Neutral Citation No. [2004] NIQB 21 | *Ref:* **COGF4120**

Judgment: approved by the Court for handing down | *Delivered:* **01.04.2004**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF THE DIRECTOR OF THE ASSETS RECOVERY AGENCY AND IN THE MATTER OF CECIL STEPHEN WALSH AND IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

COGHLIN J

[1] This is an application by the Assets Recovery Agency (hereinafter referred to as "the Agency") for a recovery order in accordance with Part 5 of the Proceeds of Crime Act 2002 ("POCA") under the terms of which the Agency seeks to vest certain property held by or on behalf of Cecil Stephen Walsh ("the respondent") in the trustee for civil recovery. The application has been made by the Director of the Agency ("the Director") under the provisions of Section 266 of the POCA.

The background facts

[2] The facts upon which the Director seeks to rely have been set out in the affidavit sworn by John Davidson; a financial investigator for the Agency authorised to exercise the powers available to the Director under Parts 5, 6, 8 and 10 of the POCA.

[3] On 16 June 2003 the Assistant Chief Constable (Crime) for the Police Service of Northern Ireland ("PSNI") referred the matter of certain property held by or on behalf of the respondent to the Agency subsequent to the acquittal of the respondent of three counts of obtaining services by deception contrary to Article 3(1) of the Theft (Northern Ireland) Order 1978 and one count of obtaining property by deception contrary to Section 15(A) of the Theft Act

(Northern Ireland) 1969 at Belfast Crown Court on 13 June 2003. The respondent was acquitted by direction of the learned trial judge. On 3 October 2001 Kerr J, as he then was,had made a restraint order against the respondent pursuant to Article 31(1) of the Proceeds of Crime (Northern Ireland) Order 1996 and, subsequent to the said acquittal of the respondent this order was discharged at the request of the Director of Public Prosecutions for Northern Ireland on 19 June 2003. Following the acquittal of the respondent and the discharge of the said restraint order the Agency applied for and obtained a Mareva Injunction against the respondent on 27 June 2003.

[4] Since the age of 13 the respondent has accumulated a substantial criminal record including 132 road traffic offences and a significant number of offences involving dishonesty. He is currently serving a sentence of six years imprisonment and eighteen months custody probation which was imposed at Antrim Crown Court on 9 April 2003 following his plea of guilty to the charge of conspiracy to commit armed robbery in relation to the contents of Securicor cash transit vehicle in Coleraine on 9 August 2001. Further details of the respondent's alleged criminal behaviour appear in the affidavit sworn by Mr Davidson.

[5] Mr Davidson has also exhibited to his affidavit a bundle of documents relating to the unsuccessful prosecution of the respondent at Belfast Crown Court on 13 June 2002 in connection with a mortgage application made by the respondent in the course of his purchase of site 85 Mayfield Village, Glengormley on 3 July 2000, subsequently known as 8 Mayfield Village. Mr Davidson has averred that the respondent placed approximately £70,250 in cash at the disposal of his solicitor during the process of the purchase of No. 8 Mayfield Village at a time when he had not been in receipt of any identifiable form of State benefit or other legitimate income. Indeed, it would appear from his criminal record, that the respondent was in prison between 4 September 2000 and 30 April 2001. A financial enquiry initiated by PSNI was unable to establish the identity of any bank or building society account held or controlled by the respondent from which the said sum of £70,250 in cash might have originated nor has any legitimate source of this money been identified by the respondent in the affidavit sworn on the 16th of September 2003 in response to the Mareva application. During the course of the mortgage negotiations the respondent represented himself to be a "self-employed car dealer" but the PSNI was unable to establish the identity of any such business with which the respondent had been involved or associated.

The statutory framework

[6] The relevant provisions of the POCA are as follows:

Section 1 creates the Assets Recovery Agency and provides that the Secretary of State must appoint a Director.

Section 2(1) provides:

> "The Director must exercise his functions in the way which he considers best calculated to contribute to the reduction of crime."

Section 2(5) provides:

> "In considering under sub-section (1) the way which is best calculated to contribute to the reduction of crime the Director must have regard to any guidance given to him by the Secretary of State."

Section 2(6) provides:

> "The guidance must indicate that the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings."

[7] Part 5 of the POCA enables the Director of the Agency to make an application to the High Court for the civil recovery of property representing the proceeds of "unlawful conduct". Section 240 sets out the general purpose of this part of the Act and provides as follows:

> "(1) This Part has effect for the purposes of –
>
> (*a*) enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property that is, or represents, property obtained through unlawful conduct. …

(2) The powers conferred by this Part are exercisable in relation to any property (including cash) whether or not any proceedings have been brought for an offence in connection with the property."

Section 241 defines "unlawful conduct" in the following terms:

"(1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.

(2) Conduct which –

(*a*) occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, and

(*b*) if it occurred in a part of the United Kingdom, would be unlawful under the criminal law of that part, is also unlawful conduct.

(3) The court or sheriff must decide on a balance of probabilities whether it is proved –

(*a*) that any matters alleged to constitute unlawful conduct have occurred, or

(*b*) that any person intended to use any cash in unlawful conduct."

Section 316 defines property as:

"

(4) Property is all property wherever situated and includes –

(*a*) money,

> (*b*) all forms of property, real or personal, heritable or moveable,
>
> (*c*) things in action and other intangible or incorporeal property."

Sections 305 and 306 allow the Agency to recover property which has not itself been obtained through unlawful conduct but which "represents" such property. Section 307 provides that the property that is recoverable under Section 304 and 306 is to be taken to include accrued profits. Section 308 limits the Agency's ability to follow and trace property and, for example, property is not recoverable while a restraint order applies nor is it recoverable if it has already been taken into account in the making of a criminal confiscation order.

[8] The procedure for a civil recovery order is set out in Section 243 and Section 266(1) of the POCA provides that:

> "(1) If in proceedings under this Chapter the court is satisfied that any property is recoverable the court must make a recovery order."

Section 266(3) provides that the Court may not make certain provisions in a recovery order:

> "(3) But the court may not make in a recovery order –
>
> > (*a)* any provision in respect of any recoverable property if each of the conditions in sub-section (4) or (as the case may be) (5) is met and it would not be just and equitable to do so, or
> >
> > (*b*) any provision which is incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998(c. 42).

(4) In relation to a court in England and Wales or Northern Ireland, the conditions referred to in sub-section (3)(*a*) are that –

(*a*) the respondent obtained the recoverable property in good faith,

(*b*) he took steps after obtaining the property, which he would not have taken if he had not obtained it or he took steps before obtaining the property, which he would not have taken if he had not believed he was going to obtain it,

(*c*) when he took the steps, he had no notice that the property was recoverable,

(*d*) if a recovery order were made in respect of the property, it would, by reason of these steps, be detrimental to him.

(5) …..

(6) In deciding whether it would be just and equitable to make the provision in the recovery order where the conditions in sub-section (4) or (as the case may be) (5) are met, the court must have regard to –

(*a*) the degree of detriment that would be suffered by the respondent if the provision were made,

(*b*) the enforcement authorities interest in receiving the realised proceeds of the recoverable property."

Section 281 of the POCA permits the true owner of any property alleged to be recoverable property to apply to the court for a

declaration that the property belongs to him and property, which is the subject of such a declaration, may not be recovered by the Agency. Section 282 provides that proceedings for civil recovery may not be taken in respect of certain people in prescribed circumstances. Section 287(1) provides that the enforcement authority may not take proceedings for a recovery order unless it reasonably believes that the total value of the recoverable property is not less than a specified amount. The purpose of this section is to ensure that civil recovery will not be used in minor or trivial cases and the specified amount currently is £10,000 (the Proceeds of Crime Act 2002 (Financial Threshold for Civil Recovery) Order 2003 (SI 2003/175).

Section 288(1) amends the Limitation Act 1980 to provide that proceedings under Chapter 2 of Part 5 of the POCA shall not be brought after the expiration of a period of 12 years from the date on which the Director's cause of action accrued. The Director's cause of action accrues in respect of recoverable property in the case of proceedings for a recovery order in respect of property obtained through unlawful conduct when the property is so obtained.

The issue in these proceedings and the submissions of the parties

[9] Mr McCollum QC, who represented the respondent together with Mr Martin O'Rourke, submitted by way of a preliminary issue that civil recovery proceedings under the provisions of the POCA should be categorised as criminal rather than civil and that, accordingly, such proceedings should attract all of the safeguards guaranteed by Article 6 of the Convention.

[10] In support of this submission Mr McCollum QC advanced a number of arguments:

(*i*) Section 241 of the POCA specifically provides that "unlawful conduct" is conduct which is unlawful under "the criminal law" and, in particular, in the circumstances of this case the Agency has relied upon the respondent's criminal record in addition to allegations of criminal conduct and police intelligence.

(*ii*) Mr McCollum QC argued that since, prima facie, none of the property that is sought to be recovered by the Agency could be proved to be the result of any activity in respect of which the respondent had been convicted, it followed that the Agency were compelled to rely upon unproved allegations of criminal conduct together with the intelligence and, in such circumstances, it was vitally important for the respondent to be able to rely upon the

presumption of innocence and the other safeguards afforded in relation to criminal offences by the provisions of Article 6. Mr McCollum QC submitted that the need for such safeguards became even more important once it was appreciated that the functions of the Agency in seeking a civil recovery order only commenced after the state agency primarily responsible for enforcing the criminal law, namely, PSNI, had failed to obtain a conviction of the respondent in respect of the Theft Act charges and the restraint order had been discharged on the application of the Director of Public Prosecutions for Northern Ireland. Mr McCollum QC contended that this indicated that the real aim of the civil recovery proceedings was to "punish" the respondent after the frustration of the failed criminal proceedings.

(*iii*) Mr McCollum QC argued that it was incongruous that those from whom the Agency sought to recover property but who were not themselves alleged by the Agency to have engaged in the relevant unlawful conduct should have the safeguards afforded by Section 266 of the POCA while no adequate safeguards were afforded to those accused of breaking the criminal law.

(*iv*) Ultimately, in the circumstances of this case, Mr McCollum QC submitted that a situation in which a formal agency of the state set out to rely upon allegations of serious criminal conduct which could not be proved to the necessary criminal standard in order to establish that the respondent had committed criminal offences with a view to confiscating his material assets could only be classified as criminal in character and, accordingly, one in which the respondent should have the benefit of full Article 6 protection.

[11] By way of response, Mr Morgan QC, who appeared on behalf of the applicant, submitted that the civil forfeiture provisions of Part 5 of the POCA were fundamentally different from criminal proceedings since they were directed to the seizure of property derived from unlawful conduct rather than to establishing that a particular offence had been committed by a particular offender for the purpose of imposing the appropriate penalty. He argued that these procedures were not concerned with the issue of guilt and lacked the features of punishment and retribution, which characterise the criminal law. Mr Morgan QC argued that, even if the Agency was required to prove that a person had committed an offence by or in return for which the property was obtained, this would not be for the purpose of punishing the respondent but rather for the purpose of removing the property from the criminal economy and from inhibiting its

possessor from acting as a role model thereby leading to a reduction in crime.

The correct approach

[12] In considering whether proceedings are criminal for the purpose of Article 6, the Strasbourg court has adopted an autonomous approach to interpretation and both parties agreed that the correct approach to the classification of the recovery proceedings was to adopt the criteria identified by that court in the case of Engel v The Netherlands (No. 1) (1976) 1 EHRR 647 at paragraph 82. Such an approach was recently followed by the Court of Appeal in this jurisdiction in Lord Saville of Newdigate v Harnden [2003] NI 239 and has also been endorsed by the House of Lords as authoritative by Lord Bingham in R v H [2003] 1 All E R 497 at page 505 paragraph [15].

[13] The three principle criteria identified in Engel are:

(*i*) The manner in which the domestic state classifies the proceedings. This normally carries comparatively little weight and is regarded as a starting point rather than determinative – see Ozturk v Germany (1984) 6 EHRR 409 at 421 and 422.

(*ii*) The nature of the conduct in question classified objectively bearing in mind the object and purpose of the Convention.

(*iii*) The severity of any possible penalty – severe penalties, including those with imprisonment in default and penalties intended to deter are pointers towards a criminal classification of proceedings – see Schmautzer v Austria (1995) 21 EHRR 511.

In Lauko v Slovakia (1998) ECHR 26138/95 the court observed that these criteria were alternatives and not cumulative although a cumulative approach might be adopted where a separate analysis of each criterion did not make it possible to reach a clear conclusion as to the existence of a "criminal charge".

The domestic classification

[14] It seems clear from a consideration of the wording of Part 5 of the POCA that it was the intention of Parliament to provide a civil procedure to recover property that is or represents property obtained through unlawful conduct. Section 240(1) specifically enacts that Part 5 has effect for the purposes of enabling the enforcement authority to recover such property "… in civil

proceedings before the High Court …" and Section 241(3) provides that the court must decide whether any matters alleged to constitute unlawful conduct have occurred on the civil balance of probabilities.

[15] However, in determining the appropriate domestic classification the court is not restricted to a contextual analysis of the statute but is also required to carry out an objective assessment of the procedure – see, for example, the judgment of Lord Steyn in R (McCann) v Crown Court at Manchester [2002] 4 All E R 593 at paragraphs [22] to [27]. For the purpose of this exercise it seems to me that the following factors are important;

(*i*) A civil recovery action may only be instituted by the Director of the Assets Recovery Agency created by Section 1 of the POCA. While the Agency is a state agency and the Director is appointed by the Secretary of State, the Agency is clearly distinct from those agencies charged by the state with primary responsibility for enforcing and upholding the criminal law, namely, the DPP and the PSNI.

In Custom and Excise Commissioners v City of London Magistrates' Court [2000] 1WLR 2020 Lord Bingham of Cornhill CJ said at page 2025:

> "It is in my judgment the general understanding that criminal proceedings involve a formal accusation made on behalf of the state or by a private prosecutor that a defendant has committed a breach of the criminal law, and the state or the private prosecutor has instituted proceedings which may culminate in the conviction and condemnation of the defendant."

The Agency is not a prosecuting authority nor does it have any power to arrest or charge an individual with a criminal offence. The procedure cannot culminate in a conviction or the acquisition of a criminal record.

(*ii*) Civil recovery takes place in the High Court and the document used to commence the proceedings is a claim form and not an information or summons. As already noted, the rules of evidence applicable to the proceedings are the rules applicable to civil proceedings.

(iii) Mr McCollum QC emphasised that despite the absence of formal powers of arrest and charge, the successful prosecution of a civil recovery action by the agency in the circumstances of this particular case would result in the public condemnation of the respondent as having participated in conduct unlawful under the criminal law. On the other hand there would appear to be a number of decisions that establish that reprehensible behaviour on the part of a respondent does not, per se, classify proceedings as criminal – see, for example, Porter v Magill [2002] 1AER 465 and R (On the Application of Mudie and Another) v Kent Magistrates' Court and Another [2003] 2AER 631. Furthermore, the making of Anti-Social Behaviour Orders in the McCann case not only reflected seriously on the character of the appellants but also, in some of the cases, orders were made as a consequence of violence amounting to criminal offences. In S v Millar [2001] SC977 the hearing before the Sheriff was to determine whether S had committed an assault involving repeated blows with a baseball bat yet in neither of these cases were the proceedings classified as criminal. The case of S v Millar was in some ways similar to the instant case in that the prosecuting authority in Scotland, the Procurator Fiscal, had decided not to proceed with a formal criminal charge of assault but it remained necessary to determine whether S had carried out the acts alleged. At paragraph [15] of his judgment the Lord President said:

> "There is no doubt, in my view, that in this case the Reporter was seeking to show that S had committed an assault to severe injury, which is a criminal offence according to the law of Scotland. If, on that basis alone, one could say that S was 'charged with a criminal offence' in terms of Article 6, then the test would be satisfied. But I consider that such an approach is too narrow and that, on a proper interpretation of Article 6(1), in deciding whether S is 'charged' with the 'criminal offence', one must have regard to the nature of the proceedings in which the Reporter is seeking to show that S has committed the offence."

At paragraph [23] he continued:

> "I should perhaps add that I accept that, at the stage when S was arrested and charged

> by the police on the 31st October, he was indeed 'charged with a criminal offence' in terms of Article 6, since he was liable to be brought before a criminal court in proceedings which could have resulted in the imposition of a penalty. He remained 'charged with a criminal offence' in terms of Article 6 until the Procurator Fiscal decided the following day – in the language of Section 43(5) of the Criminal Procedure Act – 'not to proceed with the charge'. At that point the criminal proceedings came to an end and the Reporter initiated the procedures under the 1995 Act by arranging a hearing in terms of Section 63(1). In my view, once the Procurator Fiscal has decided not to proceed with the charge against a child and so there is no longer any possibility of proceedings resulting in a penalty, any subsequent proceedings under the 1995 Act are not criminal for the purposes of Article 6. Although the Reporter does indeed intend to show that the child concerned committed an offence, this is not for the purpose of punishing him but in order to establish a basis for taking appropriate measures for his welfare. That being so, the child who is notified of grounds for referral setting out the offence in question is not thereby 'charged with a criminal offence' in terms of Article 6'.

[16] In the circumstances, I am satisfied that, in terms of domestic law, these proceedings may be properly classified as "civil". However, while the Engel decision confirmed that domestic classification of an offence as criminal would be regarded by the Strasbourg Court as decisive, the classification of an offence as civil, disciplinary or administrative is regarded as no more than a starting point and, consequently, it is necessary to proceed to consider the two further limbs of the Engel test.

The Nature of the Offence Charged

[17] In Butler v United Kingdom 41661/98 (27 June 2002 unreported) (EctHR) the Strasbourg Court noted that criminal charges had never been brought against the applicant or any other party and took the view that a Forfeiture Order in accordance with Sections 42 and 43 of the Drug Trafficking Act 1994 was a preventative measure and could not be compared to a criminal sanction since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. The court agreed that the absence of a charge or any prospect of conviction or of obtaining a criminal record were relevant considerations. The court referred to the earlier decisions in Agosi v United Kingdom (1987) 9 EHRR1 and Air Canada v United Kingdom (1995) 20 EHRR 150 in addition to a series of Italian cases involving measures taken to deal with organised crime. On the other hand these cases did not involve any requirement to establish breaches of the criminal law and, indeed, in Butler the government stressed that "no offence" was charged against the person from whom cash was seized and forfeited and that there was no offence in domestic law of intending to use money for drug trafficking or that a third party would use it for that purpose on behalf of another person. In Arcuri v Italy (No. 54024/99) the court reiterated that, according to the case-law of the Convention institutions, the preventative measures prescribed by the Italian acts of 1956, 1965 and 1982, which did not involve a finding of guilt but were designed to prevent the commission of offences were not comparable to criminal sanctions and that, accordingly, proceedings under those provisions did not involve "the determination…of a criminal charge". It is to be noted that, unlike the POCA, provided adequate circumstantial evidence is forthcoming, the Italian legislation appears to place an onus on the individual to prove that assets had been lawfully obtained. In a series of decisions both the Commission and the Strasbourg Court have recognised the danger posed to society by organised crime, the apparent inadequacy of criminal prosecutions alone and the utility of confiscation/ forfeiture of property- see, for example, M v Italy 70 DR 59 (1991); Raimondo v Italy (1994) 18 EHRR 237; Arcuri v Italy (No 54024/99). It is clear that Parliament intended the civil recovery procedure implemented by Part 5 of the POCA to fulfil a similar role in the public interest in support of the struggle against organised crime, paramilitary and otherwise, which currently holds in thrall many sections of the community in this jurisdiction.

[18] It seems to me that, in substance, proceedings by way of a civil recovery action under the provisions of Part 5 of the POCA differ significantly from the situation of a person "charged with a

criminal offence" within the meaning of Article 6. Mr McCollum QC reminded the Court of the fact that, in the circumstances of this particular case the person from whom the Agency seeks to recover property is the same as the person said to have engaged in unlawful conduct. That is certainly true but what seems to me to be of greater importance is the fact that there is no arrest nor is there any formal charge, conviction, penalty or criminal record, the serious personal consequences of involvement in criminal proceedings in respect of which the Convention provides the enhanced protection of Article 6 (2) and (3). The proceedings are not initiated as a result of the activity of the police nor or they conducted by the Department of Public Prosecutions. While the Director must exercise his or her functions in a way that he or she considers is best calculated to contribute to the reduction of crime the statute specifically provides that, in general, the reduction of crime is best secured by means of criminal investigations and criminal proceedings. The functions of the Agency are directed against property rather than individuals and in most cases an important proof on behalf of the Agency will involve establishing the absence of any legitimate source of capital or income on the part of the respondent, which might account for the acquisition or accumulation of the property sought to be recovered. It is important to bear in mind that it is not essential for the agency to establish the precise form of unlawful conduct as a result of which the property in question was acquired and the court may be asked to draw appropriate inferences from the unlawful conduct established by the agency combined with the proved absence of legitimate capital and income. On the other hand, the agency may be able to establish unlawful conduct but fail to recover the property in question if the evidence proves that it was probably acquired by the employment of legitimate funds or if the rightful owner secures an appropriate declaration in accordance with section 281 or any of the specified exemptions apply under section 282. In such circumstances the Agency has no interest in nor is it entitled to proceed any further against the person proved to have engaged in unlawful conduct for the purpose of securing a conviction or imposing a penalty in respect of such conduct.

[19] The application of the second Engel criterion requires an objective consideration of the procedure for the purposes of the Convention and it seems to me that in carrying out such an exercise the absence of a penalty is of fundamental importance – see Lord Bingham LCJ in B v Avon and Somerset Constabulary [2001] 1WLR 340 at page 353 paragraph [28]; Lord Woolf LCJ in R (McCann) v Manchester Crown Court [2001] 1WLR 358 at page 367 paragraph [31] and the Lord President (Lord Rodger of Earlsferry) at

paragraph [22] of his judgement in S v Millar [2001] SC 977. The purpose of civil recovery proceedings under Part 5 of the POCA is to recover property which the agency establishes was obtained through unlawful conduct but, apart from recovery of that property, the agency does not seek nor has the court power to impose any penalty or punishment for such unlawful conduct. Applying the second criterion I have reached the view that the essential focus of the statutory scheme is recovery of property and not the conviction and punishment of individuals for breaches of the criminal law. The purpose of the legislation is essentially preventative in that it seeks to reduce crime by removing from circulation property which can be shown to have been obtained by unlawful conduct thereby diminishing the productive efficiency of such conduct and rendering less attractive the "untouchable" image of those who have resorted to it for the purpose of accumulating wealth and status.

The severity of any possible Penalty

[20] As I have already noted, it seems to me that the purpose and function of the civil recovery procedure is to recover property obtained through unlawful conduct but not to penalise or punish any person who is proved to have engaged in such conduct. In R v H Lord Bingham observed at page 507 paragraph [19]:

"But the fact that the procedure cannot culminate in any penalty is not neutral. The House was referred to no case in which the European Court has held a proceeding to be criminal even though an adverse outcome for the defendant cannot result in any penalty. It is, indeed difficult if not impossible to conceive of a criminal proceeding which cannot in any circumstances culminate in the imposition of any penalty, since it is the purpose of the criminal law to proscribe, and by punishing to deter, conduct regarded as sufficiently damaging to the interests of society to merit the imposition of penal sanctions."

[21] In the circumstances, I have come to the conclusion that civil recovery proceedings within the meaning of Part 5 of the POCA should be classified as civil rather than criminal. It will be appreciated that such a classification will not in any respect detract from the ability of a respondent in such proceedings to rely upon the full range of rights and privileges available at common law and by virtue of Article 6(1) of the Convention. In this context I bear in mind the words of Lord Bingham in Her Majesty's Advocate v

McIntosh [2001] 3 W.L.R. 107 who, when referring to confiscation orders, said at paragraph [28]:

"In concluding, as I do, that Article 6{2} has no application to the prosecutor's application for a confiscation order, I would stress that the result is not to leave the respondent unprotected. He is entitled to all the protection afforded to him by Article 6(1), which applies at all stages, the common law……. and the language of the statute… In making a confiscation order the court must act with scrupulous fairness in making its assessment to ensure that neither the accused nor any third person suffers any injustice."