

**Neutral Citation no. [2006] NIQB 73**

**Ref: WEA5664**

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

**Delivered: 23/10/2006**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**BETWEEN:**

**THE DIRECTOR OF THE PUBLIC PROSECUTION SERVICE**

**Plaintiff;**

**-and-**

**LIAM SEAN O'RAWE**

**Defendant;**

**-and-**

**SHEENA O'RAWE**

**Notice Party.**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**FAMILY DIVISION**

**BETWEEN:**

**SHEENA O'RAWE**

**Petitioner;**

**-and-**

**LIAM SEAN O'RAWE**

**Respondent.**

## **WEATHERUP J**

### **Conjoined Applications**

[1] Two applications have been heard together. The first application by the Director of the Public Prosecution Service is for a Charging Order under Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996 in respect of 39 Downfine Park, Belfast in the sum of £20,466 payable by the defendant Liam Sean O'Rawe under a Confiscation Order made by Belfast Crown Court. The second application by Sheena O'Rawe, wife of the defendant, is for a property adjustment order under Article 26 of the Matrimonial Causes (Northern Ireland) Order 1978 transferring the whole of the defendant's interest in the former matrimonial home at 39 Downfine Park, Belfast to the wife and children of the family. Mr A J S Maxwell BL appeared for the Director of the Public Prosecution Service, Ms Gibson QC appeared for the defendant and Mr McCollum QC appeared for the wife.

### **Confiscation Proceedings**

[2] On 23 July 2002 the defendant was convicted on two counts of theft and one count of money laundering arising out of his employment with Ulster Bank Limited. On 16 December 2003 a Confiscation Order was made in the sum of £237,252.94 under Article 8 of the Proceeds of Crime (Northern Ireland) Order 1996. The Court took into account that the defendant was entitled to a 50% share in the equity of the property at 39 Downfine Park, Belfast, which property was valued at £80,932 with an outstanding mortgage of £40,000. Thus the defendant's half share of the equity was valued at £20,466. That sum has not been discharged by the defendant.

### **Matrimonial Proceedings**

[3] The defendant and his wife were married on 4 May 1985 and have four children, the eldest of whom is over 18 and the others are now 16, 9 and 6. The matrimonial home was purchased in 1991. In 2002 the mortgagee was the Ulster Bank Limited where the defendant was employed. When the defendant's offences came to light it became necessary to obtain an alternative mortgage. The alternative mortgagee would not offer a mortgage in the joint names of the defendant and his wife and the property was transferred into the sole name of the wife and a new mortgage obtained by the wife. The defendant and his wife separated in February 2004. The wife was granted a decree of Judicial Separation on 3 December 2004 on the ground of the defendant's unreasonable behaviour. The wife's application for ancillary relief arises out of those proceedings.

## Proceeds of Crime (Northern Ireland) Order 1996

[4] Article 32 of the Proceeds of Crime (NI) Order 1996 provides that a Charging Order in respect of land may be made by the High Court for securing the payment to the Crown of an amount not exceeding the amount payable under a Confiscation Order.

- Article 32(3)(a) provides that a charge may be imposed by a charging order only on -

“any interest in realisable property, which is an interest held beneficially by the defendant or by a person to whom the defendant has directly or indirectly made a gift caught by this Order ....”

- Article 7(1)(a) specifies, in relation to the offences with which the defendant was charged, those “gifts caught by the Order”, namely -

(i) it was made by the defendant at any time after the commission of the offence or, if more than one, the earliest of the offences to which the proceedings for the time being relate; and

(ii) the court consider it appropriate in all the circumstances to take the gift into account.”

- Article 36 applies to the exercise of powers by the High Court under Article 32 so that -

“(3) In the case of realisable property held by a person to whom the defendant has directly or indirectly made a gift caught by this Order the power shall be exercised with a view to realising no more than the value for the time being of the gift.

(4) The power shall be exercised with a view to allowing any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him.”

[5] Under Article 32(3)(a) a charging order may be made on the interest represented by what was described as the defendant’s half share in the equity in the former matrimonial home which is either held beneficially by the

defendant or is held by the wife further to the gift from the defendant. A question arose in the present applications as to whether the defendant having transferred his legal interest in the property to the wife retained a beneficial interest in the property. The wife denied that the defendant had any beneficial interest. Before the transfer of the defendant's half share in the matrimonial home in 2002 the legal interest was owned jointly by the defendant and his wife. The defendant transferred his interest to his wife and between husband and wife there is a presumption of advancement so the share was not held on resulting trust for the defendant but was a gift to the wife. When Belfast Crown Court made the Confiscation Order it is not apparent that the Court was aware that the defendant's interest in the property had been transferred to the wife. However for the purposes of Article 32(3)(a) I am satisfied that an interest in the property representing the defendant's half share of the equity is either held beneficially by the defendant or is held by the wife to whom the defendant has made a gift.

[6] To the extent that the interest is a gift made to the wife it is necessary to establish whether the gift is caught by the 1996 Order under Article 7(1)(a). The gift was made by the defendant at a time after the commission of the offences and thus satisfies Article 7(1)(a)(i). As to whether the Court considers it appropriate in all the circumstances to take the gift into account for the purposes of Article 7(1)(a)(ii) it is considered that the gift should be taken into account because the interest in question was taken into account by Belfast Crown Court in certifying the amount that might be realised at the time the Confiscation Order was made. Accordingly the gift to the wife is a gift caught by the 1996 Order.

[7] Next, under Article 36(4) it is the intention that a person may retain the value of any property they hold except for the defendant or the recipient of a gift caught by the Order. Accordingly the powers in relation to Charging Orders are not exercised with a view to allowing the wife as recipient of the gift to retain the property. Leaving aside the issues arising from the existence of matrimonial proceedings between the defendant and his wife, the interest in the former matrimonial home representing what was described as the defendant's half share in the equity may be liable to a Charging Order in favour of the Crown.

#### **Matrimonial Causes (Northern Ireland) Order 1978.**

[8] Article 26 of the Matrimonial Causes (NI) Order 1978 provides that upon a decree of judicial separation the Court may make an order that a party to the marriage shall transfer to the other party or any child of the family such property as may be specified, being property to which the first mentioned party is entitled either in possession or reversion (Article 26(1)(a)). In considering whether to exercise the power to make such an order Article 27 requires the Court to have regard to all the circumstances of the case, the first

consideration being the welfare of children under eighteen (Article 27(1)). Further the Court is required to have particular regard to financial resources, financial needs, standard of living, the ages of the parties, duration of the marriage, contributions of the parties and whether it would be inequitable to disregard the conduct of the parties (Article 28(2)). Leaving aside the issues arising from the existence of the Confiscation Order against the defendant, any interest of the defendant in the former matrimonial home may be liable to a property adjustment order against the defendant.

### **Conflict between Confiscation proceedings and Matrimonial proceedings**

[9] Thus there arises a conflict between the interests of the Director of the Public Prosecution Service, the defendant and the wife. The clash between the equivalent proceeds of crime legislation and matrimonial legislation in England and Wales was considered by the Court of Appeal in Customs and Excise Commissioners v A and Another (A v A) (2003) 2 All ER 736. The husband and wife lived in a jointly owned matrimonial home. They separated and the wife filed a petition for divorce and claimed ancillary relief. The husband was convicted of drug trafficking and a Confiscation Order was made against him. The Customs and Excise Commissioners applied for the matrimonial home to be included in the realisable property. The Commissioners application against the husband was heard together with the wife's ancillary relief proceedings. The question arose as to whether the Court was precluded from making a property adjustment order transferring the husband's interest in the house to the wife when that property was also the subject of proceedings to enforce the Confiscation Order. It was held by the Court of Appeal that the jurisdiction of the Court to make a property adjustment order was not ousted when the property which was the subject matter of the application was also the subject of an application to enforce a Confiscation Order.

[10] On the issue of the priority between the matrimonial legislation (the 1973 Act) and the confiscation legislation (the 1994 Act) Schiemann LJ stated -

“[43] In my judgment, there is nothing in the provisions of either the 1973 Act or the 1994 Act which requires the court to hold that either statute takes priority over the other when the provisions of each are invoked in relation to the same property. Both statutes confer discretion on the court, which the court may or may not choose to exercise, to make orders. The terms of those orders will depend on the facts of the individual case. Each statute gives the court mandatory guidance as to how the powers are to be exercised. Section 25 of the 1973 Act requires the court to take into account all the circumstances of the

case and, in particular, the various factors set out in s 25(2) when deciding whether, and if so in what manner, to exercise its powers under ss 23 and 24. Section 31 of the 1994 Act provides mandatory criteria for the exercise of the discretionary powers given by ss 26–31.

[44] Equally, it does not seem to me to be axiomatic that it is more in the public interest to enforce an order under s 31 of the 1994 Act than to make a property adjustment order under s 24 of the 1973 Act. If the former has the effect of forcing a spouse to sell her home and become dependent on the state for housing and financial support in order to meet a confiscation order in relation to property which was not acquired by the profits of crimes; if the wife has made a substantial financial or other contribution to the acquisition of that property; if the crime involved is one of which she was ignorant and by which she is untainted, it seems to me that the public policy argument may well go the other way. Each case must depend on its facts.”

[11] Having established that neither statute takes priority the Court of Appeal considered the interaction of the two legislative schemes by reference to a number of propositions that have been set out by Munby J at first instance. I set out the last three of those propositions (deleting the first sentence of paragraph (v) which Schiemann LJ at paragraph 55 stated was unnecessary to support the remainder of that particular conclusion which could stand on its own.

“(v) .....The wife's claim to relief must be evaluated having regard to the provisions of s 25 of the 1973 Act. Conflicting claims of the wife and the prosecutor are to be considered having regard to the principles contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The court must have regard to the possible penal consequences for the defendant if because of the court's order he is unable to pay the amount to be confiscated.

(vi) The court must exercise its powers, whether under the 1994 Act or the 1996 Act, in a way which is compatible with the convention and having regard to a number of potentially conflicting rights and

interests: the wife's right to respect for her private life and her home under art 8 (art 1 of the Protocol adds nothing to the protections already afforded to her under domestic law); the husband's right to liberty under art 5 and his right under art 1 of the Protocol (recognised by art 8(2)) to use his assets to discharge his liabilities; and the interests of the prosecutor, representing the public's interest (also recognised by art 8(2)) in the prevention of crime, the protection of health and the protection of the rights and freedoms of potential victims of drug traffickers.

(vii) The court has to strike a proper balance between the competing interests of the prosecutor, the husband and the wife. The conflict has to be resolved according to the general convention principles of necessity and proportionality, balancing the competing rights and interests in a manner which is consistent with the true intention of the convention taken as a whole."

### **The effect of the transfer of the defendant's interest**

[12] A v A did not involve a gift by the defendant husband to his wife. It is contended on behalf of the Director that the effect of Article 36(4) of the 1996 Order (the power to make a charging order shall be exercised with a view to allowing any person other than the defendant or the recipient of a gift to retain or recover the value of any property held) is to preclude any balancing exercise in favour of the wife as the recipient of a gift. However that provision in the proceeds of crime legislation does not take priority over the provisions of the matrimonial legislation. The making of a Charging Order is a matter of discretion under Article 32 of the 1996 Order and the court is not obliged to impose a charge by a Charging Order on property held by a person to whom the defendant has made a gift. I repeat the words of Scheimann LJ set out above at paragraph 43 of A v A, "Both statutes confer discretion on the court, which the court may or may not choose to exercise, to make orders. The terms of those orders will depend on the facts of the individual case." I accept the contention made on behalf of the wife that a balancing exercise must be conducted taking account of the statutory considerations and the broader considerations referred to in A v A, as well as the fact of the transfer to the wife and the circumstances related to and arising from the transfer.

### **The discretion as to the order to be made**

[13] The wife is innocent of any involvement in the defendant's criminal activity. The proceeds of the defendant's criminal activity were not used to purchase the property. The mortgage payments on the property were discharged from the defendant's salary and not the proceeds of his criminal activity. The transfer of the mortgage and of the title to the property were forced on the family by the existing mortgagee, as the employer of the defendant, and by the new mortgagee, each of whom would not accept the defendant's involvement in the property or the mortgage because of his criminal activity. The wife worked during the marriage and was the main carer of the children. She is not in employment and is now a single parent carer for four children, three of whom are under 18 years old. The wife and the children live in reduced financial circumstances. The defendant's future financial position and prospective contributions to the family finances are limited. The enforcement of an order charging land will displace the wife and children from their home and probably require dependence on public housing. The refusal of an order charging land will require the Director of the Public Prosecution Service to recover the balance due on the Confiscation Order from the defendant, who in default of payment will be liable to imprisonment. In my opinion it would be unjust to place the added burden on the wife and the children that would arise from the making of a Charging Order on the property.

### **Conclusion**

[14] I refuse the application for an order charging land in respect of 39 Downfine Park, Belfast. I make an order transferring to the wife all of the defendant's interest in the property.