

Neutral Citation no. [2006] NIQB 43

Ref: **WEAF5592**

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

Delivered: **19/06/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**AN APPLICATION BY JOHN KENNETH DORAN AND SAMUEL
WILLIAM SELWYN DORAN (No. 2)**

-and-

**IN THE MATTER OF THE PROCEEDS OF CRIME
(NORTHERN IRELAND) ORDER 1996**

WEATHERUP J

[1] On 7 December 2001 Restraint Orders were made against John Kenneth Doran and Samuel William Selwyn Doran (the defendants) under Article 31 of the Proceeds of Crime (Northern Ireland) Order 1996. By the Orders a Receiver was appointed and it was provided that the Receiver was to act in accordance with a letter of agreement dated 6 December 2001 and was to have the powers set out in the letter of agreement, as well as any existing powers vested by statute or otherwise. The defendants were acquitted on the 20 June 2005 and the Restraint Orders were discharged on the 23 June 2005. The Receiver reported that the restrained assets, as at 23 June 2005, amounted to £1,029,773, and the Receiver's costs and expenses amounted to some £185,000, which sum was retained by the Receiver. The defendants now apply for payment by the Receiver of the sum of £185,000 to the defendants and for an order that the Receiver's costs and expenses be paid by the Director of the Public Prosecution Service. It should be noted that the issue concerns the remuneration of the Receiver and not litigation costs in connection with the receivership. Mr J Aiken appeared for the first defendant, the second defendant appeared in person and Mr G Simpson QC and Mr AJS Maxwell appeared for the Director of the Public Prosecution Service.

[2] The letter of 6 December 2001, which was incorporated into the Restraint Orders, was a letter to the Receiver from the Department of the Director of Public Prosecutions (now the Public Prosecution Service) and provided at paragraph 5 under the heading "Your Powers" that -

"The Director will be making application for you to be given, inter alia, the under mentioned powers -

(c) power to discharge all and any other costs, charges and expenses of the Receivership out of the assets and/or the proceeds of realisation thereof."

The letter further provided at paragraph 6 under the heading "Remuneration"-

"It is proposed to seek an Order from the Court that your costs in this matter should be costs in the Receivership; that is to say that your costs shall be paid out of the assets you deal with during the course of this Receivership. If the Court declines to make such an Order, or if you are unable to bring sufficient assets to meet your costs, they will be met by the Director".

[3] The Director did not seek an order from the Court that the Receiver's costs should be costs in the receivership as stated in paragraph 6 of the letter.

[4] In Re Andrews (1999) 1 WLR 1236 a defendant and his son had been charged with offences under the Criminal Justice Act 1988 and Restraint Orders had been obtained against both and a Receiver appointed. The son was convicted and the defendant was acquitted and awarded his costs out of central funds. The Restraint Order was discharged but the Receiver retained the expenses of the receivership out of the defendant's assets. The defendant's application for an order that the Prosecution pay the Receiver's remuneration was dismissed. A letter of agreement between Prosecution and Receiver included the same provisions as to powers and remuneration as set out above in relation to the present case. There had been no Order obtained to provide that the Receiver's costs should be costs in the receivership as the agreement letter had stated. Ward LJ set out a number of principles from page 1242E and I summarise as follows -

1. When a Court appoints a Receiver or Manager the Receiver/Manager is an officer of the court, not the agent of either party in the proceedings - citing Gardner v London Chatham and Dover Railway (No.1) [1867] LR 2 Ch.App. 201.

2. Receivers/Managers must look for their indemnity to the assets that are under the control of the Court – it would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by Receivers/Managers over which they had no control – citing Bohem v Goodall [1911] 1 Ch 155.

3. The court has no power, before the issues in an action have been determined, to make any interim order requiring one of the parties to pay the remuneration or expenses of the Receiver/Manager and accordingly the Receiver/Manager is entitled to recover his remuneration and expenses only from such funds as are under the control of the Court pursuant to the receivership – citing Evans v Clayhope Properties Ltd [1988] 1 WLR 358.

4. The Receiver's lien over the assets gives him a continuing right to possession even after the discharge of the receivership order and accordingly he is entitled to an Order charging all the assets available to him during the currency of his receivership with the amount of his costs and remuneration – citing Mellor v Mellor [1992] 1 WLR 517.

[5] To the above might be added the following matters arising out of Re Andrews.

5. The agreement between the Receiver and the Prosecutor that the Prosecutor would indemnify the Receiver if unable to bring in sufficient assets to meet the remuneration did no more than replicate the statutory position under sections 81 and 88 of the 1988 Act (which in Northern Ireland are to be found in Articles 35 and 40 of the 1996 Order) – page 1243G-H.

6. The remuneration and expenses incurred by the Receiver could not be treated as part of the costs of the proceedings in which the Receiver was appointed and accordingly were not in the general discretion of the Court as to costs.

[6] The argument for the Defendant on point 6 above relied on the statutory discretion under section 51 of the Supreme Court Act 1981 (as section 59 of the Judicature (Northern Ireland) Act 1978) that “the costs of and incidental to all proceedings” in the High Court shall be in the discretion of the Court. Order 62 Rule 1(4) (as Order 62 Rule 1(4) in Northern Ireland) states that references to “costs” should be construed as including references to expenses and remuneration. The argument for the Prosecutor was that it was not Order 62 but Order 30 that dealt with Receivers costs (as Order 30 in Northern Ireland), and that Order 30 represented a distinct and separate regime, with the result that the costs of the receivership are not costs “of and incidental to [High Court]

proceedings” but are management costs requiring independent treatment. Ward LJ accepted the Prosecutor’s argument (at page 1246H) –

“I am, with unfeigned reluctance, compelled to conclude that, even if the expenses of the receivership are within the definition of costs, they are not costs “of and incidental to [the] proceedings”. They must lie where they fall”.

[7] Hughes v Customs & Excise Commissioners [2002] 4 All ER 633 adds the following to the 6 propositions set out above.

7. Receivers appointed under the statutory schemes in relation to the proceeds of crime are, subject to the provisions of the statutes, to be treated in the same manner as Receivers appointed at common law and are to recover their remuneration out of the assets in the receivership – paragraph [50].

8. The use of the assets of an unconvicted or acquitted Defendant to pay the remuneration of the Receiver is not a breach of the Defendant’s right to property under Article 1 of the First Protocol of the European Convention on Human Rights – paragraphs [56] and [57].

[8] Hughes concerned Receivers appointed by the Court pursuant to the restraint and receivership provisions in the Criminal Justice Act 1988 and the Drug Trafficking Act 1994. The Defendant argued that the position of a Receiver was not to be equated with that of a common-law Receiver and that the decision in Re Andrews had proceeded on the false basis that the Receiver had been entitled during the course of the receivership to deduct the expenses from the value of the estate. The Defendant sought to read sections 81 and 88 of the 1988 Act as requiring the prosecution to pay the Receiver’s remuneration unless and until a confiscation order was made. The Defendant’s argument was rejected and at paragraph [50] Simon Brown LJ stated –

“Statutory receivers to be treated precisely as their common-law counterparts save to the extent that the legislation expressly provides otherwise. The statute is not to be regarded as an entirely self contained code incorporating nothing from the common-law. The fact that, unusually (although not uniquely), the prosecutor cannot be required to give a cross undertaking in damages does not constitute so fundamental a difference between statutory and common-law receivers as to give rise to wholly discrete schemes for their remuneration”.

[9] Further, the Defendant in Hughes argued that the use of the assets of an unconvicted or acquitted Defendant was a breach of the right to property under Article 1 of the First Protocol of the European Convention. The Court also rejected this contention and at paragraphs [56] and [57] Simon Brown LJ stated –

“It is common ground that acquitted defendants are not, save in the most exceptional circumstances, entitled to compensation for being deprived of their liberty whilst on remand or indeed for any other heads of loss suffered through being prosecuted. In my judgment it is no more unfair, disproportionate or arbitrary that they should be uncompensated too for any adverse effects that restraint and receivership orders may have had upon their assets.”

“Legal costs are one thing; the losses consequent on prosecution – and any restraint and receivership proceedings ancillary to such prosecution – are another. Whilst, therefore I agree that the costs of restraint proceedings, upon an acquittal, should indeed be borne by the public rather than the acquitted defendant, I do not agree that such an approach carries across to the remuneration and expenses of any linked receivership.”

[10] The propositions set out above hold good in Northern Ireland. The position has changed in England and Wales with the introduction of Civil Procedure Rule 69.7 in December 2002 giving to the Court a discretion as to Receiver’s remuneration. Under the heading “Receiver’s remuneration” Rule 69.7(2) provides that the Court may specify –

- “(a) who is to be responsible for paying the receiver; and
- (b) the fund or property from which the receiver is to recover his remuneration.”

[11] The effect of CPR 69.7 was considered in Capewell v Commissioner for HM Customs & Excise [2005] EWCA Civ 964. Having found that a receivership should have come to an end four months earlier than the date of discharge and that there should have been no need for a claim for Receiver’s remuneration or expenses during that extra period, the Court of Appeal applied CPR 69.7(2) and ordered that the Customs should pay the Receiver’s remuneration (paragraph 23). However, it was concluded that Rule 69.7(2) dealt with “remuneration” and did not include “expenses” and the Order

provided that the Receiver's expenses during the extra four months would "fall to be met from the realisable assets in the ordinary way" (paragraph 25). In Northern Ireland Order 30 continues to apply and there is no equivalent to CPR 69.7(2).

[12] The defendants in the present case contend that the Director failed to obtain an Order that the costs of the Receiver should be costs in the receivership and accordingly the Receiver's remuneration cannot be recovered from the defendants' assets in the receivership. In the light of the propositions set out above it was not necessary for the Director to obtain an Order that the costs of the Receiver should be costs in the receivership. Further the defendants contend that by reason of the reference in the letter of 2 December 2001 to obtaining such a costs Order the defendants had a legitimate expectation that the Director and not the defendants would be responsible for the remuneration of the Receiver. However any such expectation could not be regarded as legitimate in the light of propositions set out above as to the nature of a receivership and the status of the assets of a receivership.

[13] The defendants also contend that responsibility for the Receiver's remuneration is in the discretion of the Court. Again this contention is rejected in the light of the propositions set out above. As to the further complaint that the amount claimed by the Receiver by way of remuneration is excessive, that raises a different issue. Order 30 Rule 3 provides that the Court may authorise proper remuneration for the Receiver and may direct such remuneration may be fixed by reference to such scales or rates of professional charges as the Court thinks fit. That issue will be visited after responsibility for remuneration has been determined.

[14] The defendants further contend that the retention of the Receiver's remuneration after the acquittal of the defendants represents a disproportionate interference with the defendants' right to property under Article 1 of the First Protocol. This point has been rejected by the Court of Appeal in England and Wales in Hughes v Commissioners for HM Customs and Excise as outlined above. I adopt the same approach. The earlier claim by the present defendants that the compensation provisions under the 1996 Order are inadequate and result in a statutory scheme that represents a disproportionate interference with the defendants' right to property was dismissed in John Kenneth Doran and Samuel William Selwyn Dorans Application [2004] NIQB 14.

[15] The defendants' application for an Order directing the Receiver to repay to the defendants the retained remuneration and requiring the Director to pay the Receiver's remuneration is dismissed.

