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Judgment: approved by the Court for handing down | *Delivered:* **23/06/11**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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THE SERIOUS ORGANISED CRIME AGENCY

-v-

SEAMUS MULLAN

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TREACY J

Introduction

[1] The plaintiff Agency, pursuant to Section 243 of the Proceeds of Crime Act 2002, ("the Act") has brought proceedings against the defendant in respect of certain properties held by this defendant which it is claimed are recoverable property within the meaning of the Act.

[2] The defendant seeks a stay of the proceedings as an abuse of process on the basis that the defendant's inability to give instructions due to his medical condition renders him unable to effectively participate in the trial and that to continue with the proceedings would constitute a breach of his Convention rights in particular Article 6(1) and Article 1 of the First Protocol.

[3] The defendant has previously been charged with five counts on a Bill of Indictment relating to the possession and sale of contraband cigarettes. On 9 June 2009 following a hearing before Judge McFarland it was concluded, having considered the medical evidence, that the defendant had established that he was unfit to plead. The judge then stayed the proceedings which were not to be proceeded with without the leave of the court.

[4] Dr Byrne and Dr O'Kane who both gave evidence in support of the unfitness to plead application also gave evidence before me professing to confirm in effect that the defendant's underlying medical condition had not materially improved in the meantime.

Background to Present Proceedings

[5] A property freezing order was obtained over particular assets of this defendant on 21 July 2009. Proceedings for a recovery order of that property

were commenced on 24 September 2010 and the hearing of the civil recovery proceedings had been listed for hearing but adjourned pending the determination of the abuse of process application.

[6] The defendant's background has been helpfully summarised in SOCA's skeleton argument. The defendant, at the time of the swearing of the grounding affidavit, was 56 years old. He is married with a wife and son. He was convicted of robbery in 1976 and was sentenced to seven years imprisonment. He was convicted of blackmail in 1980 and was sentenced to ten years imprisonment. In 1987 he was convicted of the murder of a police officer and was sentenced to life imprisonment. He was released on licence under the terms of the Belfast Agreement in 1998. Following his release it appears he continued to be involved in unlawful conduct and acquisitive crime including the distribution of contraband cigarettes and tobacco. He was stopped a number of times from 2003 through to 2006, and other similar offenders who were detected in other parts of the country were also linked to him as their distributor (see paras 22-58 of grounding affidavit).

[7] In August 2006 the police seized 240,000 contraband cigarettes in a van driven behind the defendant's vehicle. He denied knowing anything about the cigarettes but his fingerprints were found on the black plastic used to cover the rear windows. The driver of the van eventually implicated the defendant. Subsequent searches of properties associated with the defendant revealed the paraphernalia associated with contraband cigarette distribution. He is alleged to have used aliases to try to hide his involvement in the unlawful conduct and to have tried to hide his association to telephone numbers others had for him as a contraband cigarette distributor. He has also used a series of different addresses and, according to SOCA, has acquired properties through mortgage fraud. It is claimed that the defendant and his wife have been engaged in various types of fraud to obtain various different State benefits to which it is asserted they were not entitled. It is also claimed that he has been engaged in tax evasion associated with farming. His licence under the early release provisions consequent upon the Belfast Agreement in 1998 was revoked by the Secretary of State on 20 December 2008 following the Secretary of State's determination that the defendant was in breach of his licence and remained a danger to the public. SOCA, at paragraph 20 of the skeleton argument, emphasised that the defendant is the owner of a family farm in Garvagh, has been since in or about 1999, that they do not seek to recover this property and it is accordingly available for his use either to live in or to raise money on.

Staying Civil Proceedings

[8] Civil proceedings, pursuant to Section 86(3) of the Judicature Act 1978, may be stayed by a court on equitable grounds subject to such conditions as it thinks fit. Valentine on The Supreme Court at paragraph 11.181 gives

examples of what has in the past been regarded as capable of attracting a stay in civil proceedings. For example if the real purpose of the proceedings is for some purpose other than satisfying the plaintiff's legal right, if the proceedings were commenced with no intention of bringing him to a conclusion or if they will re-litigate an issue decided against the plaintiff in previous litigation. But, of course, as counsel for SOCA, Mr Aiken, has pointed out none of these have any relevance to the present proceedings.

[9] I do not accept that the defendant's medical condition is a basis for staying the proceedings. There are of course detailed procedures in place governing the representation of persons under a disability or mentally incapacitated. But the inability to give instructions due to an underlying medical condition does not in my view constitute a basis for staying proceedings on the ground that to continue with them would be a breach of Article 6(1) or Article 1 of the First Protocol. Persons appearing before a court under a perceived disadvantage or disability may require a court to consider taking reasonable mitigating measures to enhance an individual's participation in the trial process. But the novel contention that the inability to give instructions due to an underlying medical condition must, in present circumstances, lead to a stay is unsupported by authority and is unsound in principle. It is unsound in principle because it would necessarily involve depriving other parties of *their* rights to a fair or any hearing to determine their civil rights and obligations. If the contention was correct individuals in a similar or worse position to the defendant could neither sue nor be sued - that consequence would appear to inexorably flow from acceding to the defendant's application to stay the present proceedings on the basis asserted. It would be surprising if SOCA were thereby to be deprived of their rights, in the public interest, to pursue the proceeds of crime no matter how vast where the defendant has for whatever reason become unable to give instructions. And what of people who have died in the meantime? Logically if the defendant's contention is meritorious a similar argument could be made in those circumstances.

[10] Unsurprisingly the defendant's submission is unsupported by authority. There is powerful jurisprudence to the contrary. In The Queen v M, K and H [2002] 1 WLR 824 the Court of Appeal in England rejected the contention that it infringed Article 6 to proceed to determine whether the defendant did the acts charged following a jury finding of unfitness to plead. The court also acknowledged that an application to stay proceedings as an abuse of process could be made before the jury's determination of fitness to plead or following that determination but before proceeding to determine whether the defendant did the acts charged. However, and very importantly in the present context, such an application the court held had to be founded on matters independent of the defendant's disability. Accordingly *the defendant's disability or matters related to it could not* ***in themselves*** *found a successful application to stay on grounds of abuse.* If that be so in the criminal

context it would be surprising if a more favourable approach was mandated in the civil context. The headnote records, *per curiam* :

> "Persons under mental disabilities whose condition does not prevent their being fit to plead to a criminal charge may well be under disadvantage in legal proceedings whether civil or criminal. The court should do its best to minimise that disadvantage but it may be unable to remove it totally. A trial in civil or criminal proceedings where that disadvantage has been minimised can be "fair". Sections 4 and 4(A) constitute a fair procedures providing an opportunity for investigation of the facts on behalf of a disabled person so far as possible. It fairly balances the public interest both in ascertaining whether acts have been committed and in identifying and treating or otherwise dealing with persons who have committed the acts and the interests of those persons. If Article 6 applies, it has not been infringed in any of these cases."

[11] Rose LJ stated as follows:

> "[29] The submission is that a person who is unfit to plead cannot have the fair trial required by Article 6. He cannot sufficiently understand the proceedings or give proper instructions and he may be unable to give evidence. He has not the rights guaranteed by Article 6(3). The elements of "equality of arms", it is submitted, are noticeably lacking. Furthermore Mr Smith submitted that the fact that Dr Kerr was unable to give evidence deprived him of the presumption of innocence.
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> [30] It is not submitted that the proceedings do not involve a public hearing by an independent and impartial tribunal established by law as required by Article 6(1). It is not suggested that, if the defendants were mentally able fully to participate in the proceedings, the resultant proceedings would not be fair or that the requirements of Article 6(3) would not be complied with. It is not suggested that there is or could be any alternative procedure with would be fair or which could comply with Article 6(3). The effect of these submissions is that a trial of a criminal charge against a person who is unable to plead can never

> comply with Article 6. *It seems to us that if this is so in relation to the trial of a criminal charge it is equally so in relation to the determination of civil rights and obligations. If correct therefore these submissions have important implication for those who may have to pursue civil claims, such as claims for the recovery of debts or of property against persons who become seriously mentally disabled.*
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> [31] In our judgment these submissions confuse the rights assured by Article 6 with the enjoyment of those rights. The State can only assure rights to its citizens it cannot ensure that all its citizens are able, in practice, to use those rights. Persons under mental disabilities whose condition does not prevent them being fit to plead to a criminal charge may well be under a disadvantage in legal proceedings whether civil or criminal. The court should do its best to minimise that disadvantage but it may be unable to remove it totally. A trial in civil or criminal proceedings where that disadvantage has been minimised can be fair."

[12] At paragraph 37 of the judgment the court concluded:

> "An abuse application whenever made must be founded on matters independent of the defendant's disability such as oppressive behaviour of the Crown or agencies of the State or circumstances or conduct which would deprive the defendant of a fair trial, e.g. destruction of vital records during a long period of delay or an earlier assurance that he would not be prosecuted."

[13] I hold that it is not open to a party in civil litigation to seek to stay the proceedings as an abuse of process on the basis solely of that party's inability to give instruction due to that person's medical condition/disability. The present application is far removed from the very limited type of case referred to in Valentine at para 8 above which have in the past been recognised as capable of attracting a stay. Whilst it is plain that such a party's disability will inevitably impact on that party's effective participation in the trial process it does not follow that a "fair" hearing is not possible. The fact that the plaintiff in the present proceedings may be regarded as a state actor/emanation of the state does not alter this conclusion. If the court were to hold otherwise a very dangerous precedent would be established creating a class of persons under a disability who could not sue or be sued. Such a

conclusion would itself fundamentally violate the protections of Article 6 by denying the right to a hearing to people who fell within the class or, as in this case, prevent another party such as SOCA from discharging its statutory duty. It is important not to confuse the *conditions* under which trial litigation may require to be conducted to minimise disadvantage to secure a fair hearing with the *entitlement* to an Article 6 compliant *hearing* to determine civil rights and obligations. The taking of special measure to minimise disadvantage to ensure a *fair* hearing (or protect other convention rights) will be context specific but, as the authorities make clear, a trial in civil or criminal proceedings where the relevant disadvantage has been minimised can still be "fair" even if it is impossible to totally remove the disadvantage. And whilst the right to a fair hearing guaranteed by Article 6 applies to both criminal and civil cases "the contracting states have a greater latitude when dealing with cases concerning civil rights and obligations than they have when dealing with criminal cases" Beheer v Netherlands (1993) 18 EHRR 213, ECtHR para 32; Lester & Pannick "Human Rights Law and Practice", 3rd Edn, para4.6.26.

[14] The decision in The Queen v H was appealed to the House of Lords : [2003] 1 WLR at page 411. Dismissing the appeal it was held that the impugned procedure (under Section 4(a) of the relevant legislation which deals with the determination of facts after a finding of unfitness to plead) did not as a matter of domestic law involve the determination of a criminal charge and the defendant was not charged with a criminal offence within Article 6 and *that in any event* the procedure properly conducted *was fair and compatible with the rights of the accused person*. It is interesting to observe that the House of Lords at paragraph 14 recorded the following:

> "It was not suggested by the appellant that the Section 4(a) procedure was incompatible with the Convention even if it did not involve the determination of a criminal charge. His argument depended on making good his premise that the procedure did involve the determination of a criminal charge thus the crucial issue dividing the parties was whether the procedure did or did not involve the determination of a criminal charge."

In other words the appellants in that case did not consider that their argument for a stay based on unfitness had any "legs" if only the civil limb of Article 6, as in the present case, was engaged.

[15] It would in my view be highly anomalous if a defendant's inability to give instructions due to an underlying medical condition were to trump the Article 6 rights of others. To accede to such an argument would itself involve violating the Article 6 rights of others. It is I believe plain from the passages that I have cited above that the argument is not only as I have observed

unsound in principle but is also contrary to authority and accordingly the application to stay is therefore dismissed.