

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION**

IN THE MATTER OF PAUL ARTHUR MAYE

AND

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

MORGAN J

Introduction

[1] On 23 November 1998 an order was made under the Proceeds of Crime (Northern Ireland) Order ("the 1996 Order") restraining the applicant from disposing of his assets. Shortly thereafter the applicant and others were arrested, interviewed and charged in connection with various criminal offences alleging dishonesty. At arraignments on 8 January 2002 and 15 January 2002 the applicant pleaded guilty to various counts of obtaining property by deception. Sentencing was adjourned inter alia to enable the court to consider the making of a confiscation order.

[2] At a hearing on 26 June 2002 the court determined that the applicant had benefited from his offences in the amount of £168,833.32. The court was satisfied, however, that the amount that might be realised was less than the value of the applicant's benefit from the offences and ordered pursuant to article 15(10) of the 1996 Order that the amount to be recovered under the confiscation order should be £33,269.17.

[3] The applicant's mother and father had died intestate on 21 July 2000 and 28 September 2001 respectively. Letters of administration of the estates were taken out on 29 July 2002. The applicant was one of 13 children and he became entitled to the sum of £18,000 following the administration of the intestate estates.

[4] On 5 November 2002 the Director of Public Prosecutions in Northern Ireland ("the DPP") applied to the High Court pursuant to article 21 of the 1996 Order for a certificate that the amount that might be realised in the case of the applicant should be increased by the value of the inheritance and a certificate to that effect was duly issued on 6 August 2003.

[5] On 7 August 2003 the DPP applied to the Crown Court for an increase in the amount to be recovered under the confiscation order by virtue of article 21(4) of the 1996 Order. At the hearing before His Honour Judge Burgess it was argued by the applicant that the inheritance could not be taken into account since it was an asset acquired after the date on which the confiscation order had been made. The learned judge concluded that he had no jurisdiction to reconsider whether or not assets should be included in the certificate of realisable property since it was for the High Court to make that decision and it had so decided on 6 August 2003. I do not understand it to be in dispute that the approach of the learned Crown Court Judge on this matter was correct.

The applications

[6] By a summons issued on 27 February 2004 the applicant seeks an order setting aside the certificate issued by the High Court on 6 August 2003 or alternatively seeks leave to appeal the said order to the Court of Appeal.

[7] On 26 April 2004 the Crown Solicitor's Office wrote to the DPP advising him that the applicant had just settled an action against the Chief Constable in the sum of £2,500 and costs and by summons dated 5 May 2004 the DPP applied pursuant to article 21 of the 1996 Order for a certificate that the amount that may be realised in respect of the applicant should be increased by the said amount.

The Statutory Framework

[8] The 1996 Order provides the framework within which these applications have to be determined. Article 3 establishes the meaning of property:-

"Meaning of 'property' and related expressions

3.-(1) In this Order 'property' includes money and all other property, real or personal, heritable or movable, and including things in action and other intangible or incorporeal property.

(2) In this Order 'interest' in relation to property, includes right."

Article 5 sets out the meaning of realisable property and related terms:

“Meaning of ‘amount that might be realised’ and ‘realisable property’

5.-(1) For the purposes of this Order the amount that might be realised at the time of confiscation order is made against the defendant is –

(a) the total of the values at that time of all the realisable property held by the defendant, less

(b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations,

together with the total of the values at that time of all gifts caught by this Order.”

Article 8 deals with the making of confiscation orders:

“Confiscation orders

8.-(1) Where a defendant is convicted, in any proceedings before the Crown Court or a court of summary jurisdiction, of an offence to which this Order applies the court shall –

(a) if the prosecution asks it to proceed under this Article, or

(b) if the court considers that, even though it has not been asked to do so, it is appropriate for it so to proceed,

determine whether the defendant has benefited from any relevant criminal conduct, or as the case may be, from drug trafficking.

(2) Subject to paragraph (4) if, in the case of an offence of a relevant description, the court determines that the defendant has benefited from any relevant criminal conduct, the court shall make an order (a confiscation order) ordering the defendant to pay –

(a) the amount equal to the value of the defendant's benefit from the relevant criminal conduct; or

(b) the amount appear to the court to be the amount that might be realised at the time the order is made,

whichever is the less."

Article 13(5) is a relevant enforcement provision;

"(5) Where the defendant serves a term of imprisonment or detention in default of paying any amount due under a confiscation order, his serving that term does not prevent the confiscation order from continuing to have effect, so far as any other method of enforcement is concerned."

Article 21 provides for increases in realisable property:

"Increase in realisable property

21.-(1) This Article applies where by virtue of Article 8(2) or (3) the amount which a person is ordered to pay by a confiscation order is less than the benefit in respect of which it is made or, as the case may be, the amount assessed to be the value of his proceeds of drug trafficking.

(2) If, on an application made in accordance with paragraph (3), the High Court is satisfied that the amount that might be realised in the case of the person in question is greater than the amount taken into account in making the confiscation order (whether it was greater than was thought when the order was made or has subsequently increased), the Court shall issue a certificate to that effect, giving the Court's reasons.

(3) An application under paragraph (2) may be made either by the prosecution or by a receiver appointed under this Order in relation to the realisable property of the person in question under Article 31 or 34 or in pursuance of a charging order.

(4) Where a certificate has been issued under paragraph (2) the prosecution may apply -

(a) where the confiscation order was made by the Crown Court, to that Court; and

(b) where the confiscation order was made by a court of summary jurisdiction, to a court of summary jurisdiction for the same county court division,

for an increase in the amount to be recovered under the confiscation order.

(5) The Crown Court may, on an application under paragraph (4) -

(a) substitute for the amount to be recovered under the confiscation order such amount (not exceeding the amount of the benefit in respect of which it is made or, as the case may be, the amount assessed as the value of the proceeds of drug trafficking) as appears to the Court to be appropriate having regard to the amount now shown to be realisable; and

(b) increase the term of imprisonment or detention fixed in respect of the confiscation order under section 35(1)(c) of the 1945 c. 15 (N.I.) Criminal Justice Act (Northern Ireland) 1945 (as it has effect by virtue of Article 13) if the effect of the substitution is to increase the maximum period applicable in relation to the order under subsection (2) of that section."

Finally article 22 deals with the inadequacy of realisable property:

"Inadequacy of realisable property

22.-(1) If, on an application in respect of a confiscation order by -

(a) the defendant, or

(b) a receiver appointed under Article 31 or 34 or in pursuance of a charging order,

the High Court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order, the Court shall issue a certificate to that effect, giving the Court's reasons."

The Arguments

[9] For the applicant Mr McNulty QC, with whom Mr Hutton BL appeared, contended that the High Court in the exercise of its power under article 21 of the 1996 Order to certify an amount greater than the amount taken into account when making the confiscation order could only take into account assets which were in existence at the date on which the confiscation order was made.

[10] In support of that argument Mr McNulty traced the origin of the provision from s.16 of the Criminal Justice (International Co-Operation) Act 1990 dealing with drug trafficking. He relied upon the decision of Schiemann J in Re Barretto (unreported 30 November 1992) where the learned judge had accepted a similar submission in respect of the 1990 Act.

[11] He pointed out that the meaning of the "amount that might be realised" set out in article 5 of the 1996 Order was calculated by reference to the date of the confiscation order and he relied on statements by ministers introducing the Drug Trafficking Offences Act 1986 and the 1990 Act to establish that the mischief at which the section was aimed was met by his interpretation.

[12] He recognised, however, that these arguments had been rejected by the Court of Appeal in R v Tivnan (1998) EWCA Crim 1370. Mr. McNulty criticised the reasoning in that case and invited the court not to follow it but to prefer the approach of Schiemann J in Barretto. He further contended that the decision of the Court of Appeal had been reached per incuriam as the parliamentary materials were not fully brought to the attention of the court.

[13] For the DPP Mr Sefton BL relied on the decision in Tivnan and the reasoning of the court. He contended that it was neither necessary nor appropriate to resort to the parliamentary materials and that in any event they did not provide unequivocal guidance on the issue. He submitted that the scheme of the 1996 Order was to require a person convicted to remain liable to discharge the full amount of his ill-gotten gains no matter how long that may take and the scheme in that regard was similar to the recovery provisions of the criminal injury code which had been in existence for many years.

Conclusion

[14] This case turns upon the proper interpretation of article 21 of the 1996 Order. Statutory interpretation is an exercise which requires the court to ascertain the meaning of the words used in the context in which they are used. That context is immediately set by the language used within the statute but external aids have long been recognised as an aid to construction. The use of external aids must not, however, offend the constitutional principle of legal certainty in that the meaning of the statute should be readily understood by the citizen. Lord Nicholls set out the principles in ex parte Spath Holme (2001) 1 All ER 195 at 217g as follows:

“This constitutional consideration does not mean that when deciding whether statutory language is clear and unambiguous and not productive of absurdity, the courts are confined to looking solely at the language in question in its context within the statute. That would impose on the courts much too restrictive an approach. No legislation is enacted in a vacuum. Regard may also be had to extraneous material, such as the setting in which the legislation was enacted. This is a matter of everyday occurrence.

That said, courts should nevertheless approach the use of external aids with circumspection. Judges frequently turn to external aids for confirmation of views reached without their assistance. That is unobjectionable. But the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. Sometimes external aids may properly operate in this way. In other cases, the requirements of legal certainty might be undermined to an unacceptable extent if the court were to adopt, as the intention to be imputed to Parliament in using the words in question, the meaning suggested by an external aid. Thus, when interpreting statutory language courts have to strike a balance between conflicting considerations.”

[15] Applying these principles I turn first to the terms of article 21. The first subsection establishes that the article applies where the amount which the person is ordered to pay by a confiscation order is less than the benefit in respect of which it is made. That clearly is the case here.

[16] Article 21(2) requires the High Court to be satisfied that the amount that might be realised in the case of the person in question is greater than the amount taken into account in making the confiscation order. In the ordinary use of language such a test does not exclude an increase in the amount that might be realised because of the later acquisition of property. The words in brackets in this subsection clearly refer to the “amount that might be realised” and recognise that the available property may have been more valuable than was thought when the order was made or have subsequently increased. In any event they do not in my view assist an argument that after acquired property cannot be taken into account.

[17] Mr McNulty correctly points out that the meaning of the “amount that might be realised” is addressed in article 5 of the 1996 Order. That section merely provides, however, for the method by which the calculation is to be carried out at the date on which the confiscation order is made. The same methodology is to be used by the High Court in making its calculation under article 21.

[18] There is a potentially significant benefit for the convicted person in this approach. In a case where the realisable property was undervalued the defendant may have disposed of the value of the difference by the time that an article 21 application is made. If the applicant’s submissions are correct and the calculation under article 21 is historic the section would almost certainly require the High Court to issue a certificate increasing the recoverable amount thereby exposing the accused to the risk of imprisonment in the discretion of the Crown Court in those circumstances. Such a consequence is avoided where the calculation is carried out on the basis of the property available at the time of the application.

[19] I further consider that article 13(5) of the 1996 Order assists in setting the context within which these provisions are found. It is clear by virtue of that article that a criminal who disposes of his assets after the making of a confiscation order and thereby avoids satisfying the order in full is liable to imprisonment in default. He also remains liable to discharge the confiscation order out of any assets he subsequently acquires. It is hardly surprising, therefore, that a criminal who disposes of his assets before the making of a confiscation order similarly remains liable to satisfy the confiscation order in full out of any assets which he subsequently acquires.

[20] For these reasons which are broadly similar to those upon which the Court of Appeal relied in Tivnan I consider that article 21 of the 1996 Order requires the court to take into account property acquired after the making of the confiscation order. I do not, therefore, need to look at the parliamentary materials because I do not find the legislation ambiguous or obscure nor do I

consider that it leads to an absurdity (see Pepper v Hart (1993) 1 All ER 42 at 69d).

[21] Having examined those materials for the sake of completeness they consist of ministerial statements in 1986 and 1990 in respect of earlier statutes. The 1986 statement related solely to drug trafficking. Accordingly I consider that the Court of Appeal in Tivnan were correct to look only at the statement of Earl Ferrers in 1990. That statement did not contain the clarity necessary on this issue that would be required for the principle in Pepper v Hart to come into play. Although I was also referred to the statements of Mr Waddington on the same Bill they did not in my view advance the argument on this issue at all.

[22] The applicant also referred to the Home Affairs Committee report on Drug Trafficking and Serious Related Crime 8 November 1989 and the speeches on that report but those materials seem to me to be of little or no value in determining this rather discrete point of statutory interpretation.

[23] Accordingly I refuse the applicant's application to set aside the Order of 6 August 2003 and refuse leave to appeal from that Order. I further order that a certificate pursuant to article 21 of the 1996 Order be issued certifying that the amount that might be realised in respect of the confiscation order dated 26 June 2002 should be increased by £2,500 representing the amount in which the applicant had settled his claim against the Chief Constable on 26 April 2004.

[24] Finally I wish to express my gratitude to counsel for their thoughtful and helpful written and oral submissions.