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*Judgment: approved by the Court for handing down* | *Delivered:* **26/08/05**
*(subject to editorial corrections)*

**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 PATRICK DAVID BELTON AND THE PROCEEDS OF CRIME ACT 2002**

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**BETWEEN:**

**THE DIRECTOR OF THE ASSETS RECOVERY AGENCY**

**Plaintiff;**

**-and-**

**PATRICK DAVID BELTON**

**Defendant.**

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**COGHLIN J**

[1] This is an application brought on behalf of the defendant, Patrick David Belton, for an order pursuant to Order 26 rule 3(2) of the Rules of the Supreme Court (Northern Ireland) 1980 compelling the plaintiff, the Director of the Assets Recovery Agency, to withdraw interrogatories served upon the defendant dated 21 April 2005 and 20 May 2005. The defendant does not contend that the questions contained in either set of interrogatories are irrelevant or unnecessary for the purpose of the just determination of the issues in this litigation but relies upon his privilege to refuse to answer interrogatories on the ground that to do so may expose him to proceedings for the recovery of a penalty. At the commencement of the hearing I granted the defendant's application to extend the period for service and gave leave to amend the summons to include reference to the second set of interrogatories.

[2] The plaintiff was represented by Mr Stephens QC and Mr McMillan, while Mr O'Rourke appeared on behalf of the defendant and moving party. I am indebted to both sets of counsel for their industry and the assistance that I derived both from their oral submissions and their skeleton arguments.

[3] This application relates to proceedings brought by the plaintiff in accordance with the provisions of the Proceeds of Crime Act 2002 ("PoCA"). On 15 June 2004 the Director of the Assets Recovery Agency ("the Agency") issued an originating summons pursuant to the provisions of Section 243 of PoCA seeking a recovery order in respect of property identified therein. For the purposes of this application the defendant accepted that, as a consequence of the decision of the Court of Appeal in Northern Ireland in Walsh v The Director of the Assets Recovery Agency [2005] NICA 6, such proceedings are to be regarded as civil rather than criminal in nature. However, Mr O'Rourke drew my attention to paragraphs [36] to [39] of that judgment as confirmation of his submission that the Court of Appeal had not expressed any final view as to whether recovery of assets in accordance with PoCA should be regarded as penal within the autonomous meaning of that term.

[4] Section 10(1) of the Civil Evidence Act (Northern Ireland) 1971 provides as follows:

> " Privilege
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> 10.-(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings …. for the recovery of a penalty –
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> (*a*) shall apply only as regards …. penalties provided for by the law [of any part of the United Kingdom.]"

[5] In Martin v Treacher (1886) 16 QB 507 Lord Esher MR observed that the mere fact that to answer might lay a person interrogated open to a criminal charge or to an action for penalties was not in itself, in most cases, a sufficient reason why the interrogatory should be disallowed and that, as a general rule, the party interrogated should take the objection upon oath in his answer. However, that case concerned an action by a common informer for penalties and, at page 511 Lord Esher MR said of such an action:

> "…. Although the penalty is not in strict law a criminal penalty, yet the action is in the nature of a criminal charge against the defendant: it is obvious in such a case that the action is of a fishing character, the

> plaintiff first bringing his action and then seeking to obtain the necessary materials to support it by interrogating the defendant: and, the object of the action being to subject the defendant to a penalty in the nature of a criminal penalty, it would be monstrous that the plaintiff should be allowed to bring such an action on speculation, and then, admitting that he had not evidence to support, to ask the defendant to supply such evidence out of his own mouth and so to criminate himself."

In such circumstances, he felt that, as a general rule, a common informer could not be permitted to administer interrogatories in an action for penalties in order to enable himself to maintain such an action.

[6] In Mexborough v Whitwood [1897] 2 QB 111 Lord Esher MR confirmed this view saying, at pages 114/115:

> "I think that there are two rules of law which have always existed as part of the common law of England, and have been recognised as such by all courts whether of law or equity, and the rights conferred by them have never been taken away by any statute. The first is that, where a common informer sues for a penalty, the courts will not assist him by their procedure in any way: and I think a similar rule has been laid down and acted upon from the earliest times, in respect of actions brought to enforce a forfeiture of an estate and land. These are no doubt rules of procedure, but they are much more than that: they are rules made for the protection of people in respect of their property, and against common informers."

[7] The action for a penalty or forfeiture by common informer was abolished by the Common Informers Act 1951 and a more recent example of the privilege from disclosure in relation to claims for penalties may be seen in Colne Valley Water Company v Watford and St Albion's Gas Company [1948] 1 KB 500. In that case a water company sued a gas company for damages for wrongful pollution as well as claiming an injunction and seeking to recovery penalties. The penalties for pollution were imposed under Sections 62 and 63 of the Water Works Clauses Act 1847 and Sections 21 and 23 of the Gas Works Clauses Act 1847. Both Lord Goddard CJ and Tucker LJ were satisfied that the sums involved constituted true penalties and not merely compensation and that, accordingly, the defendant would have a clear objection to discovery and inspection of documents. The court held that, in

that particular case, it would be impossible to frame an order limited to those issues in the action which were not concerned with the claim for penalties, namely, damages and/or an injunction, and, accordingly, refused to order the defendant to furnish an affidavit of documents.

[8] Article 250A of the Companies (Northern Ireland) Order 1990 imposes civil penalties upon companies for failing to deliver accounts and reports within the specified periods. The amount of such penalties is determined by reference to the length of the period between the end of the period allowed for laying and delivering accounts and reports and the day on which the requirements are complied with and whether the company is a private or public company. In Rio Tinto Zinc Corporation v Westinghouse Electrical Corporation [1978] AC 547 the House of Lords held that certain companies were entitled to maintain an objection to discovery of documents upon the ground that to do so would tend to expose them to fines imposed by the Commission of the European Communities under Article 15 of Regulation 17 of 6 February 1962 for intentionally or negligently acting in breach of Article 85 of the Treaty of Rome. At that time that Article prohibited cartels the object or effect of which was the prevention, restriction or distortion of competition within the common market. The Article was directly applicable in the Member States and formed part of the law of England and could be enforced by proceedings for recovery of a penalty under the European Communities (Enforcement of Community Judgments) Order 1972.

[9] Finally, I note that the 16th Report of the Law Reform Committee in 1967 (Command 3472), which ultimately produced section 14 of the Civil Evidence 1968 Act in England and its equivalent in Northern Ireland, section 12 of the Civil Evidence Act 1971, recorded that actions for penalties were obsolete except in Revenue cases but recommended that, as long as penalties were recoverable in some civil proceedings, the existing privilege should continue to apply.

[10] The absolute privilege against self incrimination, including liability to penalties, has formed part of the domestic law of evidence recognised by the common law for centuries. The Oxford English Dictionary defines a "penalty" as:

> "A punishment imposed for breach of law, rule or contract; a loss, disability or disadvantage of some kind, either fixed by law for some offence, or agreed upon in cases of violation of a contract;"

Such a definition would appear to be consistent with the relatively restricted areas in which statutory civil penalties are likely to be recovered today including, for example, Revenue offences, contraventions of the reporting requirement of the Companies Order and penalties imposed by a relatively

small number of other statutes. Almost without exception such penalties tend to be in the nature of fines, fixed according to a statutory or other scale, recoverable from a specific person or body upon proof of specific act/acts or omission/omissions irrespective of any right to recovery of damages or forfeiture of property. In my opinion such a concept has nothing in common with proceedings taken by the plaintiff in accordance with Section 243 of PoCA which are predominantly *in rem*, essentially preventative in character and designed to recover the proceeds of crime.

[11] In the course of giving judgment in the Court of Appeal Kerr LCJ confirmed at paragraph [36] that the term 'penalty' involved in autonomous Convention concept and referred to a number of authorities in support of that proposition. In the course of his submissions before this court Mr O'Rourke relied upon those authorities and, while he conceded that they were concerned with confiscation orders, he argued that once the relevant threshold was crossed, in the case of confiscation proceedings, a criminal conviction, and, in the case of recovery proceedings pursuant to PoCA, property was proved to have been obtained as a result of unlawful conduct, there was no relevant difference between the two procedures.

[12] In Welch v United Kingdom (1995) 20 EHRR 247 the European Court of Human Rights ('ECHR') considered the case of an applicant who had been convicted of drug offences committed in 1986 and who had received a sentence of imprisonment. The trial judge imposed a confiscation order pursuant to the Drug Trafficking Offences Act 1986 the operative provisions of which had come into force on 12 January 1987. The applicant complained that the confiscation order constituted a retrospective criminal penalty contrary to Article 7 of the Convention. At paragraph 27 of the judgment the Court confirmed that the concept of a 'penalty' was like the notions of 'civil rights and obligations' and 'criminal charge' an autonomous Convention concept. In such circumstances, in order to render the protection offered by Article 7 effective, the court confirmed that it remained free to go behind appearances and assess for itself whether a particular measure amounted in substance to a 'penalty' within the meaning of the provision. The court then proceeded to make the following observations:

> "The wording of Article 7(1), second sentence, indicates that the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for 'a criminal offence'. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity."

The court noted that confiscation orders had been characterised in some UK court decisions as constituting 'penalties' and, in others, as pursuing the aim of reparation as opposed to punishment. It did not consider such decisions to be of much assistance since they had not been directed at the point at issue under Article 7 but rather made in the course of examination of associated questions of domestic law and procedure. Ultimately the court identified several aspects of the making of a confiscation order under the 1986 Act as being in keeping with the idea of a penalty as commonly understood and these were:

(*i*) The sweeping statutory assumptions in Section 2(3) of the 1986 Act that all property passing through the offender's hands over a six year period was the fruit of drug trafficking unless the offender could prove otherwise;

(*ii*) The fact that the confiscation order was directed to the proceeds involved in drug dealing and was not limited to actual enrichment or profit;

(*iii*) The fact that, in fixing the amount of the order, the trial judge had discretion to take into consideration the degree of culpability of the accused;

(*iv*) The possibility of imprisonment in default of payment by the offender.

[13] The approach of the ECHR in Welch v United Kingdom was followed by the Court of Appeal in R v Benjafield and R v Rezvi [2001] 3 WLR 75 cases which both involved the imposition of confiscation orders, the former subsequent to a conviction for conspiracy to supply drugs and the latter subsequent to convictions for dishonesty. In McIntosh v Lord Advocate [2001] 3 WLR 107 the Privy Council characterised a confiscation order in the following terms:

"….a financial penalty (with a custodial penalty in default of payment) but it is a penalty imposed for the offence of which he has been convicted and involves no accusation of any other offence"

and this was accepted as an accurate description of the confiscation procedure by Lord Steyn in the House of Lords in R v Rezvi [2003] 1 AC 1099 at [10].

[14] After carefully considering the detailed and helpful submissions put forward by Mr O'Rourke, I do not consider that the confiscation proceedings in the cases to which he referred provide a very helpful analogy. In my view the threshold or gateway by which it is triggered is of importance in determining whether a measure is in substance a penalty. The ECHR emphasised in Welch v United Kingdom the fact that the imposition of a confiscation order is dependent upon there having been a criminal conviction

and, indeed, in several cases such orders have been recognised as constituting part of the sentencing process- see, for example the judgement of Lord Steyn in R v Rezvi. In M v Italy Application Number 12386/86 17 DR 59 the Commission recognised that confiscation was not confined to the sphere of the criminal law but held that forfeiture of property obtained by unlawful conduct as a preventative measure in the absence of a conviction of any specific offence did not constitute a penalty. The distinction may be illustrated by comparing Phillips v United Kingdom (2001) 11BHRC 280 EctHR with Butler v United Kingdom 41661/98 (27 June 2002 unreported) EctHR In this jurisdiction the Court of Appeal has confirmed that proceedings pursuant to Section 243 of PoCA are civil rather than criminal in character. Other aspects identified in Welch v United Kingdom as being in keeping with the autonomous concept of a penalty are clearly absent. In the course of recovery proceedings the court must make an order in respect of property that is established on the balance of probabilities to have been acquired as a result of unlawful conduct. No discretion exists to take into account the degree of culpability of any person proved to have committed such conduct. In addition, recovery is limited to property obtained as a result of unlawful conduct and cannot include property acquired through legitimate activities. The proceedings are *in rem* aimed at the identification and recovery of property obtained as a result of unlawful conduct and, consequently, to which the defendant can have no legitimate claim. The Agency cannot charge, try or convict the defendant of any offence and, unlike confiscation orders, there are no other indications of a punishment regime.

[15] In the circumstance, I do not consider that recovery proceedings in accordance with Section 243 of PoCA constitute a penalty either in domestic law or in terms of the autonomous Strasburg concept and, accordingly, I propose to dismiss the defendant's summons.