

Neutral Citation no. [2006] NIQB 84

Ref: COGC5673

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

Delivered 01/12/06

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 MALACHY JAMES MALLOY AND PATRICIA
MALLOY

-and-

MFS FUELS SUPPLIES LIMITED

-and-

TILE SAFE LIMITED

-and-

MFS BALLYBAY LIMITED

-and-

MFS DEVELOPMENTS LIMITED

-and-

IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

COGHLIN J

[1] This is an application brought on behalf of the plaintiff, the Director of the Assets Recovery Agency (“the Director”) in accordance with the provisions of Section 251 of the Proceeds of Crime Act 2002 (“POCA”) for directions to be given as to the further conduct of the investigation by the Interim Receiver (“the Receiver”) and, in particular, as to whether the Receiver may investigate as to whether or not any property acquired by the defendants prior to 2001 is recoverable property within the meaning of Section 304 of POCA. Mr Humphries appeared on behalf of the plaintiffs while the defendants were represented by Mr Ronan Lavery and Mr Moore, Solicitor, appeared on behalf of the Receiver. I am grateful to all the legal representatives for their careful preparation of the case and the clear and helpful way in which they delivered their respective submissions.

[2] The factual history of this case and the basis upon which an Interim Receiving Order (“IRO”) was originally made on 13 March 2006 have been set out in the affidavit sworn on 9 March 2006 by Ms Dee Traynor, a Financial Investigator acting on behalf of the Director, in support of the application and in the judgment that I delivered on 6 July 2006 in respect of an application to discharge the IRO. It is accepted by the Director that the evidence that grounded the original application for the IRO was limited in time to unlawful conduct on the part of the defendants since 2001. The relevant unlawful conduct identified by Ms Traynor included fuel smuggling, evasion of excise duty and laundering of the money proceeds produced by fuel smuggling.

The Statutory Framework

[3] Section 304 of POCA defines recoverable property as property which is or which represents property obtained through unlawful conduct and Section 241 defines “unlawful conduct” as conduct occurring in any part of the United Kingdom if it is unlawful under the criminal law of that part. By virtue of Section 246 the first condition that must be established by the Agency in order to obtain an IRO is that there is a good arguable case that the property to which the application for the order relates is or includes recoverable property and that, if any of it is not recoverable property, it is associated property.

[4] The functions of the Receiver as set out in Section 247 include the following:

“247 Functions of Interim Receiver

- (1) An Interim Receiving Order may authorise or require the Interim Receiver -
 - (a) to exercise any of the powers mentioned in Schedule 6,
 - (b) to take any other steps the Court thinks appropriate, for the purpose of securing the detention, custody or preservation of the property to which the order applies or of taking any steps under sub-section (2).
- (2) An Interim Receiving Order must require the Interim Receiver to take any steps which the Court thinks necessary to establish -
 - (a) whether or not the property to which the order applies is recoverable property or associated property,
 - (b) whether or not any other property is recoverable property (in relation to the same unlawful conduct) and, if it is, who holds it."

The more detailed powers and duties given to the Receiver in this case are set out in the Order of the Court dated 13 March 2006.

[5] The reporting duties of the Receiver are set out in Section 255 of POCA:

"(1) An interim receiving order must require the interim receiver to inform the enforcement authority and the court as soon as reasonably practicable if he thinks that -

(c) any property to which the order does not apply is recoverable property (in relation to the same unlawful conduct) or associated property"

and directions may be sought from the Court in accordance with Section 251(1) which provides as follows:

"251 Supervision of Interim Receiver and Variation of Order

(1) The Interim Receiver, any party to the proceedings and any person affected by any action taken by the Interim Receiver, who may be affected by any action proposed to be taken by him, may at any time apply to the Court for directions as to the exercise of the Interim Receiver's functions."

POCA does not contain any specific time restriction upon the exercise of the Receiver's powers other than Section 288 which provides for a twelve year limitation period in respect of the recovery of recoverable property.

The Parties' Submissions

[6] On behalf of the Director Mr Humphries submitted that acting under the direction and supervision of the Court the Receiver ought to be able to carry out her investigations with regard to recoverable property without any time restriction being placed upon the word "same" in Section 247(2) (b) other than the twelve year period provided for in Section 288. He submitted that such an approach would be consistent with the wording of the statute and with the policy of the legislation. Furthermore, Mr Humphries drew to the attention of the Court the fact that the three specified properties identified at 7, 8 and 13 of Schedule 2 to the original IRO had each been acquired in 1999 and that, consequently, the order itself required an investigation pre-dating 2001. To date, no application had been made on behalf of the defendants to exclude these properties from the ambit of the order. Mr Humphries relied upon the approach to interpretation of the relevant sections of POCA taken by Silber J in Director of the Assets Recovery Agency v Szepietowski and Others [2006] EWHC 2406 (Admin).

[7] On behalf of the defendants Mr Lavery contended that the Receiver's investigation was strictly limited to property alleged to have been obtained through the specific unlawful conduct relied upon by the Agency for the purpose of obtaining the IRO. In his submission such a restriction would exclude the Receiver from investigating the possibility that property had been obtained as a consequence of the same generic unlawful conduct at any date earlier than that originally specified by the Agency in the affidavit grounding the original application for the IRO. Mr Lavery emphasised to the Court that the Agency had not identified any prima facie evidence of earlier similar conduct which might be investigated by the Receiver.

Discussion

[8] In R (Quintaville) v Secretary of State for Health [2003] 2 AC 687, which was a case concerned with the interpretation of the Human Fertilisation and Embryology Act 1990, Lord Bingham said:

"8. The basic task of the Court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It

may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the Court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The Court's task, within the permissible bounds of interpretation is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute at a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

At paragraph 21 of his speech in the same case Lord Steyn said:

"21. The adoption of a purposive approach to construction of statutes generally, and the 1990 Act in particular, is amply justified on wider grounds. In Cabell v Markam [1945] 148 F2d 737, 739 learned Hand J explained the merits of a purposive interpretation:

'Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable source of interpreting the meaning of any writing; be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary: but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'

The pendulum has swung towards purposive measures of construction. This change was not initiated by the teleological approach of European Community jurisprudence and the influence of European legal culture generally, but it has been

accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in River Weir Comrs v Adamson [1877] 2 Appeal Cases 743, 763. In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, eg social welfare legislation and tax statutes may have to be approached somewhat differently.”

[9] It seems clear that, in passing POCA, Parliament intended to provide a robust but proportionate response to the rapid development of more sophisticated methods and diversity of operations on the part of organised crime. As confirmed by the explanatory notes Part 5 makes clear that recovery proceedings may be brought whether or not proceedings have been brought for an offence in connection with the property and that cases where criminal proceedings have not been brought would include cases where insufficient grounds for prosecution, or where the person suspected of the offence is outside the jurisdiction or has died. Such cases may include those where criminal proceedings have been brought and a defendant/defendants have been acquitted. Part 5 provides for an entirely new cause of action intended to make it easier for the State to ensure that crime does not, and is seen not to, pay by removing from the “untouchables” the proceeds of their unlawful conduct. As Kerr LCJ observed in Walsh v Director of Assets Recovery Agency [2005] NI383 at [32]:

“The purpose of Pt 5 of the 2002 Act can be viewed on a more general basis as the State’s response to the need to recover from those who seek to benefit from crime the proceeds of their unlawful conduct.”

[10] The Court of Appeal in Northern Ireland in Walsh v Director of the Assets Recovery Agency confirmed that it was not inevitable that recovery proceedings would be confined to an examination of specific offences and in The Director of Assets Recovery Agency and Others v Green [2005] EWHC 3168 [Admin] Sullivan J held at [47]:

“1. In civil proceedings for recovery under Part5 of the Act the Director need not allege the commission have any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.”

In answering the preliminary question posed for the Court Sullivan J recognised that, inevitably, there would be disputes as to whether matters

alleged contained sufficient information to enable a Court to decide whether there had been any kind or kinds of unlawful conduct by or in return for which the property had been obtained.

[11] In adopting a purposive interpretation of the legislation it seems to me that I should reject the time restriction sought to be placed by Mr Lavery on the phrase “the same unlawful conduct” as used in section 247(2)(b). In my opinion such an interpretation would place an artificial and unnecessary restriction upon the investigative powers of the Receiver and would be inconsistent with the purpose of the legislation in seeking to afford the State an effective and flexible response to organised crime. In my view the word “same” as used in section 247(2)(b) should be interpreted so as to include property being the product of unlawful conduct generically similar to that originally identified by the Director. In such circumstances the rights of the respondents are protected by virtue of the reporting obligation cast upon the Receiver by Article 255(1) (c). Once the Receiver “thinks” that such property exists a report must be made to the court and the enforcement authority, in this case the Director, “as soon as reasonably practicable.” The Director/Receiver would then have to decide whether to apply to the Court under s.251 for any appropriate directions and the respondents would be notice parties.

[12] If Mr Lavery’s submission is correct then, despite being generically similar to the unlawful conduct identified in the original IRO, the conduct would have to be regarded as conduct “other than” that identified by the Agency. While there is no specific provision relating to such conduct, in such circumstances, I am persuaded by the reasoning of Silber J in the Szepietowski case that information relating to the existence of such conduct should be passed by the Receiver to the Director who would then have to seek directions from the Court.

[13] It appears that the reason that the Receiver did not furnish a report to the Court in accordance with Article 255 was a direction that I had given during the application to discharge the IRO that the relevant conduct of the respondents should not be investigated earlier than 2001. I wish to make it clear that direction was purely temporary the purpose of which was to avoid incurring additional expense by way of further investigations pending a decision as to whether the IRO itself should be discharged. Now that a decision has been taken that the order should stand there is no further need for any such restriction. Consequently, subject to any further submissions that counsel may wish to make, I propose to permit the Receiver to take such further steps in accordance with the statutory provisions that he/she may feel appropriate.