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Judgment: approved by the Court for handing down | *Delivered:* **31-03-09**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

BETWEEN:

SERIOUS ORGANISED CRIME AGENCY

Plaintiff/Appellant;

-and-

WILLIAM AND CHRISTINE WILSON

Defendants/Respondents.

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Before: Girvan LJ, Coghlin LJ and Morgan J

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GIRVAN LJ

Introduction

[1] This appeal arises from an order made by Higgins J following civil recovery proceedings brought under Part 5 of the Proceeds of Crime Act 2002 ("the 2002 Act"). The essential question raised in the appeal is whether that part of the expenses and remuneration of an interim receiver appointed under Part 5 which relate to her statutory investigation functions fall to be categorised as part of the litigation costs of the appellant ("the Agency") which had been successful in the proceedings for a recovery order against the

defendants/respondents. Higgins J held that they do not fall to be so categorised. If they can be so categorised a separate question would arise as to whether the trial judge should have awarded such costs against the defendants. That would involve the exercise of a discretion which has not yet been exercised in view of the trial judge's decision in principle that they do not constitute costs in the litigation.

The recovery proceedings

[2] By amended originating summons dated 23 August 2004 the Director of the Assets Recovery Agency (which subsequently merged with the Serious Organised Crime Agency pursuant to an order made under the Serious Crime Act 2007) commenced recovery proceedings under Section 243 of the 2002 Act. An interim receiver was appointed by order of Coghlin J on 23 August 2004 over the property of the defendants which included but was not limited to the property listed in Schedule 2 of the Order. The order stated that the Schedule 2 property included any other property which the receiver believed to be recoverable or associated property held by or on behalf of the defendants. The order set out the powers and duties of the receiver which included a power to obtain information from the defendants and to require them to answer any questions as provided for in Schedule 6 paragraph 2 of the 2002 Act. The duties of the receiver included considering such information and documents as she obtained under the order to establish whether or not Schedule 2 property was recoverable property or associated property and taking all reasonable necessary steps to establish whether or not other property was recoverable property and if it was who held it. The interim receiver was charged with providing a report of her findings. The order further provided that the costs of the receiver should be in accordance with the letter of remuneration as exhibited to the affidavit of Edward Marshall.

[3] The unlawful conduct alleged against the defendants included drug dealing, mortgage fraud, benefit fraud and tax and VAT fraud.

[4] The interim receiver furnished a report which was the product of her investigatory work. It identified substantial real and personal property owned by the first defendant. The report set out her findings in relation to each financial year from 1991 to 2004 with an analysis of evidence or lack of evidence of the sources of money giving rise to the relevant assets.

[5] After a lengthy hearing before Higgins J he held that he was satisfied that the property defined in the recovery order filed on 9 July 2007 was recoverable property and the order identified further recoverable associated property. Mr Alan McQuillan was appointed trustee for civil recovery pursuant to Section 267(1) of the 2002 Act and the property was vested in him. The interim receiving order was to be discharged on the trustee taking

possession of the property. The order made provision for the defendants' reasonable legal expenses to be discharged pursuant to an exclusion from the interim receiving order in respect of such expenses made by Coghlin J under section 252(4) of the Act on 5 June 2006. Paragraph 6 of the recovery order concluded:

> "The plaintiff to have her costs of the proceedings against the defendants such costs to be taxed in default of agreement."

The word "her" in the order appears to be an error and should be "its".

The hearing on costs

[7] Although the recovery order in paragraph 6 made the costs order as therein stated it was understood when the recovery order was made that an issue arose as to the status of the interim receiver's costs in relation to the question of the inter partes order for costs and the judge was to be called on to rule on that issue. Submissions were duly made to the judge on the question. It was contended by the Agency that the costs of the interim receiver could be divided into two categories namely the costs incurred in the course of the investigation into recoverable property ("the investigation costs") and the costs incurred by the interim receiver in the course of management of the recoverable property ("the management costs"). The Agency contended that while the management costs fell to be met out of the assets of the receivership the investigation costs should be met by the defendants as part of the litigation costs. Higgins J having considered the authorities rejected the argument stating in his conclusion at paragraph [22] of his judgment:

> "What is claimed by the plaintiff is remuneration and expenses for filling the statutory functions of the receiver and not litigation costs of or incidental to the proceedings. Therefore the application that the receiver's costs however so described be paid by the defendants is refused."

[8] Mr Simpson QC, who appeared with Mr Aiken on behalf of the Agency, informed the court that the total of the interim receiver's costs including investigation costs and management costs did not exceed the value of the assets subject to the recovery order so no question arises in this case of any shortfall in the recoverable amount of interim receiver's costs out of the recovered assets. He also informed the court that the Agency has in fact discharged in full the costs of the interim receiver so that the receiver has not had to rely on her lien on the assets covered by the receivership.

Submissions

[9] Mr Simpson argued that before the Agency could bring any civil recovery proceedings it was necessary for the Agency itself to exercise appropriate investigating functions in order to establish a good arguable case that the property was recoverable. Once the interim receiving order had been made and the interim receiver appointed by the court the investigative function of the Agency came to an end and it was for the interim receiver to continue investigating the affairs of the defendant. The interim receiver is a different creature from the traditional court appointed receiver whose function is to collect and protect property. The investigative role of the interim receiver is not replicated in any of the other court appointed receiverships under statute. The interim receiver performs an investigative role to assist the Agency in deciding whether to bring recovery proceedings and if so as to which property. The mandatory investigative powers of a Part 5 interim receiver are not replicated in relation to receivers appointed under other parts of the Act. Counsel pointed out that the statutory regimes discussed in Re Doran [2006] NIQB 43 by Weatherup J (Proceeds of Crime (Northern Ireland) Order 1996) and in Hughes v Customs and Excise Commissioners [2002] EWCA Civ. 734 (the Criminal Justice Act 1988 and the Drug Trafficking Act 1994) did not involve an investigative role for the receiver. The costs of the investigative role differ from the management costs which counsel accepted would fall on the assets subject to the receivership. Mr Simpson argued that some part of a receiver's remuneration and expenditure might in appropriate circumstances be regarded as costs. The 2002 Act as originally enacted made no provision for the payment of the interim receiver's remuneration. Section 280 of the 2002 Act was amended by section 99 of the Serious Organised Crime and Police Act 2005 to provide a discretionary power on the part of the Agency to apply realised proceeds under a recovery order for the payment of the remuneration and expenses of an interim receiver. It is, however, a discretionary power. Central to Mr Simpson's argument was his proposition that the investigation costs incurred by the Agency prior to the making of the interim receiving order were costs which the Agency could recover against an unsuccessful defendant at the conclusion of the civil recovery proceedings. Since the interim receiver takes on a separate mandatory statutory investigation after appointment he submitted that all expenditure by the interim receiver identified as referable to the statutory investigation should properly be regarded as "costs of an and incidental to the proceedings" within the meaning of section 59 of the Judicature (Northern Ireland) Act 1978 and Order 62 Rule 14. Section 280 of the Act makes clear that the net realised proceeds of property which is vested in the trustee for civil recovery or obtained by him pursuant to a recovery order are to be paid to the Agency and thence into the Consolidated Fund. If the costs of the interim receiver, both investigative and management, are to be borne out of the assets under the control of the interim receiver this will necessarily reduce the amount of the net proceedings available to the

consolidated fund. This is equally so if the Agency must bear the costs. It was submitted that it was equitable that a defendant who has obtained property through unlawful conduct should bear the investigative costs of the interim receiver rather than that the same should deplete assets available to go into public funds.

[10] Mr Lavery QC who appeared with Mr Foster on behalf of the defendants reminded the court that the purpose of the 2002 Act was to authorise the state to strip a defendant of assets acquired by unlawful acts. Where a public statutory function is being carried out it requires an express statutory power to visit the costs of that on the defendant. Where the Agency is carrying out investigating functions it would require a specific statutory provision to lay the costs of that function on the defendant. There was no such power in the present case, he argued. The premise of the Agency's argument that the Agency's investigatory costs were recoverable costs in the litigation and hence the interim receiver's costs should be so treated was false. The Agency should be expected to pay for its own expenses and is only entitled to recover the inter partes litigation expenses. The case law authorities and the relevant text books make clear that the receiver is bound and entitled to look to the assets covered by the receivership to recover his costs and expenses. A defendant has no liability beyond the recoverable property as it is at the date of the judgment. A claim under Part 5 differs from a conventional proprietary claim in that the defendant has no personal liability even if he has disposed of the property. Any depletion of the property frozen by the order will not be recoverable from any property of the defendant that is free from any claim under the Act. Part 5 of the 2002 Act does not make any specific direction as to costs and the court should not infer such a power without a specific direction from Parliament. An interim receiver is a receiver albeit with enhanced powers. By choosing to empower the court to appoint such a creature the legislature has imported the law and practice relating to receivers which include the well established principles relating to remuneration which represent a lien on the assets. In any event the statutory investigating powers of the interim receiver are no different in principle from the powers of a traditional receiver appointed by way of equitable relief whose functions of collecting assets will on occasion require the carrying out of investigatory work. The interim receiver like any other receiver is entitled to recover his remuneration and expenses out of the assets covered by the receivership and neither the interim receiver nor the Agency have a claim for them against the respondents.

Discussion

[11] The equitable jurisdiction to appoint a receiver is of ancient origin, indeed being one of the oldest Chancery remedies (Hopkins v Worcester and Birmingham Canal Proprietors (1868) LR 6 EQ 437.) The receiver, being appointed by the court, is an officer of the court, and his duty is to act

impartially in administering the property to which the receivership extends and to do so under the direction and supervision of the court. As Lord Walker pointed out in Capewell v The Revenue and Customs Commissioners [2007] 2 All ER 370 at 378 it has always been a basic principle of receivership that the receiver is entitled to be indemnified in respect of his costs and remuneration if he is entitled to be remunerated out of the assets in his hands as receiver. Warrington J in Boehm v Goodall (1911) 1 Ch 155 at 161 (cited with approval by Lord Walker) stated the principle thus:

> "Such a receiver and manager (that is one appointed by the court) is not the agent of the parties. He is not a trustee for them, and they cannot control him. He may as far as they are concerned incur expenses or liabilities without them having a say in the matter. I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the court. The court itself cannot indemnify receivers but it can and will do so out of the assets so far as they extend for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to permit parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control."

[12] Because of its useful procedure Parliament has from time to time extended the range of situations which a receiver or manager can be appointed. Under Part 2 of the 2002 Act dealing with confiscation proceedings management receivers may be appointed in England under section 48, enforcement receivers under section 50 and directors receivers under section 52 and in Northern Ireland under the equivalent provisions are sections 196, 198 and 200. Equivalent provisions apply in Part III in relation to confiscation proceedings in Scotland, the equivalent of a receiver there being called an administrator. Part 5 is the relevant part of the 2002 Act in the present instance. Under the earlier confiscatory statutory provisions in the Criminal Justice Act 1988 and the Drug Trafficking Act 1994 statutory power was conferred to appoint receivers. As Simon Brown LJ pointed out in Hughes v Customs and Excise Commissioners [2002] 4 All ER 633 at paragraph [50] statutory receivers are to be treated precisely as their common law counterparts save to the extent that the legislation otherwise provides. The statute is not to be regarded as an entirely self-contained code incorporating nothing from the common law or the principles of equity.

[13] Re Andrews [1999] 1 WLR 1236 was the first decision in which the question of how receiver's costs under a receivership order made under

confiscatory provisions fell to be discharged. In that case the defendant was acquitted of the offence in respect of which a receivership order had been. He was awarded his costs out of central funds but the Taxing Master held that these costs did not include the costs of the receivership proceedings. The receiver deducted his expenses out of the property released in consequence of the discharge. The defendant applied for an order that the prosecution pay his costs of the receivership proceedings. The court concluded that the receiver was entitled to recover his remuneration and expenses from the assets under the court's control. A party seeking appointment of a receiver is not thereby liable for his remuneration. A receiver had a lien for his costs and remuneration against the assets which gave him continuing right to possession of the assets even after discharge of the receivership order. The receiver's remuneration was an expense of the receivership and not a cost of or an incidental to the proceedings and thus not within the courts discretionary jurisdiction to award costs. As Aldous LJ put it succinctly at 1428F-G:

> "The remuneration of a receiver is an expense of the receivership, not costs incidental to the proceedings in which he is appointed."

[14] Subsequent case laws confirm this approach. Longmore LJ in the most recent authority Sinclair v Glatt [2009] EWCA Civ. 176 reiterated the approach which he considered was "all settled by authority":

> "It is now settled that such a receiver appointed pursuant to section 77 of the Criminal Justice Act 1988 like a receiver at common law is entitled to recover his remuneration, costs and expenses from the assets which he has been appointed to receive ('the receivership assets'). That is so whether or not he ought to have been appointed in the first place or the order appointing him has been discharged. See Mellor v Mellor [1992] 1 WLR 517. Even if the defendant, whose assets have been caught by the order appointing the receiver is subsequently acquitted or has his conviction quashed, the receivership asset must bear the costs of the receivership; this is also the position if, as in the present case, confiscation orders are made but subsequently quashed, (Hughes v Customs and Excise Commissioners [2003] 1 WLR 177. Even if the receiver carries on his receivership unnecessarily and should have agreed that his receivership should have been discharged at a time before a court application is made to terminate his receivership the receivership

> assets bear those costs reasonably incurred up to the date he is actually discharged. Capewell v Revenue and Customs Commissioners [2007] 1 WLR 386."

Likewise in Re Doran [2007] NIJB 147 Weatherup J helpfully reviewed the authorities and summarised the principles in a number of propositions set forth in Higgins J's judgment at paragraph [15].

[15] In his judgment Higgins J pointed out that the case law which established the principles related to receivers appointed under earlier legislation and under Part II of the 2002 Act. He concluded, however, that there was no reason to suppose that they do not apply equally to receivers under Part 5 of the 2002 Act, a proposition which finds support in text books such as Smith, Owen and Bodner on Asset Recovery at paragraph 111.1.129.

[16] Mr Simpson's argument seeks to distinguish the position of interim receivers under Part 5 of the 2002 Act from the position of other receivers under confiscatory statutory provisions because, he argued interim receivers unlike other statutory receivers are given wide-ranging investigatory powers the exercise of which involves the incurring of substantial expenditure and which should be treated as akin to the investigating costs of the Agency itself prior to the appointment of the interim receiver. However, such a distinction is not a true distinction leading to or justifying a different approach to the recovery of receivership costs in Part 5 cases. Receivers appointed by way of equitable relief charged with the collection and management of assets, for example the assets of a company in receivership, will frequently have to carry out extensive investigations to enable them to get in and collect and protect the assets over which they have been given receivership powers. It has never been suggested that the costs of such investigations fall to be treated differently from other management costs. Thus the mere fact that a receiver has to carry out investigation work does not of itself make the position of the interim receiver under Part 5 different in principle from other receivers.

[17] Part 5 of the 2002 Act as originally enacted made no provision for the recovery of receivers' costs. The 2002 Act was enacted in the light of case law such as Re Andrews and it is to be inferred that in relation to English and Northern Ireland interim receiverships express provision for receivers' costs was considered unnecessary because of the standard receivership lien on the assets for the receiver's costs. In the case of the equivalent Scottish administration order express provision for those costs was needed and was specifically dealt with by section 284 which provides that any fees or expenses incurred by an interim administrator or a trustee for civil recovery appointed by the Court of Session in the exercise of its functions are to be reimbursed by the Scottish Ministers as soon as it is practicable after they have been incurred. That provision makes abundantly clear that in Scotland those costs fall to be defrayed out of public funds. The net result is that the

Consolidated Fund loses out in relation to the administrator's fees. It is inherently unlikely that Parliament intended to confer protections on defendants in relation to administrator's fee and costs in Scotland but not in England and Wales and in Northern Ireland in relation to receivers' fees and costs. This becomes particularly clear when one bears in mind that a defendant under investigation may have assets in Scotland as well as England or Northern Ireland. Following the ordinary rules in relation to receivership costs coming out of the relevant assets the same net result is produced in Northern Ireland as in Scotland. This is so provided there is no shortfall between the assets and the interim receiver's costs. In the event of a shortfall in practice the interim receiver will look for an indemnity to the Agency and normally will require an agreement for such an indemnity when he accepts office. The Agency under section 99 of the Serious Organised Crime and Police Act 2005 (amending section 280(3)(b) of the 2002 Act) may meet the shortfall. The question may arise (though not in this case) whether the shortfall discharged by the Agency falls to be treated as costs of the Agency incidental to the proceedings. The Scottish provision which throws the entirety of the costs on the public exchequer may support the argument that the shortfall should not be treated as recoverable litigation costs.

[18] The policy behind the civil recovery proceedings under the 2002 Act is to strip a defendant of criminal assets. The interim receiver's resort to those assets for recovery of her costs does not in any way detract from that policy. The defendants' assets are stripped by the recovery order even if part of them goes to the receiver. Requiring them to meet the costs of the interim receiver's investigation work would strip them of further assets and clear statutory wording would be needed to establish the state's right to do so. In any event the costs and fees of the interim receiver cannot sensibly be considered as costs of the Agency since the interim receiver is independent and separate from the Agency. As Higgins J correctly held they are expenses incurred by a third party in furtherance of carrying out a statutory function held, and in furtherance of her duty as an independent person appointed by and answerable to the court. They cannot be considered as costs incurred by the Agency as part of its costs of and incidental to the proceedings.

[19] Mr Simpson's arguments sought to equate the interim receiver's investigation work with the work of the Agency in investigating the matter before the interim receiver order. Mr Lavery challenges the recovery from the defendant even of the pre-interim receiving order investigation costs. He did not refer to any authorities to support this part of his argument and it is a point on which it would be necessary for much greater argument. Having concluded for the reasons which we have given that the question of the interim receiver's investigation costs incurred by her carrying out her statutory function as an officer appointed by the court fall to be treated in the same way as other receivership of costs, it is unnecessary to resolve the question whether the investigation costs incurred by the Agency prior to the

interim receiving order fall to be treated as costs of and incidental to the proceedings or whether they constitute expenses incurred in the carrying out of a statutory function which would only be recoverable if expressly made recoverable. That question may, however, arise in the taxation of costs in the present case and we accordingly express no opinion on the point.

[20] For these reasons we conclude that Higgins J was correct in his conclusion and we dismiss the appeal.