application under section 3 a member or an authorised officer of the Bureau may give oral evidence of belief in relation to the matters which I mention at (i) and (ii) above and if the Court is satisfied that there are reasonable grounds for the belief the statement of belief shall be evidence of the said matters. Thus relevant to the Court on an application under section 3 are both the belief and the grounds of the belief. The averments in paragraphs (9) and (10) of T.F.'s Affidavit if proved in oral evidence are relevant as grounds for the belief of T.F. in relation to the matters at (i) and (ii) above. Paragraphs (9) and (10) of his Affidavit having been incorporated into the reply to particulars are appropriate to be opened to the Court as part of the Pleadings: however relevant to the Court for its determination will be the oral evidence of T.F. and such other witnesses as may be called to establish by evidence the matters contained in paragraphs (9) and (10). Insofar as the averments are incorporated into the particulars furnished by the Plaintiff they obtain no special status by reason of the circumstance that they have been deposed to by

him on the application under section 2 of the Act. I am accordingly satisfied that the Defendant is not entitled to the relief which he seeks on this Notice of Motion.

8. On the Motion which I first mention the Defendant seeks an Order for Discovery pursuant to Order 31 Rule 12 of the Rules of the Superior Courts in respect of the following categories of documents –

- (a) All documentation of whatever nature (including manuscript copies of Garda notebooks) relating to or concerning the stop and search of vehicle registration no. ----- and the seizure of the property therein on the 24th August 2002 and including all documents detail or listing items seized or received by the Plaintiff his servants or agents or any other person on his behalf from the Defendant or from the motor vehicle registration no. -----.
- (b) All documentation of whatever nature relating to or concerning information received by the Plaintiff, his servants or agents or any other person on his behalf that the driver of the vehicle registration no. ----- was in possession of a large quantity of cash and/or the proceeds of trade in cannabis resin.
- (c) All documentation of whatever nature relating to or concerning information received by the Plaintiff, his servants or agents or any other person on his behalf that the Defendant was acting as a courier for a Dublin based gang and/or one J.M.
- (d) All documentation of whatever nature detailing or recording all attendances by the Defendant at Fitzgibbon Street Garda Station between 24th August 2002 and 30th April 2003.
- (e) All documentation of whatever nature detailing or recording all documentation furnished by the Defendant to Detective Garda F. at Kevin Street Garda Station between 24th August 2002 and 30th April 2003.
- (f) All documentation of whatever nature (including applications for warrants and warrants issued and manuscript copies of Garda notebooks) and relating to or concerning all searches conducted by the Plaintiff, his servants or agents or any other person on his behalf at:

(a) An address in Dublin City.

(b) An address in Dublin City

(g) All documentation of whatever nature relating to or concerning the theft of the sum of €26,000 on or about 26th February 2002 from motor vehicle registration no. -----.

(h) All documentation of whatever nature (including manuscript copies of Garda notebooks) relating to or concerning conversations between Detective Garda T.F. with one J.M. and relating to the issues of the within proceedings.

(i) All documentation of whatever nature relating to or concerning the failure of two witnesses to attend the trial of J.M. and D.L.

(j) All documentation of whatever nature relating to or concerning information received by the Plaintiff, his servants or agents or any other person on his behalf and the threatening of witnesses in the trial of one J.M. and one D.L.

(k) Any documentation of whatever nature relating to or concerning information received by the Plaintiff, his servants or agents or any other person on his behalf with respect to injuries sustained by the Defendant in or about August 2002.

9. I have considered the Pleadings herein. In the light of the same and the issues therein disclosed I order discovery in the following terms –

(a) All documents detailing or listing items seized or received by the Plaintiff, his servants or agents or by any other person on his behalf from the Defendant or from motor vehicle registration no. ----- on the 24th August 2002.

(b) As sought.

(c) As sought.

(d) All documentation recording information given by the Defendant at Fitzgibbon Street Garda Station between 24th August 2002 and 30th April 2003.

(e) All documents and records of such documents furnished by the Defendant to Detective Garda F. at Kevin Street Garda Station between 24th August 2002 and 30th April 2003.

(f) The search warrants and applications therefor and entries in Garda notebooks relating thereto relating to the searches conducted by the Plaintiff, his servants or agents or any other person on his behalf at

(a) An address in Dublin City.

(b) An address in Dublin City.

(g) As sought.

(h),(i) All documentation of whatever nature relating to or concerning the failure of

(j) two witnesses to attend the trial of one J.M. and one D.L.

(k) All documentation relating to injuries sustained by the Defendant in or about August 2002.

10. I have modified slightly the terms in which discovery was sought by the Applicant having regard to the pleadings. I do not see the documents sought at (h) as relevant to the issues as defined in the Pleadings.

11. I will hear Counsel as to the appropriate Order for costs to be made in respect of each of the Motions.