

Neutral Citation No: [2017] NICC 5

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

Delivered: 24/04/2017

THE CROWN COURT IN NORTHERN IRELAND

SITTING IN ANTRIM

Between

REGINA

Plaintiff:

-v-

SAMUEL CRUISE

Defendant:

MARRINAN J

[1] On 20 January 2009, the defendant, Samuel Cruise, having been convicted of offences to which the Proceeds of Crime Act 2002 ("the 2002 Act") applied, was ordered to pay £49,966.16 on or before 20 July 2009 by way of a confiscation order under section 156 of the 2002 Act and in default to serve 18 months' imprisonment consecutive to any term of custody which he was liable to serve for the substantive offences.

[2] Pursuant to section 157(5) of the 2002 Act, the court was satisfied that the following matters were relevant in the determination by the court of the available amount from which the confiscation order made by the court might be paid:

- (a) Equity in property at 9 Meadowvale Park, Limavady, £139,392.
- (b) Transfer from Ulster Bank, account number X, to an Ulster Bank account number Y in the name of Jason Cruise on 31st of December 2007, £10,000; and
- (c) Funds held in an Ulster Bank account, number X, £3,020.08 making a total of £152,412.08.

The available amount owed was £152,412.08. The court assessed the value of the defendant's benefit from his criminal conduct at £49,966.66 and the recoverable amount was therefore that sum.

[3] The schedule above assumed that the entirety of the equity at that time in the

property was held to be available to the defendant in satisfaction of any order imposed.

[4] At the time of making of the original order no representations were invited from the other legal owner of this property, nor would a court at that time have been required by the legislation to do so when making an order.

[5] The order made on 20 January 2009 was not discharged and default proceedings were then commenced. Many proposals were made by the defendant over a long period of time to discharge the order and extensions of time were duly granted by the court for this purpose but these came to naught. Ultimately, on 15 July 2016 the defendant not having discharged the order, a warrant for committal in prison for six months in default was issued. The defendant was arrested and committed to Her Majesty's Prison Maghaberry on 6 November 2016.

[6] Thereafter, the defendant having received further legal advice made application to this court under section 173 of the said Act, i.e., to vary the confiscation order made against him on 20 January 2009 on the basis that the available amount was inadequate. In its review of the matter the court directed that fresh affidavits be lodged and skeleton arguments submitted. The defendant was released on bail pending the present application. On 20 December 2016 the court directed further that an updated valuation report on the property be prepared by an RICS registered valuer.

[7] The application came on for hearing on 30 March 2017. By that stage interest on the sum ordered had accrued in the sum of £28,758.61, leaving a total sum owing of £78,724.77.

Section 162(4) provides that the interest must be treated as part of the amount to be paid under the confiscation order.

In his affidavit of 25 January 2017 the defendant swore that he was married to his wife Janet in 1980 and that he had lived in the property at 9 Meadowvale Park, Limavady, since 1998. He avers further that the property was bought in their joint names with the assistance of a mortgage from the Ulster Bank, the current redemption value of that mortgage being approximately £11,000. In her affidavit his wife Janet supports these contentions and adds that she "*understands that (the original order) was made on the understanding that (she) as joint owner of the property consented to its sale.*"

At paragraph 6 of her said affidavit she avers:

"I hereby state that I do not consent to the sale of the family home which is my only residence and which has been adapted to

my medical needs (set out at paragraph 4). I will not provide my consent to authorise any sale of my home, nor will I willingly vacate my home. I have lived here for about 20 years and if I were forced to move from it I do not have anywhere else to go."

It is clear that she suffers from significant disabilities and the house has been modified to cater for her health problems.

[8] The Land Registry entry for the subject property, now filed by the defendant's solicitor, shows the full owners of the property as Samuel and Janet Cruise, subject to a charge in favour of the Ulster Bank.

[9] Where the defendant has applied to the court under section 173(1) of the 2002 Act to vary the original confiscation order subsection (2) provides:

"In such a case the court must calculate the available amount, and in doing so it must apply section 159 as if references to the time the confiscation order is made were to the time of the calculation and as if references to the date of the confiscation order were to the date of the calculation."

"(3) If the court -

(a) finds that the available amount (as so calculated) is inadequate for the payment of any amount remaining to be paid under the confiscation order it may vary the order by substituting for the amount required to be paid such smaller amount as the court believes is just.

(5) The court may disregard any inadequacy which it believes is attributable (wholly or partly) to anything done by the defendant for the purpose of preserving property held by the recipient of a tainted gift from any risk of realisation under this part."

[10] In short, the court is to conduct the exercise of calculating the available amount afresh in the circumstances pertaining at the time of the application under section 173 of the 2002 Act. "Available amount" is defined as follows in section 159 of the 2002 Act:

"1. The available amount is the aggregate of:

(a) the total of the values (at the time the confiscation order is made) of all the free property then held by the

defendant minus the total amount payable in pursuance of obligations which then have priority and;

(b) the total of the values (at that time) of all tainted gifts."

[11] Finally, section 160 of the 2002 Act (as amended by section 24 of the Serious Crime Act 2015 ("the 2015 Act")) provides:

"160A:

Determination of extent of defendant's interest in property:

(1) Where it appears to a court making a confiscation order that -

(a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order, and

(b) a person other than the defendant holds, or may hold, an interest in the property, the court may, if it thinks it appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property

(2) The court must not exercise the power conferred by subsection (1) unless it gives to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to make representations to it.

(3) A determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with -

(a) the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the confiscation order, or

(b) any action or proceedings taken for the purposes of any such realisation or transfer.

(5) ... the 'extent' of the defendant's interest in property means the proportion that the value of the defendant's interest in it bears to the value of the property itself."

[12] What then in this case is the available amount so far as this defendant is concerned?

- (i) Clearly, there is the tainted gift made to his son, Jason Cruise, of £10,000. No issue arises concerning this payment.
- (ii) There is also a sum of £5,000 provided to the defendant's solicitor by the defendant, which sum the defendant's solicitor has undertaken to hold pending the court order (see paragraph 32 below).
- (iii) There is a small sum, £553.00, still held in the Ulster Bank account number X as at 30 March 2017.
- (iv) Other than these items, the only other "*free property*" held by the defendant is the value of his interest in the property at 9 Meadowvale Park, Limavady, the family home owned jointly by the defendant and his wife since 1998, which is subject to an outstanding mortgage to the Ulster Bank of approximately £11,000. According to the affidavit of the financial investigator, David Dixon, sworn on 23 February 2017, the Prosecutor accepts this is an obligation which has priority (see section 159(a) of the 2002 Act).

[14] The valuation report directed by the court was provided by Brian Lavery, BSC Hons, MRICS, an RICS registered valuer, dated 9 February 2017. His valuation of the property is in the sum of £102,000, thus leaving an estimated net equity after discharge of the mortgage of £91,000.

[15] Mr Dixon argues that this full net amount of £91,000 should be included in the available amount as it is "*free property*" (as defined by the 2002 Act) "*then held by the defendant.*"

As he says at paragraph 18 of his said affidavit:

"The Prosecution believes that equity held in the property 9 Meadowvale Park, Limavady, should continue to be included within the defendant's available amount and any difficulty in realising this equity may be dealt with during any potential enforcement proceedings."

However, in its skeleton argument the Prosecution submits that the defendant's "*available assets*" include "*50% of the net equity in 9 Meadowvale Park, Limavady.*"

[16] On behalf of the defendant, Ms Lynch argues that the amount available for satisfaction of the confiscation order imposed in 2009 is clearly inadequate to meet the full amount of the order. Leaving aside the matters referred to in paragraph 11 (1), (2) and (3) above, she submits that the only asset presently available to the defendant is his interest in the family home which is subject to the legal interest of

the other legal owner (his wife), who is resident in the property and does not consent to any sale or vacation of the property.

Of course, in simple terms, if the defendant and his wife were agreed on the sale of the house, he would have entitlement to 50% of the net proceeds after discharge of the mortgage, estate agents' and conveyancing fees.

Applying section 160 of the 2002 Act and having given the defendant's wife a reasonable opportunity to make representations to the court, a role undertaken by Ms Lynch, the court felt initially minded to determine that the extent of the defendant's interest in the property is 50% of the net value of the property.

However, on reflection, this may be too simplistic. The defendant's wife will not sell the property and is not prepared to vacate the property without a court order. It is the professional opinion of the valuer on the assumption that an interest of 50% ownership of the property is available, that *"selling a 50% in this property is not a marketable proposition to a third independent party at either auction or elsewhere."*

In effect, his opinion is that the defendant's interest at the present time has no market value because vacant possession cannot be effected, at least not without an order of the court.

[17] The situation in the present case is very different from, say, valuations for the purposes of equity release schemes. In such schemes, as one understand them, older couples who wish to remain living in their home but who wish to raise money for various purposes will enter into a contract with an insurance company releasing to them a proportion of the value of their property.

Applying actuarial principles based on the life expectancy of the last surviving spouse the insurance company will release a percentage of the value of the property. Interest is charged, often at a higher rate than a mortgage, and added on in compound form until the surviving partner dies. The property is then sold with the insurer recovering its loan plus all the interest and the remaining proceeds, if any, being made available for distribution to any heirs of the deceased.

[18] However, such an arrangement can only be made if both partners are willing to enter into a binding agreement with the insurers. No one suggests that any insurer would be willing to give the defendant a measurable sum in return for his selling his interest in a property where vacant possession cannot be assured.

The Prosecution do not challenge the valuer's analysis but argue that with vacant possession the defendant has a 50% interest in the net equity of the family home, valued at £45,500 approximately, and that that sum should be included as part of the defendant's available assets. They say that the appropriate time for consideration of

whether the house in which the defendant and his wife live has to be sold is not now but at the enforcement stage.

[19] It is not in dispute in this case that, leaving aside the tainted gift and the cash referred to at paragraph 11 above, raising the sum referred to at paragraph 18 above would require a consequential and forced sale of the family home. The defendant has no other assets.

[20] This became abundantly clear during the years 2009 to 2016 during the hearings on the default proceedings. At no time during that period, or subsequently, even after 15 July 2016 when the court directed that a warrant for committal in prison be issued, was any application made to the court by the Prosecutor to appoint a Receiver in respect of realisable property as provided for by section 198 et seq. of the 2002 Act. An order appointing a Receiver could confer on the Receiver the powers to manage or otherwise deal with the property (section 199(2)(c)). Managing or otherwise dealing with the property of course includes selling the property or any part of it or interest in it (section 199 10(a)).

[21] Section 227 of the 2002 Act is entitled: "Value: The basic rule." (See paragraph 9 above).

The importance of this section is crucial to the court's consideration. Whilst subsection (2) notes that the value at any time of property then held by a person is "*the market value of the property at that time*", this must be read subject to subsection (3) which provides:

"But if at that time another person holds an interest in the property its value, in relation to the person mentioned in subsection 1, (i.e. the defendant) is the market value of his interest at that time, ignoring any charging order under a provision listed in subsection 4." (my underlining).

[22] This section makes it clear that where a defendant holds an interest in property at the same time as another person the value of that property insofar as the calculation of the available amount is concerned is the market value of his interest only. As section 227 applies specifically for the purpose of deciding the value at any time of property then held by a person, such as the defendant, it does not appear open to the court to approach the calculation of benefit in any alternate manner from that provided for by the 2002 Act itself.

[23] As noted in paragraph 10 above, the 2015 Act contained a number of amendments to the 2002 Act including the insertion of a new provision whereby a court conducting confiscation proceedings may give to anyone who the court thinks is or may be a person holding an interest in the property a reasonable opportunity to

make representations to it. The court offered that opportunity to the defendant's wife and has considered her affidavit. This new provision (which came into force on 1st of June 2015 by S.R. 2015/190 Regulation (3)(1)(a)) is section 160A of the 2002 Act and allows a court to make a determination as to the extent of competing beneficial and equitable interests.

[24] This is significant because, prior to this amendment, it was generally accepted that a court could only determine the extent of competing beneficial interests at the enforcement stage once the Receiver had been appointed. Now, however, a court conducting confiscation proceedings may look at property regardless of whether the legal estate is held in the defendant's sole name or jointly with another person and can give effect to the beneficial and equitable interests of third parties. In Re B [2008] EWHC 3217(Admin) the established principles with regard to the consideration of inadequacy applications were set out including the principle that the burden lies on the applicant to prove, on the balance of probabilities, that his realisable property is inadequate for the payment of the confiscation order.

Inter alia, it was noted that such an application was not an opportunity to adduce evidence or present arguments which could have been put before the Crown Court judge at the confiscation hearing.

However, it was also accepted that the clarification of a third party's interest in property may be a post confiscation order event and not seen as an opportunity to re-litigate matters already determined against the defendant in the Crown Court (see also Gokal v SFO [2001] EWCA Civ 368).

The Prosecution raised no issue in this regard in the present case.

[25] The defendant and his wife, as joint owners, are beneficially entitled to 50% of the net value of the property. Ms Lynch argues that section 227 provides the key to the correct way to determine the value of the defendant's interest for the purposes of deciding the available amount in this application. This would not be the present net market value of the house with vacant possession divided by two as argued for by the Prosecution-- still less the entire equity in the house as suggested by the Financial Investigator. It is, rather, the sum which a willing buyer on the open market would be expected to pay for the defendant's interest in the family home subject to the legal interest of a wife who was unwilling to sell.

[26] Ms Lynch submits further that support for this proposition can be found in a number of the Social Security Commissioners' cases which concern the interpretation of very similar legislative provisions. She submits that these cases make it clear that a distinction is to be drawn between parties' deemed undivided share and a simple mathematical division of equity of the full and undivided asset, the latter approach being wrong in law in her submission.

[27] The cases relied on by her were concerned with determinations of whether the claimants in each case had capital (including property) over the threshold for benefit entitlement. In each case the claimant was a joint owner of property.

[28] Regulation 111 of the Job Seekers Allowance Regulations (Northern Ireland) 1996 provided that capital possessed by a claimant is to be calculated "*at its current market or surrender value.*"

[29] In R(JSA) 1/02 (CJSA/1114/2000), a decision of the Social Security Commissioner in England, it was held construing very similar regulations in England, that:

- (i) There is no rule of law that where a wife and children are still living in a matrimonial home the value of the claimant's share must be regarded as nil.
- (ii) In circumstances in which a party is the joint owner of the property that party could not enforce a sale of the whole house without an order of the court.
- (iii) It could not be assumed that an order of the sale of the house would be made on such an application, the needs and resources of the other resident party would be taken into consideration. An order for sale may be refused or delayed for many years. Any likely purchaser may have to wait for a lengthy period to get an order for sale.
- (iv) It is for the court to decide the value with the assistance of any professional valuation and based on all the relevant factors.

[30] It is of interest that the Commissioner concluded that:

"Where the home is of modest value and none of that value could be realised by the party or any person acquiring his interest for a lengthy and perhaps unascertainable period, it is unlikely that anybody would be prepared to pay very much for that interest and it may have little or no value."

[31] More recently, in a Northern Ireland case: (C/813 - 14 (JSA)), the Social Security Commissioner held that the Tribunal was wrong in law to take as a starting point the market value of the whole house (after deduction of the mortgage debt) and to divide the remainder by two to arrive at a value for the claimant's half share. He ruled that the correct approach in law was rather to assess what a third party might expect to pay for that half interest in the property in the light of there being another joint owner - as opposed to what a third party might expect to pay for the whole house.

[32] I find these cases helpful and persuasive on the interpretation of sections 227 and 160A of the 2002 Act-- even though they are examples of determinations made at the enforcement stage.

[33] Applying these principles to the construction of the 2002 Act Ms Lynch submits that the court should conclude that the market value of the defendant's interest is nil and that the court should make a nominal order.

Alternatively, she argues:

"If the court considers there is a market value that is less than the amount of the confiscation order it may make such order as it considers just in the circumstances. The court is not restricted in which factors that it may consider material to a determination of what is just. It is submitted that relevant factors to which the court should have regard include the period of imprisonment that the defendant has already served in default of the original confiscation order, the time elapsed since the index offence and the imposition of the original confiscation order and the availability to Mrs Cruise of £5,000 by way of loan from family members to purchase Mr Cruise's interest."

[34] Ms Gallagher, for the Prosecution, argues that the correct approach to this case is as set out in the recent decision of the Court of Appeal in England in *R v Jacqueline Reynolds* [2017] EWCA Crim 57. This was an appeal against sentence solely in relation to the making of a confiscation order.

The appellant argued that it would be disproportionate and unfair to do so. Both the appellant and her husband suffered from significant medical disabilities. The only asset of any value of the appellant was her share in the family home. The property was valued at £149,500. As is the situation in this present case it had been purchased many years before the claim for benefits by the appellant became an unlawful claim and no issue arose in respect of any question of it being a tainted gift. It was subject to a mortgage and a secured loan for disability improvements. After deducting the costs of sale the net equity divided between the appellant and her husband was £21,643.05 each. She also had the sum of £40.00 in sole bank accounts.

A confiscation order would be of no value unless enforced by an order for the sale of the property.

[35] The Court of Appeal was asked to consider the consequences of a confiscation order upon an innocent third party. This is a further similarity with the present case.

[36] It is striking that both in *Reynolds* and in *Parkinson* [2015] EWCA Crim 1448 it appears to have been assumed by all concerned that the correct method of assessing the defendant's/appellant's interest for the purposes of deciding the available amount was to take the present net market value of the house with vacant possession and divide it by two. In England and Wales section 79 of the 2002 Act applies for the purposes of deciding the value at any time of property then held by a person. This section is couched in language identical to the wording for the basic rule where value in Northern Ireland is set out at section 227 of the 2002 Act (see paragraph 10 above - for Scotland see the identical wording of section 145 of the 2002 Act). The relevant decisions of the Social Security Commissioners were not referred to (see paragraphs 29 and 30 above).

[37] Both of these cases (*Reynolds* and *Parkinson*) focused on the issue of whether or not it was proportionate to have made confiscation orders in the first place, not on the correct method of calculating the available amount and, arguably, provide no guidance as to the correct interpretation of section 79 of the 2002 Act - section 227 in Northern Ireland.

[38] No authority other than the decisions of the Social Security Commissioners was produced to this court dealing with the correct way to interpret section 227. In the absence of any such authority the court should give its primary focus to the language of the statutory provisions in question in the context of the Statute and in the light of any statutory definition; (for this see the principles set out by Lord Bingham in the judgment of the *House of Lords* in *May* [2008] 1 *Appeal Cases* 1028 (set out at paragraphs 67 herein).

[39] Section 156(5) of the 2002 Act provides that if the court decides:

"that the defendant has benefited from (criminal) conduct it must -

- (a) decide the recoverable amount; and*
- (b) make an order (a confiscation order) requiring him to pay that amount."*

Section 157 provides:

"(1) The recoverable amount for the purposes of section 156 is an amount equal to the defendant's benefit from the conduct concerned.

(2) But if the defendant shows that the available amount is less than that benefit the recoverable amount is -

- (a) *the available amount, or*
- (b) *a nominal amount, if the available amount is nil."*

[40] The court is concerned with the available amount in the present case (see paragraph 9 above).

[41] In *R v Waya* [2012] UKSC 51, the Supreme Court observed, in relation to the making of a confiscation order under section 6(5)(b) of the 2002 Act (section 156(5)(b) in Northern Ireland):

16. "It is plainly possible to read paragraph (b) as subject to the qualification: "*except insofar as such an order would be disproportionate and thus a breach of Article 1, Protocol 1. It is necessary to do so in order to ensure that the statute remains Convention compliant as Parliament must, by section 3 of the HRA, be taken to have intended that it should. Thus read, POCA can be 'given effect' in a manner which is compliant with the Convention right. The judge should, if confronted by an application for an order which would be disproportionate, refuse to make it but accede only to an application for such sum as would be proportionate.*"

[42] At paragraph 27 of its judgment the Supreme Court observed:

"It is an important part of the scheme that even if the proceeds have been spent, a confiscation order up to the value of the proceeds will follow against legitimately acquired assets to the extent that they are available for realisation."

43. Although the Supreme Court emphasised (at paragraph 21 of *Waya*) that:

"the purpose of the legislation is plainly and has repeatedly been held to be to impose upon convicted criminals a severe regime for removing from them their proceeds of crime.", the Court of Appeal in *Reynolds* observed at paragraph 29 :

"However, the Crown Court has a duty to avoid making a confiscation order which is an infringement of Article 1 of the First Protocol to the ECHR because it is disproportionate."

[44] Article 1 of the First Protocol provides:

"Every natural or legal person is entitled to the peaceful

enjoyment of its possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[45] Following the Supreme Court's decision in Waya the following words were inserted after section 156(5)(b) of the 2002 Act:

"Paragraph (b) applies if, or to the extent that, it would not be disproportionate to require the defendant to pay the recoverable amount."

(See the Serious Crime Act 2015, Schedule 4, paragraph 46).

[46] The Prosecution in the present case argued that whilst the loss of a house is draconian, it is not of itself an excessive burden pointing out that in Parkinson the court did not accept that there is some general principle that where a confiscation order would require the sale of the family home, such an order will not, or at all events would not usually be made. As Lord Justice Davis said at paragraph 31 of Parkinson:

"Overall, ... we conclude that confiscation proceedings of this kind, whilst a potential consequential forced sale of the family home is of course a matter to be taken into account, it is not to be taken as in principle some kind of trump card in resisting the making of a compensation order, let alone with regard to the making of a confiscation order itself."

The learned Lord Justice, however, does not elaborate on the potential effects or importance for the court's decision of taking a potential consequential forced sale into account.

[47] The learned judge continued at paragraph 32:

"We suggest that Crown Court judges should nowadays be a little careful, in the course of confiscation or compensation proceedings, in not too readily assuming that the making of a compensation order in such circumstances inevitably will require a jointly owned property to be sold in order to realise the defendant's beneficial interest in such property. Commonly, no doubt, that may well be the consequence."

But under modern jurisprudence there is at least some prospect, in an appropriate case, for a spouse or partner having the remaining beneficial interest share in the family home, and perhaps also where there are dependent young children, at least raising an opposing argument as to sale or possession. Such arguments being potentially available in the course of enforcement proceedings in the courts which have been subsequently undertaken to realise the value of the defendant's beneficial interest.

Such arguments in opposition are capable of placing reliance, in an appropriate case, on the considerations arising under Article 8 of the Convention or on wider equitable principles.

At all events one can perhaps reflect that if the enforcing court in a subsequent sale and possession proceedings does not consider it in any particular case to be unjust or disproportionate to order sale and possession, then that is suggestive of it not having been unjust or disproportionate to have made the original compensation order in the first place."

48. At paragraph 37 of the Reynolds judgment the Court of Appeal concluded as follows:

"Those observations (of Lord Justice Davis) apply equally to the making of the confiscation order itself. We agree with the Recorder that the appropriate time for consideration of whether the house in which the appellant and her husband live has to be sold is at the enforcement stage, if it be reached."

[49] In essence, the Prosecution submits that in assessing the available amount under section 159 the court should determine the extent of the defendant's interest in the matrimonial home where, under section 160A (5) of the 2002 Act "*the extent*" of the defendant's interest in the property means: "*The proportion that the value of the defendant's interest in it bears to the value of the property itself*" minus the total amount payable in pursuance of obligations which then have priority (in this case, the mortgage to the Ulster Bank). To this should be added the values (at the time of making of the order) of all tainted gifts and any other cash available to the defendant.

[50] Clearly, the defendant has a 50% interest in the property but the value of that interest at the time the confiscation order is made may well be very different to its value when both owners are agreed upon a sale, thus ensuring vacant possession to a new buyer.

[51] I remind myself that section 227 applies specifically "...for the purpose of deciding the value at any time a property then held by a person." (Subsection (1)).

[52] Section 227, subsections (2) and (3) are even more to the point. subsection (2) reads:

"Its value is the market value of the property at that time."

Subsection (3) reads:

"But if at that time another person holds an interest in the property its value, in relation to the person mentioned in subsection (1), is the market value of his interest at that time....." (my underlining).

It should be noted that subsection (3) refers specifically not to the market value of the property generally or the entire property, but rather to the "market value of his interest... (the defendant's interest).

[53] The Prosecution submit at paragraph 9 of its skeleton argument that:

"Whilst not specifically referred to in the Reynolds decision, the Court of Appeal would have been alive to the issue of the valuation of the property held by the appellant being the market value of her interest and they still held the appropriate time for consideration of whether the house in which the appellant and her husband lived had to be sold was at the enforcement stage."

[54] Without more, I cannot agree with this assertion unless it means that the court, knowing of the interest of the appellant's husband in the property, must have necessarily assumed that the market value of the appellant's interest at the time the confiscation order was made was 50% of the market value with vacant possession.

Nowhere in Reynolds or Parkinson can I find any discussion of the meaning of the term "market value."

[55] "Market value" is not defined in the 2002 Act.

However, I note from Mr Lavery's report that the Royal Institute of Chartered Surveyors defines this term as follows:

"The estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in arm's length transaction after proper marketing

wherein the parties have each acted knowledgeably, prudently and without compulsion." (effective from January 2014).

In R v Islam (2009 UKHL 30) the House of Lords approached the question as a matter of statutory interpretation.

Lord Hope for the majority was of the view that earlier cases in other legislative contexts supported the view that "...the essence of market value is simply...the price that would be paid for the goods as between a willing buyer and a willing seller..." (para 16).

Their Lordships held that there was no anomaly in defining "market value" widely at the stage of the benefit calculation, and more narrowly at the stage of the available amount calculation, because the context of the expression was different at each stage."

[56] It will be recalled that Mr Lavery's professional opinion--which was not challenged by the Prosecution-- on the question of the market value on the assumption that 50% ownership was available for sale was "*...in our opinion selling a 50% (share) in this property is not a marketable proposition to a third independent party at either auction or elsewhere.*"

The Social Security Commissioner's cases referred to above in paragraphs 26 to 32 provide detailed guidance on the factors to be taken into account in making an assessment of the market value of a part interest and I find that these factors have been properly addressed by the professional valuer in this case.

[57] The cases relied on by the Prosecution appear to proceed on the basis that one should assume a market value with vacant possession for the purposes of making the confiscation order. This assumption can then be tested during potential later proceedings for enforcement. Such an approach might well be justified if one was dealing solely with the wording of section 227(2) but, so far as I can see, takes no account of the relevance and importance of the rider set out at section 227(3).

[58] Furthermore, on a practical level such an interpretation would have severe and unintended consequences for the defendant and his wife.

In making the confiscation order the court will fix the appropriate amount which the defendant must pay and, in default of payment, a prison sentence consecutive to any term of custody which the defendant is liable to serve for the substantive offences.

[59] Section 161 of the 2002 Act, as now amended by section 28 of the 2015 Act,

provides that the norm is that the amount ordered to be paid under a confiscation order must be paid within three months from the date of the making of the order but in certain circumstances a court may make an order extending that period but that period itself must start with the day in which the order is made and must not exceed a period of six months.

[60] Here, as in *Reynolds*, the reality is that if one proceeds on the basis of valuing the defendant's interest in the matrimonial home as his half share, assuming vacant possession, then, if his wife refused to sell the house, he will clearly be unable to pay the amount ordered under the confiscation order.

[61] At the end of a maximum period of six months from the date of the confiscation order, the Prosecution can institute default proceedings, as they did earlier in this case.

Although the judge hearing those default proceedings can allow further time to pay, the reality is that unless the defendant's wife can be persuaded to sell, a decision clearly contrary to her best interests and property rights, the defendant may well be committed to prison. Even when he has served that sentence the confiscation order will remain unsatisfied.

[62] As in *Reynolds* the situation is that the bulk of the confiscation order as contested for by the Prosecution will be of absolutely no value unless it is enforced by an order for the sale of the property.

[63] The Prosecution are under no obligation to apply to the court for an order under section 198 of the 2002 Act to appoint a Receiver in respect of realisable property with powers including the power to sell the property. If they choose not to do so then there may never come an appropriate time for consideration of whether the house in which the defendant and his wife live has to be sold.

[64] In the present case, at no stage in these very protracted proceedings has the Prosecution applied to begin enforcement proceedings even after the court directed that a warrant for the committal of the defendant to prison be issued in July 2016. There may well be very many good reasons for this decision including the realisation that a good deal of expense might be involved in seeking a remedy which may well not be granted in line with the reasoning in the Social Security Commissioner cases.

[65] In these circumstances, granting the form of order suggested by the Prosecution in this case could be said to place the wife in an extremely invidious position.

Effectively, she would have the choice of agreeing to sell her home in which she has

lived for almost 20 years and which has been specifically adapted because of her medical needs or refuse to do so in the certain knowledge that her husband will be committed to prison perhaps for a lengthy period.

[66] In truth, in the scenario proposed by the Prosecution, the defendant will inevitably be imprisoned again for failure to pay a sum which he cannot pay unless he persuades his wholly innocent wife to join in the sale of their matrimonial home, leaving her homeless and with very little equity.

[67] In *R v May [2008] House of Lords 28* Lord Bingham observed at paragraph 35, dealing with the making of a confiscation order, the following:

"... From the 1986 Act onwards, the courts have been required to reinforce confiscation orders by the imposition of a term of imprisonment to be served in default of payment. But it has been recognised that a defendant may lack the means to pay a sum equal to the aggregate of the payments or rewards he has received, or the value of the property or pecuniary advantages he has obtained.

It has also been recognised that it would be unjust to imprison a defendant for failure to pay a sum which he cannot pay. Thus provision has been made for assessing the means available to a defendant and, if that yields a figure smaller than that of his aggregate benefit, making the confiscation order in the former, not the latter, sum."

[68] Section 160A of the 2002 Act has enabled the court to examine the interest in the property of a person other than the defendant (see paragraphs 23 and 24 above). Thereafter the court may, if it thinks appropriate to do so, determine the extent (at the time the confiscation order is made) of the defendant's interest in the property (section 160A(1)(b)).

[69] As previously noted, subsection (5) of the same section provides that the "extent" of the defendant's interest in property means the proportion that the value of the defendant's interest in it bears to the value of the property itself.

[70] By subsection (3) of the same section:

"...a determination under this section is conclusive in relation to any question as to the extent of the defendant's interest in the property that arises in connection with:

(a) the realisation of the property, or the transfer of an interest in the property, with a view to satisfying the

confiscation order; or

(b) any action or proceeding taken for the purposes of any such realisation or transfer." (my underlining).

[71] The Prosecution remind the court that at paragraph 24 of Waya the Supreme court said:

"...it must clearly be understood that the judge's responsibility to refuse to make a confiscation order which, because disproportionate, would result in an infringement of the Convention right under A1 P1 is not the same as the re-creation by another route of the general discretion once available to judges but deliberately removed."

[72] In Paulet v United Kingdom [2016] 61 EHRR 39 the European Court of Human Rights ("ECHR") stated at paragraph 65:

"...An interference with Article 1 of Protocol 1 will be disproportionate where the property owner concerned has had to bear "...an individual and excessive burden.." such that "...the fair balance which should be struck between the protection of the right of property and the requirements of the general interest.." is upset. The striking of a fair balance depends on many factors."

[73] Parkinson acknowledged that in confiscation proceedings a potential enforced sale of the family home is a matter to be taken into account with regard to the making of a confiscation order. Given the inevitability that the defendant in this case will be unable to discharge the amount sought by the Prosecution and will therefore be committed to prison unless he persuades his wife to forego her rights and to agree to the sale of their matrimonial home, comes very close to my mind to requiring the defendant to bear the "...individual and excessive burden.." referred to in Paulet.

It certainly places a disproportionate burden on his innocent wife. On the other hand, in the light of Waya, it is recognised that cases properly categorised as disproportionate are likely to be extremely rare.

[74] I do not believe it is necessary to go that far in this particular case. The court's duty under section 173(2) is to calculate the available amount as at the present time. I have dealt with the test to be applied in this process above.

[75] There being no evidence to the contrary, I accept the definition used by the

RICS and, applying this definition to this case, I find that the market value of the defendant's interest in this property at this time is of little or no financial value in the sense set out at paragraph 55 above other than what the defendant's family are willing to pay for it.

In all the circumstances I do not believe it is necessary to make any formal determination of the defendant's interest in the property under section 160A.

[76] Applying both the spirit and the letter of the legislation I have re-considered the available amount and in doing so I calculate it to be as follows:

- (i) The market value of the defendant's present interest in 9 Meadowvale Park, Limavady, is £5,000 (the sum available to Mrs Cruise by way of a loan apparently from her family members to buy the defendant's interest).
- (ii) Balance in the Ulster Bank account, number X, £553.00.
- (iii) The tainted gift to his son Jason Cruise of £10,000.

The total of these sums is £15,553.

[77] As I find this available amount as so calculated to be inadequate for the payment of the amount remaining to be paid under the confiscation order, (which at today's date including interest stands at £78,987.57), I direct that the order be varied by substituting for the amount required to be paid the lesser sum of £15,553 believing this to be just and having taken fully into account all relevant circumstances.

[78] I wish to note further that the legislation provides considerable flexibility in the reconsideration of the available amount for whatever reason.

If at some future time the defendant's financial circumstances change substantially for the better it could be open to the Prosecutor or the Director of the Assets Recovery Agency or any Receiver appointed under section 198 or section 200 of the 2002 Act to apply afresh to the court to make a new calculation (see section 172 of the 2002 Act) unless, presumably, the existing confiscation order is satisfied when no amount is due under it (see section 235(1) of the 2002 Act).

[79] An illustration of this is *R v Padda* [2013] EWCA 2330. In that case the defendant had been convicted of drugs offences and sentenced to a term of imprisonment. In proceedings under the 2002 Act the judge found that the defendant had benefited from his offending to the extent of £156,226 but made a confiscation order in the sum of £9,520 on the basis that that was the available amount for the purposes of the 2002 Act. Following his release from prison in 2008

the defendant established a successful car hire business.

[80] In 2013 on the Crown's application for a new calculation of the available amount pursuant to section 22 of the 2002 Act (section 172 in Northern Ireland), the judge made a fresh order varying the confiscation order by substituting for the amount to be paid the sum of £74,652, calculating that this was the amount currently available to the defendant.

The defendant appealed on the grounds that:

- (i) in considering whether the amount substituted was just, for the purposes of section 22(4)(a) of the 2002 Act (section 172(4)(a) in Northern Ireland), the judge had taken insufficient account of the judgment in *Waya*;
- (ii) that the passage of time since the making of the original confiscation order in 2006 had not been fully considered; and
- (iii) the fact that the defendant had acquired these fresh assets by an entirely legitimate process.

The Court of Appeal dismissed the appeal, ruling that, when deciding whether an order was "just", the court could take into account all relevant circumstances, including the amount outstanding, the additional amount which might have become available, the length of time since the making of the original order, the impact on the defendant of any further payment contemplated, the policy of the 2002 Act in favour of maximising the recovery of the proceeds of crime for the State, even from legitimately acquired assets, and any other consideration which might properly be thought to affect the justice of the case.

They concluded that it was very unlikely that any order which was "just" would be found to be disproportionate so as to infringe Article 1 of the First Protocol; and that the judge had taken a perfectly proper course in the order he had made; and, that, accordingly, his order was neither wrong nor manifestly excessive.

[80] Finally, the court expresses its gratitude to both counsel for the skill and significant amount of industry they have displayed in the preparation and presentation of their respective arguments.

[81] I think, Ms Lynch, it only remains then for you to ask, if you wish, for some time to pay.

MS LYNCH: We are very keen to have the matter resolved as soon as possible but bearing in mind that the £10,000 is in the possession at this time still of another person who will have to raise funds to do it, three months, your Honour.

JUDGE MARRINAN: Yes. Granted. So that means you would have to come back to me before the end of the three months if you wished a further extension.

MS LYNCH: And at that stage the defendant would have to satisfy your Honour that reasonable efforts had been made.

JUDGE MARRINAN: Well, in view of the fact that the defendant has already been in custody, I would fix the default period for non-payment as six months imprisonment.