Neutral Citation No: [2017] NICA 73 ***Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **DEE10305** ***Delivered:*** **12/05/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

BERNADETTE HILTON

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Before: Gillen LJ, Deeny J and Keegan J

DEENY J

[1] The appellant before the court, Bernadette Hilton, was committed for hearing at Belfast Crown Court on 22 September 2015 on two counts on an indictment. She had pleaded guilty to those at the Magistrates' Court on 7 July 2015 and the effect of those was that she had obtained income support dishonestly by failing to report that she had part-time employment. Furthermore, this had proceeded for quite an extensive period of time as appears from the facts of the case. Nevertheless, the court took into account her plea of guilty and her personal circumstances and on 20 April 2016 a probation order was imposed on her for 2 years in respect of each count concurrent.

[2] However, the Crown exercised its right to bring confiscation proceedings against her and these were apparently adjourned on several occasions but ultimately came for hearing before His Honour Judge Millar QC on 20 October 2016 and the learned judge imposed a confiscation order of £10,263.50 which he found to be the recoverable amount within the provisions of the statute. He said in his sentencing remarks that if she was in default there would be a sentence of 6 months' imprisonment. The order of the court of 20 October 2016 allowed her 3 months in which to pay that sum.

[3] It is not in contention and it was clear to the judge and to both counsel that this woman could only raise such a sum of money by selling the home in which she lived, [address] Dunmurry, Belfast. The title to that property was before the court and showed that she was the co-owner with her husband. However, her husband was estranged from her and was not living at the property. The property was the

subject of a substantial mortgage with the Nationwide Building Society and this court was told and apparently the trial judge was told that the property had an approximately value of £175,000 and a mortgage at that time of £154,423.00. The court was told that this was an interest only mortgage so it would not have diminished between last year and the hearing before this court. The interest we were told is in fact being paid by way of housing benefit by the state and the rates are borne by the Housing Executive we were told but certainly not by this applicant. The applicant is unemployed and in receipt of benefits.

[4] It is clear what the learned trial judge did was to subtract the mortgage from the approximate value of the house, divide it in two and come up with the figure he did come up with. That was less than the figure that the appellant had benefitted from her dishonesty in claiming benefits while working. The court was told by Mr Gavin Duffy QC who appeared with Mr Curran for the appellant that she is paying off the balance between that and the overall sum of £16,000 at about £45 per month. The judge's figure of recoverable amount it seems clear did therefore relate to what he believed could be realised from a sale of the home. Regrettably, it does not appear that the judge's attention was drawn to the provisions of Section 160A of the Proceeds of Crime Act 2002 which had come into force by the time of his adjudication. I shall read the section so far as it is appropriate.

> "Section 160A – Determination of extent of defendant's interest in property
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> (1) Where appears to a court making a confiscation order that –
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> (a) there is property held by the defendant that is likely to be realised or otherwise used to satisfy the order; and
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> (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."

[5] Pausing there this court has concluded and accepted the submissions of counsel for the appellant that this is what the judge did, he did determine that she had a half interest in the property that was likely to be realised and therefore to be available for meeting a confiscation order. What regrettably was not drawn to his attention was the following sub-section 2:

> "The court must not exercise the power conferred by sub-section 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."

[6] First of all the language used by Parliament would suggest that it was intended that this be a mandatory provision and the court having exercised its power under sub-section 1 ought to have done that. In any event the provision is a sensible one in case there had been some development since the title to the property had been commenced which was not reflected on the title to the property and by which one of the other persons with an interest the property, in this case the estranged husband and the lender, might be able to persuade the court that this appellant did not have a 50% interest in the property but conceivably a larger or a smaller interest either of which would affect the order to be made by the court.

[7] The omission to do that we consider is fatal to the decision of the judge. We identified two further matters to be addressed. One is that we accept the submission of the appellant that the costs of sale ought to be taken into account. It does seem that the learned judge was mindful of this but the order does not expressly take it into account. It may be and this is consistent with the submissions of Mr Brownlie for the prosecution that any injustice could be remedied by a subsequent hearing that might be brought either by the Crown through a receiver or brought by the appellant herself pursuant to either Section 173 of the Proceeds of Crime Act or Section 199. That would involve unnecessary expense and court time in our view. The preferable course we conclude on the particular facts of this case would have been to take the estimate of costs that had been prepared and to take that into account, ie that the figure in the order that was made by the judge should have been reduced by half of the estimated costs figure of £3,557.50. We say it in the particular circumstances of this case as that estimate seems a reasonable one and any variation from it would not justify making fresh applications to the court under the provisions to which I have averted.

[8] The third issue is one which I will deal with briefly on foot of the order of the court. The court is conscious of the decisions of the English Court of Appeal in relation to these cases and counsel for example properly drew to our attention the decision of that court in R v Jacqueline Reynolds [2017] EWCA Crim 57 where Mr Justice Supperstone delivering the judgment of the court said at paragraph 37 that:

> "The court agreed with the Recorder that the appropriate time for consideration of whether the house in which the appellant and her husband lived has to be sold is at the enforcement stage, if it be reached."

[9] Nevertheless we accept the submission partly based on the decision of the same court in R v Parkinson [2015] EWCA Crim 1448 that some reference should be made to the Article 8 rights of the appellant at the stage that the confiscation order is

made. It may be in a particular case and we are not saying that it is this case, but in a particular case the facts might be so striking that it would be egregious and inappropriate to impose an order of this kind. For example, if the dwelling house that was likely to be sold had been specially converted for a disabled child who was still living in the property. Some reference should be made to Article 8 although we accept the contention that there is a further opportunity to deal with that at a later stage if necessary.

[10] Taking these three factors into account therefore we have reached the conclusion that the order of 20 October 2016 ought to be quashed. We have considered whether we should substitute an order for it but as is implicit in my remarks so far the court has concluded that it is appropriate on foot of the court's powers under Section 10 of the Criminal Appeal Act to direct the Crown Court to reconsider the matter afresh in light of these observations. These ex tempore observations will be reduced to writing for the assistance of the judge and the parties.