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Judgment: approved by the Court for handing down

Delivered: **22/03/10**

*(subject to editorial corrections)**

2006 No.37

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

SERIOUS ORGANISED CRIME AGENCY

Plaintiff:

and

JULIE ANNE SCOTT

First Defendant:

and

JULIE ANNE SCOTT AS THE PERSONAL REPRESENTATIVE OF RONALD TODD (DECEASED)

Second Defendant:

and

IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

TREACY J

Introduction

1. Pursuant to Section 266(1) of the Proceeds of Crime Act 2002 ("the 2002 Act") the plaintiff ("SOCA") seeks a Recovery Order.

2. The defendants have issued a Summons in which they seek:

   (i) an Order pursuant to O24(3) Rules of the Supreme Court (NI) 1980 that SOCA make and serve a List of the Documents which

are or have been in its possession, custody or power relating to any matter in question in this action;

(ii) an Order pursuant to O24(7) requiring SOCA to file an affidavit stating whether any of the documents described in the Schedule to the Summons are or have been in its possession, custody or power and if not now in its possession, custody or power stating when it parted with them and what has become of them;

(iii) an Order pursuant to O24(10) that SOCA provide inspection of the documents that appear on SOCA's List of Documents

3. The Schedule to the Summons describes three categories of documents:

(i) the intelligence referred to in the affidavit of Anna McCready as provided to her by DCI Maxwell to include all notes or memorandum relating to meetings that SOCA had with DCI Maxwell or other PSNI members relating to the intelligence sought;

(ii) a copy of all documents relating to the decision not to prosecute the First Defendant referred to in the same affidavit (para.7) to include all notes, emails and memorandum of discussions between SOCA and the PSNI relating to the criminal investigation of Julie Anne Scott;

(iii) a copy of all Halifax plc documentation relating to applications made by the Defendant for mortgages and to include details of all policies in place with the Halifax plc in place at the time of each and every mortgage application which are the subject matter of these proceedings.

Background

4. The Summons is grounded on the affidavit of Lauren Davey, Associate Solicitor in the firm of John McAtamney & Co., who are the solicitors on record for the defendants.

5. The affidavit states:

> **"(4) The Plaintiff has lodged an Affidavit from Anna McCready upon which their case against the Defendants is grounded. Within the body of this affidavit the Plaintiffs make**

the case against the Defendants and in particular their case against the Second Named Defendant that he was a drug dealer. As part of that case against the Second Named Defendant the Plaintiff has referred to intelligence against Ronald Todd but have not exhibited any such intelligence nor given any details as to the reliability of that intelligence. … This intelligence is referred to in the affidavit of Anna McCready as provided to that deponent by DCI Maxwell referred to at paras. … There is no detail given as to the source of the intelligence whether by means of observation or information garnered from a covert human intelligence source or otherwise. … Correspondence has now been received from PSNI setting out the grading of the intelligence however … the Defendants should also be supplied with details of the *actual intelligence* referred to above save for such detail which would interfere with any party's Article 2 … rights. As things stand even with the supply of the intelligence grading still makes the case for the Defendants extremely difficult to defend in the absence of the details of the above intelligence especially as Mr Todd is dead and therefore is not in a position to refute any of the allegations raised within the body of the affidavit.

(5) … SOCA .has previously replied … that they did not have this intelligence [and] referred this matter to the PSNI. … SOCA should have this documentation within their possession, custody or power and accordingly should be required to discover this documentation subject to the proviso [Article 2] set out above.

Intelligence Material

6. In a letter dated 19 August 2009 from the defendants' solicitors (to the CSO) the author notes that SOCA seeks to rely upon the statement of DCI Stephen Maxwell which, inter alia, describes *intelligence* relating to Todd's alleged criminality. It states that none of the intelligence discussed by DCI Maxwell had been given a specific grading "therefore, the Court is assessing his intelligence in the dark, without any knowledge as to what weight, if any, should be placed upon it and the defendant is at a disadvantage in countering this statement". The letter then closes with a request that SOCA approach the police to obtain the police grading for the intelligence received and mentioned in this case. After having been provided with the grading sought they then wrote to Detective Inspector Scott PSNI Financial Investigation Unit on 8 October 2009 seeking "all police intelligence relating to Ronald Todd, save for such detail which would interfere with any party's Article 2 … rights". They also wrote in similar terms to the CSO.

7. By letter dated 7 October 2009 the defendants' solicitor wrote regarding, inter alia, the intelligence material itemised in the schedule accompanying the summons. In that letter the author stated:

> **"We believe that SOCA, whilst not actually having copies of this document nonetheless would have access to this documentation. Therefore SOCA must comply with the requirements of discovery providing details of documentation within the possession, custody or power of a party. We believe that SOCA has powers under Section 436 of the Proceeds of Crime Act 2002 allowing them to obtain information which, in our submission, must include the associated documentation. We therefore request that SOCA discover this documentation to the defendants under its obligations pursuant to the discovery process."**

8. SOCA by letter dated 9 October 2009 replied to that letter in the following terms:

> **"2. Your request for intelligence is misguided. Core intelligence documents have**

never been provided in a civil recovery case and you know this from having previously dealt with at least two major cases where intelligence matters have been dealt with in the same way as they have been in this case. SOCA does not have and has never had access to core intelligence documents held by the PSNI nor would SOCA expect or wish to do so. Nor will we be requesting the documents from the PSNI. We also do not have the power to compel their production and you have misunderstood the purpose of Section 436 of the Act; even if we did have a power under that Section, which we do not, that is a power of the Agency and we would not use it to gather the intelligence documents you refer to for what we would have thought are obvious reasons. Police witnesses will give evidence in this matter. In an effort to be helpful and not have you waste costs, we would also say that it is extremely unlikely that the PSNI will produce core documents to you or the Agency in these proceedings. In any application to compel them to do so in this civil case is, in my opinion, bound to fail. The Judge at trial can determine what weight, if any, to attach to the evidence which will be given by the police officers in both documentary and oral form."

Discontinuance of Prosecution

9. The exhibited correspondence also indicates that a PSNI file was never presented to the PPS in respect of the first defendant and that the PSNI investigation was *discontinued*. The correspondence also confirmed that SOCA did not receive any information in relation to why the PSNI took this decision other than that contained within the grounding affidavit of Anna McCready.

Halifax Material

10. In the letter dated 7 October 2009 in relation to this material the defendants' solicitors wrote:

> **"The rejoinder affidavit of Anna McCready exhibited a witness statement from an unnamed "police liaison officer" relating to the procedure allegedly operated by Halifax plc at the time when the defendant was applying for mortgages which are relevant to this case. We believe that the defendants are entitled to know details of all Halifax plc lending policies and practices in operation during the property boom period. We have already exhibited to the second affidavit of Julie Anne Scott a copy article from the Daily Mail referring to 'sharp practices' that were in operation by another major mortgage lender during the period in question and which the defendant says would have mirrored those operated by Halifax plc. We believe that SOCA would have access to such Halifax plc documentation for the reasons set out above and should discover such germane documentation in respect of the lending criteria of Halifax plc at the time when Ms Scott applied to them for mortgages.**
>
> **We know that Counsel for SOCA indicated in open Court that the above matters are more suited to '*Khnna subpoena* applications'. We, however, are of the opinion that for the reasons stated above that this information documentation is within the possession, custody or power of SOCA."**

The reference to the reasons stated above appears to be a reference to Section 436 of the 2002 Act.

11. By letter dated 9 October 2009 the CSO on behalf of SOCA wrote in response:

> **"We also fail to understand why you think we have control over Halifax plc and their documents; for the avoidance of doubt we do not. If you wish to obtain documents from Halifax, please feel free to do so and**

obviously we would be obliged to receive copies of anything you receive. It is not the plaintiff's role to assist the defendant with whatever proofs you wish to obtain. We would also point out that mortgage fraud is occasioned by an individual whether the mortgage company would have welcomed it or not. We fail to see how a successful argument could be mounted to the effect that the banks deserved to be the subject of fraud by your client and her former partner because the banks engaged in bad practices themselves and that therefore this somehow absolves your client and her partner from their fraud and its consequences in these proceedings; but you can obviously make that argument if you wish.

We also think it quite remarkable that you think that a newspaper article lambasting one bank somehow is evidence in and of itself, never mind being evidence against a completely separate company; again that is a matter for you. We will not be seeking documents from a third party on your behalf".

Rules of the Supreme Court 1980

12. O24(2) provides as follows:

"Discovery by Parties without Order

(1) …The parties to an action between whom *pleadings* are closed must make discovery by exchanging Lists of Documents and, accordingly, each party must, within 14 days after the pleadings in the action are deemed to be closed as between him and any other party, make and serve on that party a *List* of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the action."

13. O24(3) provides:

> "*Order for Discovery*
>
> **Subject to the provisions of this Rule and of Rules (4) and (8), the Court *may* order any party to a cause or matter (whether begun by Writ, Originating Summons or otherwise) to make and serve on any other party a *List* of the documents which are or have been in its possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party."**

14. O24 (7)(1) provides:

> "*Order for Discovery of Particular Documents*
>
> **Subject to Rule 9 the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any documents specified or described in the application or any class of documents so specified or described is, or has at any time been, in his possession, custody or power and if not then in his possession, custody or power, when he parted with it and what has become of it."**

15. O24(9) provides:

> "*Discovery to be ordered <u>only if necessary</u>*
>
> **On the hearing of an application for an order under Rule 3, 7 or 8 the Court, if *satisfied* that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an**

order if insofar as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

16. O24(10) provides:

> "*Inspection of documents referred to in List*
>
> **A party who has served a List of Documents on the other party whether in compliance with Rule (2) or (6) or with an Order under Rule (3) must allow the other party to inspect the documents referred to in the List (other than any which she objects to produce) and to take copies thereof and, accordingly he must when he serves the List on the other party also serve on him a Notice stating a time within 7 days after the service thereof at which the said documents may be inspected at a place specified in the Notice."**

O24(2)2

17. In relation to the first Order sought, namely the provision of a List of Documents under O24(2), the defendants have submitted that the pleadings in this case closed with the filing of SOCA's rejoinder affidavit on 21 September and that accordingly SOCA is in default of the Rules by failing to provide a List.

18. I agree with SOCA's submission that there is no entitlement to automatic discovery under O24(2) in civil recovery proceedings. This is because pursuant to O123(5) civil recovery applications are brought by way of Originating Summons under O28 and are dealt with by affidavit evidence and do not have pleadings within the definition of "pleadings" set out in O1(3). For these reasons I conclude that SOCA is not, as alleged, in default of a discovery obligation *and neither are the defendants* as there is no discovery obligation without a *prior* order of the Court. Until the present application it appears that it had not been the practice of the parties to exchange lists – presumably because practitioners recognised the inapplicability of O24(2) to civil recovery proceedings commenced by originating summons.

O24(3) & (7)

19. It is accepted by SOCA that O24(3) and (7) do apply to proceedings brought by way of Originating Summons and that the Court has *power* to make an order for discovery by way of List verified by way of affidavit (Rule 3) and/or an order for specific discovery (Rule 7) if the Court deems that appropriate. The power to make orders under those Rules is subject to O24(9) which provides that such orders should only be made if they are necessary for fairly disposing of the matter in question or saving costs.

20. Donna Duffy, a lawyer employed by SOCA has deposed as follows:

> **"4. In accordance with O28 [RSC] the practice that has developed in respect of civil recovery cases is that SOCA will serve its grounding affidavit, and the evidence upon which it proposes to rely at the Recovery Order hearing will be exhibited to the affidavit, as opposed to under the discovery process set out in O24 … The defendant does likewise by replying affidavit exhibiting their documentation and SOCA may file a rejoinder affidavit with any further documentation upon which it proposes to rely.**
>
> **5. Inevitably these cases produce large amounts of relevant documentation exhibited to affidavits for the Court to consider.**
>
> **6. However, it is invariably the case that there will be documents that SOCA has received in the course of its civil recovery investigation but that are not exhibited to the affidavits. The reason for not exhibiting everything is to ensure that the Court is not swamped with material that serves no useful purpose in the proceedings and it also reduces costs which an unsuccessful defendant may end up liable for.**
>
> **7. Initially, in some early cases, SOCA's predecessor ARA, in conjunction with the**

> **Crown Solicitor's Office, attempted to produce formal lists of documents detailing all documents that were in ARA's possession whether exhibited or not. However, it quickly became apparent that this was a time consuming and expensive process that served to be of little assistance to the Court.**
>
> **8. Thereafter the practice adopted by SOCA, in most cases, which has never caused any difficulty or proved controversial, has been to prepare a simple list of classes or categories of documentation that can be found in the various boxes of unused material and provide this to a defendant with an invitation to view any of the unused material on the list if they wish to do so. The practice has been that defendants invariably do not take up that offer and indeed in these proceedings it can be seen that the defendant is not seeking any documents that would fall into the category of that contained within the unused material."**

The List referred to in para.8 of Ms Duffy's affidavit has now been furnished to the defendants.

21. In light of those averments, the fact that a List has now been provided and that the unused documents are available for inspection leads me to the conclusion that an O24(3) List is not necessary for fairly disposing of the matter in question or saving costs. No convincing argument has been put forward to the contrary and I am of the view that the provision of such a List is not necessary for the fair disposal of the matter and is likely to increase costs without any tangible benefit either to the parties or to the Court.

O24(7)

22. In order to get around the difficulty that SOCA doesn't have and never had the core intelligence documents (or the other two categories of documents referred to in the schedule) the defendants sought to pray in aid the decision in ***Flood v Lawlor* [2002] 3 IR 67 (SC)**. Based on that authority they submitted that SOCA had a duty to pursue by all means

the documents in its power from the persons in whose actual possession they were. The headnote in ***Flood*** states:

> **"That the obligation of the party required to make discovery extended not merely to documents which were or had been in his possession. It also extended to documents relating to the matters in question in the suit which, while not in his possession, were or had been in his power, ie, were held by other persons on his behalf or in circumstances where he could reasonably require those persons to produce the documents, or copies of them, to him. It was the duty of the defendant in order to comply with his discovery obligations to pursue expeditiously by every means in his power the recovery of these documents from any person in whose possession they might be."**

23. The defendants appear to argue that the documents identified in the schedule are in the "power" of SOCA within the meaning of O24. None of the three categories of documents has ever been sought or obtained by SOCA. The defendants' contention that these third party documents are nonetheless within their power rests on their claim that SOCA has statutory powers, principally Section 357 to compel disclosure and thereby place them within their power. In effect, what the defendants seek is that SOCA should make use of invasive statutory powers, created for an entirely different purpose, in order to put itself into a position where it could then be said to have a "presently enforceable legal right" to documents that would then come within the definition of documents being within its "power" under O24 thereby requiring them to discover them to the defendants. In my view this argument is simply untenable not least because it would involve, in my view, an ultra vires use of statutory powers.

24. In this context in their skeleton argument and before the Court the defendants relied principally on Section 357 and to a lesser extent upon Section 436 of the 2002 Act.

25. Section 357 empowers the Judge on application by the relevant authority, to make a disclosure order and states:

"(i) A Judge may, on an application made to him by the relevant authority, make a disclosure order if he is satisfied that each of the requirements for the making of the Order is fulfilled …"

"Power"

26. What is meant by the expression "possession, custody or power" for the purposes of O24 is well settled – see, for example, the ***White Book on Supreme Court Practice*** at 24/2/3 and ***Matthews & Malek*** on ***Disclosure*** at paras.4.46-4.54.

27. The test for "power" has long been established to mean that the person whom it is alleged has the power to obtain the document must have a presently enforceable legal right to inspect or obtain the document – see, for example, ***B v B*** **[1978] Fam 181** at 186 and ***Lonhro v Shell Petroleum Ltd*** **[1980] 1 WLR 627** at 635. In Ireland there are a number of decisions on the meaning of "power" which also require an enforceable legal right to obtain the documents from whoever actually holds the document – see ***Bulla Ltd v Tara Mines Ltd*** **[1994] 1 ILRM 111,** ***Quinlivan v Conroy*** **[1999] 1 IR 271** and ***Johnston v Church of Scientology*** **[2001] 2 ILRM 110 Irish Supreme Court.**

28. Disclosure orders under Section 357 come within Part 8 of the 2002 Act. SOCA cannot be compelled to seek a disclosure order. Parliament intended these draconian powers to be used in limited circumstances because of their invasive nature – see ***Smith, Owen & Bodner on Asset Recovery*** **Binder 1** at 1.2.439. The Court would not grant such an application because it would plainly be an ultra vires use of statutory powers. I agree that using this statutory power as a vehicle for acquiring discovery for defendants would be ultra vires the disclosure order regime and that a Judge would, if requested, refuse the application if that was the basis upon which it was being made.[1] Furthermore, if applications were made for disclosure orders they could not succeed because the required conditions in Section 358[2] of

[1] In Re De Brun & Anor [2001] NI 442

[2] The Judge may make an Order if the three "requirements" in Section 358 are met and these are first, that there must be reasonable grounds for suspecting that in a case of a confiscation investigation, the person specified in the application has benefited from his criminal conduct or in the case of a civil recovery investigation, the property specified in the application for the Order is recoverable property or associated property. Secondly there must be reasonable grounds for believing that the information which may be provided under the Order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the Order is sought. The third requirement is that there must be reasonable grounds for believing

the Act could not be met. Indeed if the conditions for the making of a disclosure order were satisfied in this case SOCA would have sought and indeed may have been required to seek the information itself.

29. Part 8 Investigatory Powers are not in any event available to SOCA at this stage of the proceedings because one of the requirements for the granting of a disclosure order is that SOCA must state in its application that the property specified in the application is subject to a civil recovery investigation and that the order is sought for the purposes of the investigation [see Section 357(3)(b)]. A civil recovery investigation is defined in Section 341(2) and is an investigation into whether property is recoverable, who holds it and its extent or whereabouts. However, Section 341(3)(a) makes it clear that an investigation is *not* a civil recovery investigation if, as here, proceedings for a recovery order have been started in respect of the property. As recovery order proceedings have been started in this case SOCA does not therefore have the power to obtain a disclosure order even if the Court felt it was appropriate that they should.

30. Section 436 of the 2002 Act upon which the defendants' placed some reliance in my view provide no assistance whatsoever. Section 436(1) provides:

> **"Information which is held by or on behalf of a committed person … may be disclosed to the Director for the purpose of the exercise by the Director of his functions under, or in relation to, Part 5 or 8."**

31. Section 436(5) defines who these permitted persons are and they include a Constable.

32. Section 436 is simply an empowering provision for the benefit of the permitted persons giving them power to share information with SOCA. It is not a provision which entitles SOCA to anything. The permitted persons are not required to provide anything to SOCA under Section 436 and that provision does not enable SOCA to compel them to do so. Furthermore, the section makes it clear that any information received by SOCA under Section 436 does not have to be disclosed by SOCA to anyone else.

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that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained.

Conclusions

33. For the above reasons I am therefore satisfied that the defendants are not entitled to any of the Orders sought in the Summons. An issue as to whether some of the documents referred to in the Schedule were subject to legal professional privilege was not pursued by SOCA. That of course is a matter for SOCA but if there are copy documents currently in their possession for which litigation privilege is not now being claimed then the Court assumes that those documents are or will form part of the corpus of unused material to which the defendants will have access.

34. Although the point has not been argued before me I incline to the view that if SOCA had (or has) documents in its possession which assisted the defendants or undermined the case being made by SOCA its obligation of complete candour to the Court and the interests of justice would require the identification and/or disclosure of any such material. The existence of these public law duties should ensure that anything of material relevance to the decision which the Court is being invited to make would be disclosed. As in criminal cases it would ordinarily not be conscionable for SOCA to proceed if, for whatever reason, it could not disclose material which might undermine its case or assist the defendants in resisting the application.

35. Finally, the defendants had in the course of their written submissions argued that the failure to disclose the underlying core intelligence was incompatible with the defendants' Article 6 rights. That is a matter which, if it is to be pursued, can be dealt with at the substantive hearing. If an abuse of process application is to be mounted, notice of such application supported by a skeleton argument must be furnished timeously to the Court and SOCA.