

Neutral Citation no. [2007] NIQB 16

Ref: **MORF5766**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **27/02/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
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**IN THE MATTER OF THE DIRECTOR OF THE ASSET RECOVERY
AGENCY**

-and-

IN THE MATTER OF PATRICK FLEMING

-and-

IN THE MATTER OF PENNY JANE FLEMING

-and-

AND IN THE MATTER OF VALERIE PATRICIA HOOK

-and-

IN THE PROCEEDS OF CRIME ACT 2002

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MORGAN J

[1] On 7 December 2004 Mr Justice Coghlin granted an ex parte application made by the Director of the Assets Recovery Agency seeking an Interim Receiving Order appointing Louise Rivers as interim receiver over the property of Patrick Fleming, his wife Penny Jane Fleming and her mother Valerie Patricia Hook (the defendants) listed in schedule 2 of the Order. The Order contained an exclusion at paragraph 13 in the following terms:

"This Order does not prohibit the defendants from spending £250 per week each towards their ordinary living expenses. But before spending any money each must tell the receiver where the money is to come from".

Unhappily Mr Fleming was killed subsequent to the issue of these proceedings and the case has continued against his personal representative

[2] On 4 July 2005 emergency legal aid certificates were granted to each of the defendants but on 20 July 2005 the certificates were revoked. The reason for the revocation was that the amounts available for ordinary living expenses under the Order exceeded the statutory limits for support under the legal aid scheme.

[3] The original provisions dealing with restrictions on dealing with property the subject of an Interim Receiving Order were found in section 252 of the Proceeds of Crime Act 2002:

“252 Restrictions on dealing etc. with property

(1) An interim receiving order must, subject to any exclusions made in accordance with this section, prohibit any person to whose property the order applies from dealing with the property.

(2) Exclusions may be made when the interim receiving order is made or on an application to vary the order.

(3) An exclusion may, in particular, make provision for the purpose of enabling any person -

(a) to meet his reasonable living expenses, or

(b) to carry on any trade, business, profession or occupation,

and may be made subject to conditions.

(4) But an exclusion may not be made for the purpose of enabling any person to meet any legal expenses in respect of proceedings under this Part.

(5) If the excluded property is not specified in the order it must be described in the order in general terms.

(6) The power to make exclusions must be exercised with a view to ensuring, so far as practicable, that the satisfaction of any right of the

enforcement authority to recover the property obtained through unlawful conduct is not unduly prejudiced.”

[4] By virtue of these provisions the defendants could not legitimately draw monies out of the accounts intending to use it for legal expenses since they would be abusing the purpose of the exclusion. The defendants instituted judicial review proceedings in respect of the decision to revoke and on 5 September 2006 Girvan LJ (as he now is) found that the decision was unlawful because the assessment office had failed to exercise its discretion to disregard the income arising under the Order in computing the relevant disposable income.

[5] Section 252 of the 2002 Act was amended by paragraph 14 of schedule 6 of the Serious and Organised Crime Act 2005:

“14 (1) Section 252 (interim receiving orders: prohibition on dealings) is amended as follows:

(2) For subsection (4) (restriction on exclusions for legal expenses) substitute -

‘(4) Where the court exercises the power to make an exclusion for the purpose of enabling a person to meet legal expenses that he has incurred, or may incur, in respect of proceedings under this Part, it must ensure that the exclusion -

(a) is limited to reasonable legal expenses that the person has reasonably incurred or that he reasonably incurs,

(b) specifies the total amount that may be released for legal expenses in pursuance of the exclusion, and

(c) is made subject to the required conditions (see section 286A) in addition to any conditions imposed under subsection (3).

(4A) The court, in deciding whether to make an exclusion for the purpose of enabling a person to meet legal

expenses of his in respect of proceedings under this Part-

(a) must have regard (in particular) to the desirability of the person being represented in any proceedings under this Part in which he is a participant, and

(b) must, where the person is the respondent, disregard the possibility that legal representation of the person in any such proceedings might, were an exclusion not made, be funded by the Legal Services Commission or the Northern Ireland Legal Services Commission.'

(3) In subsection (6) (power to make exclusions not to be exercised so as to prejudice enforcement authority's rights to recover property), after "must" insert ", subject to subsection (4A)".

[6] Although it was now intended that legal expenses could be paid out of property that was allegedly recoverable it is clear that the legislature intended that the power should be circumscribed and schedule 6 to the 2005 Act added sections 286A and 286B to the 2002 Act:

**"286A Legal expenses excluded from freezing:
required conditions**

(1) The Lord Chancellor may by regulations specify the required conditions for the purposes of section 245C(5) or 252(4).

(2) A required condition may (in particular)-

(a) restrict who may receive sums released in pursuance of the exclusion (by, for example, requiring released sums to be paid to professional legal advisers), or

(b) be made for the purpose of controlling the amount of any sum released in pursuance of the exclusion in respect of an item of expenditure.

- (3) A required condition made for the purpose mentioned in subsection (2)(b) may (for example) -
- (a) provide for sums to be released only with the agreement of the enforcement authority;
 - (b) provide for a sum to be released in respect of an item of expenditure only if the court has assessed the amount allowed by regulations under section 286B in respect of that item and the sum is released for payment of the assessed amount;
 - (c) provide for a sum to be released in respect of an item of expenditure only if -
 - (i) the enforcement authority agrees to its release, or
 - (ii) the court has assessed the amount allowed by regulations under section 286B in respect of that item and the sum is released for payment of the assessed amount.
- (4) Before making regulations under this section, the Lord Chancellor must consult such persons as he considers appropriate.

286B Legal expenses: regulations for purposes of section 266(8B) or 286A(3)

- (1) The Lord Chancellor may by regulations -
- (a) make provision for the purposes of section 266(8B);
 - (b) make provision for the purposes of required conditions that make provision of the kind mentioned in section 286A(3)(b) or (c).
- (2) Regulations under this section may (in particular)-
- (b) limit the total amount of remuneration allowable to representatives for work done in

connection with proceedings or a step in proceedings;

- (c) limit the amount allowable in respect of an item of expense incurred by a representative or incurred, otherwise than in respect of the remuneration of a representative, by a party to proceedings."

[7] Thereafter the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 came into force on 1 January 2006. Part 2 of the Regulations dealt with required conditions, Part 3 dealt with the release of interim payments and Part 4 dealt with the assessment of expenses at the conclusion of civil recovery proceedings. Part 5 dealt with the basis for assessment of legal expenses. It was provided in Regulation 16 that the court would assess a person's legal expenses on the standard basis as defined in Order 62 Rule 12 of the Rules of the Supreme Court (Northern Ireland). Regulation 17 dealt with rates of remuneration for solicitors, their employees and counsel.

[8] On foot of these provisions the defendants issued a Summons on 21 February 2006 seeking an exclusion for the purpose of meeting the reasonable legal expenses incurred consequent to the revocation of their legal aid certificates on 20 July 2005 and further seeking an exclusion for the purpose of meeting the reasonable legal expenses which will be incurred by them in relation to the application by the Assets Recovery Agency. On 24 March 2006 Mr Justice Coghlin made an exclusion in relation to the reasonable legal costs incurred by the defendant's solicitor and counsel from 1 January 2006. He declined to rule on whether the powers of the court under the amended section 252 had effect so as to authorise the release of assets, the subject of an Interim Receiving Order, to cover costs incurred prior to 1 January 2006 because the matter was being considered in the judicial review proceedings. In those proceedings Lord Justice Girvan concluded that no question of retrospectivity arose and that in any event since the change related only to procedure it would be retrospective in effect

"[24] I have reached the conclusion that it would be open to Coghlin J on foot of the amendment of the legislation to permit the payment of legal costs and expenses incurred prior to 1 January 2006 out of the frozen assets. I accept Mr Aiken's argument on behalf of the Director that on its true construction the legislature covers costs whenever incurred and that strictly no question of retrospectivity arises. If the question of retrospectivity does arise then I am satisfied that the legislature effected a change of

procedure and that it would be retrospective in effect since it relates only to procedure.”

Having reached that conclusion Girvan LJ adjourned the judicial review application to enable the defendants to pursue their application for an exclusion in respect of legal expenses out of the assets the subject of the Interim Receiving Order.

[9] Although in a skeleton argument prepared prior to 5 September 2006 the defendants had argued that the amended legislation could not operate so as to authorise exclusions prior to 1 January 2006 it was accepted at the hearing before me that this issue had been resolved by Girvan LJ in the judicial review proceedings, in particular at paragraph 24 as set out above. Nevertheless Mr O'Hara QC who appeared with Dr McGleenan for the defendants argued that the court should not exercise its discretion so as to permit the assets subject to the restraint order to be dissipated by an exclusion for legal expenses. He submitted firstly that the defendants should be entitled to the benefit of legal aid until the grant of legal aid was lawfully revoked and secondly that the making of an exclusion in respect of legal expenses in this case would offend the requirement in section 252(6) that the power to make exclusions should not unduly prejudice the right of the enforcement authority to recover property obtained through unlawful conduct.

[10] For the Assets Recovery Agency Mr Aiken submitted that the answer to the defendants' submission was found in Section 252 (4A) (b) of the amended legislation which required the court to disregard the possibility that legal representation of the person might be funded by the Northern Ireland Legal Services Commission. He also submitted that the obligation to ensure that the satisfaction of the right to recovery was not unduly prejudiced was expressly made subject to the requirement that the court must have regard in particular to the desirability of the person being represented in any proceedings in which he is a participant.

[11] In this aspect of the decision I am looking exclusively at the request to make an exclusion in respect of the costs of solicitor and counsel for the period from 20th July 2005 until 1 January 2006. In light of the ruling by Girvan LJ in the judicial review it is accepted that the court has power to make an exclusion in respect of the past period and that this includes the period prior to 1 January 2006. It is also clear that the scheme of the amended legislation is to exclude reliance on the availability of funding from the Legal Services Commission and to make the overriding objective of securing the recoverable property subject to the desirability of ensuring that those participating in proceedings of this kind are properly represented. Since there was no other objection to the principle that an exclusion for the purpose of meeting legal expenses should be made pursuant to Order 123 Rule 10A in this case the only issue is whether the prior grant and unlawful revocation of

legal aid should prevent the court exercising its discretion so as to make the relevant exclusion in this instance.

[12] I do not consider that the circumstances surrounding the grant and revocation of legal aid should prevent the court from making an exclusion in this case. The civil aid certificate issued in this case on 4 July 2005 was an emergency certificate and it seems clear that its continuance would accordingly have involved further investigation and decision-making by the Legal Services Commission. The difficulties surrounding the availability of legal aid in proceedings of this kind are referred to by Mr Justice Stanley Burnton in Director of the Assets Recovery Agency v Creaven [2005] EWHC 2726 (Admin) and he referred in particular to the delays arising because of the inability of defendants to obtain funding for legal representation. In those circumstances the extent to which the legal aid authorities would have taken on responsibility for any work carried out between 20 July 2005 and 1 January 2006 is highly uncertain. I do not consider, therefore, that there is any unfairness connected with this factor such as to cause me to exercise the court's discretion against the grant of an exclusion.

[13] I have been asked by the Assets Recovery Agency to consider the steps that must be met before an exclusion can be made in respect of any legal expenses and although there was no material contrary argument advanced before me I am happy to do so.

1. The defendants must file an affidavit containing a statement of assets.
2. The court must be satisfied that the defendants had no other assets, beyond those subject to the interim receiving order, available to them to discharge their legal expenses.
3. The court must have regard in particular to the desirability of the person being represented in proceedings under part 5 of the Act.
4. Subject to section 252 (4A) the power to make exclusions must be exercised with a view to ensuring, so far as practicable, that the satisfaction of any right of the enforcement authority to recover the properly obtained through unlawful conduct is not unduly prejudiced.
5. The exclusion must be limited to the legal expenses that are reasonable.
6. The exclusion must be limited to reasonable legal expenses that must have been or will be reasonably incurred.
7. The exclusion must specify the stage or stages in civil recovery proceedings to which it relates.
8. The exclusion must specify the maximum amount which may be released in respect of legal expenses for each stage to which the exclusion relates and the total for the entire exclusion if it covers more than one stage.
9. Any question over the amount of an exclusion for a reasonable legal expenses should normally be referred to the Taxing Master.
- 10 The defendant shall then comply with the procedure set out in the 2005 regulations for payment and notification.

[14] The only other matter arising in this case was a claim to the higher rate of remuneration by the solicitor because of complexity. On the basis of the materials before me I do not consider that such a claim is justified. The potential value asserted in the defendants' affidavit of 19 October 2006 and the volume of papers do not in my view satisfy the test of "substantial novel or complex issues of law or fact" set out in Regulation 17 of the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005.

[15] The second element of this application concerns a submission that an exclusion should be made under section 252 of the 2002 Act as amended in order to provide for the expenses of a forensic accountant retained to challenge the findings of the Interim Receiver. In order to deal with that application I want to consider first the principles which should inform the exercise of the court's discretion in this area and secondly give some guidance as to the manner in which such an application should be pursued. I will then turn to the particular circumstances in this application.

[16] I have already indicated that I have gained considerable assistance from the decision of Stanley Burnton J in Creaven. At paragraph 21 of the judgment he explains how a claim under part 5 of the 2002 Act differs from both a conventional personal and a conventional proprietary claim. He then explains in paragraph 22 and 23 that the principles applicable should be similar to those applicable to proprietary claims and that the court should not permit a defendant who has available property that is not recoverable property to use the property that is claimed to be recoverable property to meet any of his expenditure pending trial. He then goes on to look at the principles applicable to proprietary claims and concludes at paragraph 25 that the first is that the defendant will not be permitted to make payments towards his legal costs out of a fund that is the subject of a proprietary claim unless he can show that he has no other funds available for that purpose. The second is that even in that case, payment out of the fund will not be permitted unless the defendant has shown an arguable case that he is entitled to the fund.

[17] In respect of exclusions for forensic accountancy assistance the Agency have expressed particular concern about the possibility of escalating expenditure potentially dissipating significant portions of the allegedly recoverable property. In a sense this case is an example of how that may occur. In a letter dated 14th February 2006 to the defendants' solicitor the forensic accountants prepared 2 estimates of costs reflecting differing levels of investigation and reporting. Option 1 was the only option relied upon by the defendants. That comprised an overview appraisal whereby the accountants largely accepted the analysis of the Interim Receiver and carried out an audit of her figures to determine their appropriateness. Part 1 of option 1 suggested that the accountants would expend a total of £6,297.50 excluding VAT in getting to the report stage as long as the Interim Receiver provided them with

her detailed analysis. If not a further sum of £3120 would be incurred. The total potential charge in these circumstances would amount to £9,417.50 excluding VAT.

[18] The latter figure plus VAT was that for which an exclusion was originally sought. In the affidavits that figure was increased to one of £12,500 including VAT although no breakdown of that figure was provided. Subsequent to the hearing the defendant submitted a breakdown of the work undertaken to date by the forensic accountants which totalled £11,857.60 plus VAT. Since the original estimate included the preparation and issue of a textual report and dealing with and negotiating with the Agency and Interim Receiver it is clear that the proposed expenditures by the forensic accountant will significantly exceed the original estimate for part 1 and 2 of option 1 and will probably more than double the amount originally suggested in part 1 of option 1. In my view this analysis confirms the Agency's fear that there is a real risk that forensic accounting costs could escalate unless carefully controlled.

[19] The third general point to bear in mind is the position of the Interim Receiver under the Order. The Interim Receiver is appointed by the court on the application of the Director of the Assets Recovery Agency. At all times the Interim Receiver is supervised by the court. Any party to the proceedings and any party affected by the proceedings may apply to the court for directions as to the exercise of the Interim Receiver's functions. The court may vary or set aside an Interim Receiving Order at any time. The court has control over the powers granted to the receiver under section 247 of the Act and once an Interim Receiving Order is made the Director is deemed no longer to be carrying on a civil recovery investigation. Both parties except that the Interim Receiver is a public authority for the purpose of the Human Rights Act 1998 and it would be unlawful for the Interim Receiver to act in a way which was incompatible with a convention right. The Interim Receiver has unique investigative powers under the Act. In my view these factors emphasise the independence of the Interim Receiver and argue for caution in incurring additional forensic accountancy expenditure.

[20] It is clear that a party seeking to use the property subject to the Interim Receiving Order in order to fund a forensic accountant must make out his case. In assessing whether the party has made out his case the court will always take into account the nature of the resources available to him at that time. Where a party is considering a legal expenses exclusion for a forensic accountant the following matters should be taken into account.

(a) If a party considers that the interim receiver has not considered relevant evidence, he should first request of the receiver in writing that the matter be investigated. If this request is not met sufficiently or is not accepted

then the defendant can apply to the court for a direction that the receiver so investigate.

(b) If a party considers that the interim receiver has considered evidence which is not relevant, or is incorrect, it should notify the interim receiver in writing of this view. If this request is not met sufficiently or is not accepted then the defendant can apply to the court for a direction in respect of same.

(c) If a party has taken action as above, the interim receiver should make a further report to the court stating her conclusions as to the matters raised.

(d) If a party wishes to explore the methodology or findings of a report, that party may request a meeting with the interim receiver. If such a meeting occurs, all parties should be invited and the meeting should be properly minuted for the court.

(e) If a party then wishes to challenge the methodology or findings in an interim receiver's report, that party should apply to the court for a legal expenses exclusion for the retention of a forensic accountant with an affidavit setting out in a focused way which aspects of the report it takes issue with.

(f) If a sufficiently detailed affidavit is sworn and served, the court should allow time for both the interim receiver and the other parties to make any replying affidavits they wish.

(g) Upon receipt and consideration of any replying affidavits, the court should reach a determination as to whether there are any issues on which it may be reasonable to incur expenditure for expert witnesses through a legal expenses exclusion.

(h) In reaching a decision the court may wish to hear from its interim receiver in a preliminary hearing in order to be satisfied as to whether there is any substance to the defendant's claims and also to ensure that the court's interim receiver is carrying out her functions properly.

(i) The court should set out the specific areas on which the defendant will be entitled to have his own expert witness and the exclusion orders shall specify those areas.

[21] Where the court decides to make a legal expenses exclusion in respect of a forensic accountant the defendant should normally file an affidavit setting out the hourly rate of the forensic accountant who is going to do the work, the basis for that rate, the work involved in dealing with the issues, the time required to be spent on a specific issue including the time for any meetings and the length of time envisaged in respect of evidence. Where

there is a dispute in relation to these matters the court will normally rely upon the Taxing Master.

[22] Applying these principles in this case I have taken into account the detailed correspondence from the forensic accountant that the defendants have retained and the responses on the part of the Interim Receiver. I also bear in mind that the Interim Receiving Order was made in December 2004 and that civil recovery proceedings are imminent. I consider that the letter of 4 April 2006 on behalf of the forensic accountants raises arguable points in relation to the black hole computations in respect of the defendants and that these bear particularly on the identification of recoverable properly in respect of Mrs Hook. Having considered the response of the Interim Receiver I do not consider that there is anything to be gained from a further hearing and I will make an exclusion in respect of the expenses incurred in the preparation of the letter of 4 April 2006. I am not prepared to make any further exclusion at this stage. In my view the subsequent work is precisely the type of unfocused and unproductive exchange which is likely to generate wasted expenditure. If it is intended to explore the methodology or findings of the interim receiver's report consideration should be given to requesting a meeting with the interim receiver and if necessary preparing an affidavit setting out on a focused way which aspects of the report are in issue. This ruling does not prevent a further application for exclusion if it is justified.

[23] I will give the parties an opportunity to see whether they can agree the amount in respect of which the exclusion should be made. If not I will have to refer this matter to the Taxing Master.