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Judgment: approved by the Court for handing down | *Delivered:* **27/01/06**
(subject to editorial corrections)

IN THE COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

PATRICK DAVID BELTON

Defendant/Appellant

and

THE DIRECTOR OF THE ASSETS RECOVERY AGENCY

Plaintiff/Respondent

Before: Nicholson LJ, Campbell LJ and Sheil LJ

NICHOLSON LJ

Introduction

[1] By Originating Summons issued on 15 June 2004 the respondent claimed that (i) property known as 96/97 Concession Road, Crossmaglen, (ii) property known as 1A Musgrave Manor, Stockman's Lane, Belfast, (iii) the sum of £6560.08 held by BDO Stoy Hayward in a receivership account were held by or on behalf of the appellant and were recoverable property under Part 5 of the Proceeds of Crime Act 2002 ("the 2002 Act"). Inter alia, a Recovery Order pursuant to Section 243 and 266 of the 2002 Act was sought. The summons was grounded on the affidavit of Dee Traynor, a financial investigator for the Assets Recovery Agency (the Agency), sworn on 10 June 2004. An appearance was entered on behalf of the appellant on 5 October 2004. The appellant swore an affidavit in reply on 12 April 2005. Interrogatories on behalf of the respondent for the examination on oath of the appellant were served on 21 April 2005 and further interrogatories were served on 20 May 2005 without an order of the Court. By summons dated 20 May 2005 the appellant sought an order of the court pursuant to Order 26, Rule 3(2) of the Rules of the Supreme Court (NI) 1980 compelling the respondent to withdraw his interrogatories on the grounds that:-

(a) the respondent's claim was an action constituting a penalty against the appellant; or alternatively

(b) the action was to enforce a forfeiture of an estate in land.

The appellant's summons was heard by Coghlin J, who in a written judgment delivered on 26 August 2005 dismissed the summons on the ground that recovery proceedings under the 2002 Act did not constitute a penalty either in domestic law or in terms of "the autonomous Strasburg concept".

[2] The appellant appealed to the Court of Appeal for leave to appeal on the grounds that:-

1. The learned trial judge (the judge) erred in law in holding that recovery proceedings in accordance with Section 243 of the 2002 Act do not constitute a penalty either in domestic law or in terms of the autonomous meaning of penalty given by the European Court of Human Rights jurisprudence.

2. The judge erred in law in distinguishing confiscation proceedings and recovery proceedings when considering whether the latter constituted a penalty.

3. The judge ought to have concluded that recovery proceedings under the 2002 Act can constitute a penalty and hence it is not open to a respondent in such proceedings to compel interrogatories.

Recovery Proceedings under the 2002 Act

[3] The Preamble to the 2002 Act reads as follows:-

> "An Act to establish the Assets Recovery Agency and make provision about the appointment of its Director and his functions (including Revenue functions), to provide for confiscation orders in relation to persons who benefit from criminal conduct and for restraint orders to prohibit dealing with property, to allow the recovery of property which is or represents property obtained through unlawful conduct or which is intended to be used in unlawful conduct, to make provision about money laundering, to make provision about investigations relating to benefit from criminal conduct or to property which is or represents property obtained through unlawful conduct or to money laundering, to make provision to give

> effect to overseas requests and orders made where property is found or believed to be obtained through criminal conduct, and for connected purposes."

Part 1 provides for the setting up of an Assets Recovery Agency ("the Agency") and for the appointment of a Director of the Agency ("the Director"). Anything which the Director is authorised or required to do may be done by – (a) a member of staff of the Agency … if authorised by the Director Dee Traynor was so authorised. Part 2 provides, inter alia, for confiscation orders in England and Wales. Part 3 provides, inter alia, for confiscation orders in Scotland. Part 4 provides, inter alia, for confiscation orders in Northern Ireland. Part 5 relates to the civil recovery of the proceeds of unlawful conduct and covers proceedings in any part of the United Kingdom. It will be necessary to examine Parts 4 and 5 in some detail at a later stage.

Submissions on behalf of the appellant

[4] It was argued that the court should order the respondent to withdraw his interrogatories on the grounds that they offend the rules enunciated by the Court of Appeal in Mexborough (Earl of) v Whitwood Urban District Council [1897] 2 QB 111 in that the respondent's claim against the appellant (if successful) is an action constituting a penalty against the appellant. Lord Esher MR said at p115:-

> "There is no such thing as a criminal action. An action for a penalty is a civil action just as much as an action for a forfeiture … In an action for a penalty, there can be no question of the defendant's being called on to criminate himself. With regard to such actions, the law is laid down in Martin v Treacher [1886] 16 QBD 507. It was held in that case that there is a rule of law which prevents the application of any of the procedure with regard to discovery in an action for a penalty by a common informer … With regard to the case of an action brought to enforce a forfeiture of land, I may refer to the passage which I cited in Martin v Treacher from the judgment of Alexander CB in Orme v Crockford (1824) 13 Price 376 where he says:
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> > `We must not lose sight of the fact that it is a most important right of which this bill seeks to deprive the

> defendant, no less than that of protecting himself by refusing to answer, from the consequences of answering questions which might tend to charge him with a crime or subject him to penalties, or forfeiture of estate contrary to the humane policy of the law'."

It was contended that interrogatories are governed by Order 26 of the Rules of the Supreme Court (NI) 1980 and the notes in the White Book 1999 apply to these rules. (See, for example, the notes to Order 24/2/14 in the White Book at p.450.)

The issue before the court, as it had been before Coghlin J, was whether recovery proceedings were proceedings for a penalty. It was agreed that it remained open to the appellant, regardless of the decision of this court, to claim privilege in respect of any individual question on the grounds that it would expose the appellant to proceedings for a criminal offence or for recovery of a penalty.

The arguments which had been advanced before Coghlin J at first instance, contending that the recovery proceedings were in reality confiscation proceedings by a different route were re-stated; reliance was placed on paragraphs of the affidavit of Dee Traynor combined with the interrogatories as indicating an attempt to show that the appellant was involved in criminal activity.

It was submitted that there was no real difference between a confiscation order and a recovery order. A custodial sentence was a "back-up" to a confiscation order. Failure to comply with a civil order could amount to contempt of court and lead to imprisonment.

Reference was made to some of the relevant sections of the 2002 Act. In the present case, it was argued, Mr Belton was losing property for the same reason as he would have lost it if there had been a confiscation order. But a lesser standard of proof of criminal conduct was required.

A recovery order involved the imposition of a penalty within the autonomous meaning of "penalty" in Article 7 of the European Convention: see Welch v UK [1995] 20 EHRR 247.

Submissions on behalf of the respondent

[5] It was stated that the respondent alleges that the appellant has been involved in extensive smuggling of fuel across the border between Northern

Ireland and the Republic of Ireland. At all relevant times he was claiming unemployment or other forms of benefit but at the same time his bank accounts showed lodgments of £4.3 m. It was not contended by the appellant that any of the interrogatories were irrelevant or unnecessary for the determination of the issues before the court.

It was argued that questions of forfeiture or of penalising an individual by depriving him of his property assume that he lawfully held that property and was being deprived of it by some wrong doing. The 2002 Act is not punitive in so far as "recoverable property" is concerned. If it is recoverable, the holder must pass it over. There is no question of forfeiting one's own property or being penalised by the confiscation of property.

Reliance was placed on a passage from Hansard in which the Attorney General referred to the purpose of the legislation (Hansard, 13 May 2002, at 72). He said:

> "But it is important – and this is at the heart of the Government's approach – that the civil recovery process is focusing exclusively on the origin of property. It is to be a proprietary remedy, which attaches to the property. It will not be dependent on the person who holds the property having been convicted or, more to the point, having committed any offence. I illustrate that by some of the examples in which that will operate. It is not a form of prosecution. Its purpose is not to secure a conviction against any person and it cannot do so. The result of civil recovery cannot be, for example but most pointedly, a sentence of imprisonment on someone for committing serious crime. It is because civil recovery focuses on property rather than on conduct that it is properly, in the Government's view, a civil procedure."

It was contended that this is not an action for forfeiture as the originating summons laid claim to the land. There was no issue between landlord and tenant. Section 12(1)(8) of the Civil Evidence Act (Northern Ireland) 1971 abrogates the rule whereby a person could not be compelled to answer any question if to do so would tend to expose him to a forfeiture.

Section 10(1) of the Act provides that the right to refuse to answer any question in any legal proceedings other than criminal proceedings … "if to do so would tend to expose that person to proceedings … for the recovery of a penalty" applies only as regards penalties provided for by the law of any part of the United Kingdom.

It was submitted that the interrogatories do not expose the defendant to proceedings for the recovery of a penalty as he does not propose to answer any question in relation to his assets or business. The proceedings are not for a penalty because the purpose and function of civil recovery procedure is to recover property obtained through unlawful conduct, not to penalise or punish any person who is proved to have engaged in such conduct; see the judgment of Coghlin J in Walsh v Director of the Assets Recovery Agency [2005] NICA 6, the discussion of this part of his judgment on appeal and the decision of Collins J in Director of Assets Recovery Agency v Jia Jin He and Dan Dan Cheng [2004] EWHC 3021.

In confiscation proceedings the benefit to the accused who has been convicted is assessed and an amount of money is ordered to be paid. Property is not confiscated. If he has not the money the sum ordered to be paid is reduced. Legitimately acquired property may be subject to confiscation to meet the amount of money ordered to be paid.

In recovery proceedings one has to identify property acquired by unlawful conduct. Lawfully acquired property cannot be confiscated. It is immaterial whether the defendant has committed a crime.

Reference was made to paragraph 13 of the 16th Report (1967) of the Law Reform Committee, chaired by Lord Pearson, to Revenue cases, to Articles 8 and 250A of the Companies (Northern Ireland) Order 1990 and to Article 85 of the Treaty of Rome and the Rio Tinto Zinc case [1978] AC 547 at 612.

There is a difference between a criminal penalty recoverable by civil proceedings and civil recovery of damages by way of compensation for breach of duty or of property obtained by unlawful conduct by way of compensation to the public. The last will usually be the profits of crime.

Reference was made to Parts 4 and 5 of the 2002 Act, and to the decisions in Istel Ltd v Tully [1993] AC 45, David v Britannic Merthyr Coal Co [1909] 2 KB 46, R (McCann) v Manchester Crown Court [2003] AC 787, Colne Valley Water Co v Watford and St Albion's Gas Co [1948] 1 KB 500, Leach v Litchfield [1960] 1 WLR 1392 and Pye v Butterfield 122 ER at 1038.

[6] Prior to this appeal the leading case on the recovery of assets in this jurisdiction was Cecil Walsh v Director of the Assets Recovery Agency [2005] NICA 6, a decision of the Court of Appeal. In it the Lord Chief Justice, giving the judgment of the court, set out the history leading up to the passing of the 2002 Act at paragraphs [6] to [8] of the judgment. At paragraphs [9] to [16] he summarised relevant sections of the 2002 Act.

The central issue in that appeal was whether the Agency should be required to establish that the appellant was engaged in unlawful conduct to the criminal standard, notwithstanding the terms of section 241(3). That proposition was based on the appellant's common law rights and also on his rights under Article 6(2) of the European Convention on Human Rights (ECHR).

At paragraph [19] the Lord Chief Justice set out the three tests which are to be found in Engel v Netherlands (No 1) (1976) 1 EHRR 647 at 678-679. He then dealt with each of the three tests, commencing with the classification in national law at paragraphs [21] to [26] and concluding at [27]:-

> "We are satisfied that all the available indicators point strongly to this case being classified in the national law as a form of civil proceeding. The appellant is not charged with a crime. Although it must be shown that he was guilty of unlawful conduct in the sense that he has acted contrary to the criminal law, this is not for the purpose of making him amenable as he would be if he had been convicted of crime. He is not liable to imprisonment or fine if the recovery action succeeds. There is no indictment and no verdict. The primary purpose of the legislation is restitutionary rather than penal."

Next, he dealt with the nature of the proceedings in the course of which he referred to what Lord Macfadyean said in S v Lord Advocate at paragraph [33]:-

> "… the second criterion involves consideration of whether the situation in which the person concerned finds himself is of such a nature that he ought objectively for the purposes of the Convention to be regarded as 'charged with a criminal offence'. That will involve consideration of the nature of the allegation against him, and of the nature of the proceedings in which the allegation is made. It may involve consideration of the capacity in which the person making the allegation is acting. It may involve … consideration of whether the imposition of a punishment or penalty is either the purpose or a possible outcome of the proceedings. "

[7] The Lord Chief Justice concluded that the factors outlined in this passage, when applied to recovery actions, compellingly pointed to the conclusion that the proceedings were civil in character. The allegation made against the appellant did not impute guilt of a specific offence; the proceedings did not seek to impose a penalty other than the recovery of assets acquired through criminal conduct; and they were initiated by the director of an agency, which although it was a public authority, had no prosecutorial function or competence. He referred to a passage at paragraph 34 of the judgment of the European Court in Phillips v United Kingdom (2001) EHRR (Application no 41087/98). This court does not need to set out that passage in full. We extract from paragraph [30] of the judgment of the Lord Chief Justice:-

> "The Court considers that this procedure (under the 1994 Act) was analogous to the determination by a court of the amount of a fine or the length of a period of imprisonment to be imposed on a properly convicted offender. This, indeed, was the conclusion which it reached in Welch (judgment cited above) when, having examined the reality of the situation, it decided that a confiscation order constituted a `penalty' within the meaning of Article 7."

And from paragraph [31]:-

> "… it did not constitute the preferring of a charge against him within the meaning of Article 6 … . Whether or not it can be regarded as a penalty, it does not constitute the charging of the appellant with a criminal offence."

At paragraph [36] to [39] he discussed whether a penalty was imposed. He pointed out that the learned trial judge (Coghlin J) did not consider that recovery proceedings involved a penalty. At paragraph [20] of his judgment Coghlin J had said:-

> "… the purpose and function of the civil recovery procedure is to recover property obtained through unlawful conduct but not to penalise or punish any person who is proved to have engaged in such conduct …"

At paragraph [38] the Lord Chief Justice stated:-

> "A distinction between confiscation orders and recovery proceedings can be drawn … . The recovery of assets may more readily be described as a preventative measure, therefore. After all, the person who is required to yield up the assets does no more than return what he obtained illegally. It is clear, however, from the judgement in Welch (Welch v UK (1995) 20 EHRR 247) that the European Court considered that a provision will not be classified as non-penal solely because it partakes of a preventative character and since it is unnecessary for us to decide the point, we will refrain from expressing any final view on whether recovery of assets should be regarded as penal within the autonomous meaning of that term."

[8] In The Queen On the Application of the Director of The Assets Recovery Agency v Jia Jin He and Dan Dan Chen [2004] EWHC 3021 Collins J dealt with the Proceeds of Crime Act 2002 and the nature of proceedings under Part 5 of the Act. He accepted that the approach set out in Engel should be applied domestically, as confirmed by the House of Lords in R v H [2003] 1 All ER 497. He referred to a number of decisions in the High Court in which condemnation forfeiture proceedings were to be regarded as civil proceedings: see paragraph [51] of his judgment. He referred to R (Mudie and Another) v Dover Magistrates' Court [2003] QB 1238 and the judgment of Laws LJ in the course of which the latter cited a passage from Butler v UK 41661/98:

> "…. It is the applicant's contention that the forfeiture of his money in reality represented a severe criminal sanction, handed down in the absence of the procedural guarantees afforded to him under article 6 of the Convention, in particular his right to be presumed innocence [sic]. The court does not accept that view. In its opinion, the forfeiture order was a preventive measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. It follows that proceedings which led to the making of the order did not involve `the determination … of a criminal charge (see Raimondo v Italy [1994] 18 EHRR 237, 264, at para 43; and more recently Arcuri v Italy (Application No 52024/99), inadmissibility

decision of 5th July 2001 … ." See paragraph 28 of the judgment of Laws LJ.

Collins J also referred to paragraph 36 of the judgment of Laws LJ in which he said:-

"I would just add these observations. Lord Steyn's remarks in R (McCann) v Crown Court at Manchester [2003] 1 AC 787, although made in the domestic context, show that some care needs to be taken in the application of the Engel test. It is certainly beyond contest that the concept of `criminal charge' possesses an autonomous meaning in the European Court of Human Rights jurisprudence. It is also true that the first of the three criteria, that is the domestic classification of the proceedings, is treated as no more than a starting point. But that proposition should not distract the court from the question whether, given the three criteria, the proceedings in issue are in substance in the nature of a criminal charge. Are they an instance of the use of state power to condemn or punish individuals for wrongdoing? The European Court of Human Rights and our own courts have held that condemnation proceedings are not in any such category. The emphasis on the in rem nature of such proceedings in Air Canada v United Kingdom 20 EHRR 150, Lord Woolf CJ's judgment in Goldsmith v Customs and Excise Comrs [2001] 1 WLR 1673, Lord Steyn's observations in the McCann case [2003] 1 AC 787, and the European Court of Human Rights' own discussion in Butler v United Kingdom 27 June 2002, combine, in my judgment, to underline the force of that conclusion."

At paragraph 55 Collins J said:-

"Forfeiture of property which has been obtained by unlawful conduct is not regarded as a penalty. It would be helpful, I think, to refer specifically to a Commission decision, M v Italy Application Number 12386/86, a decision of 15th April 1991. The finding was that Articles 6 and 7 of the Convention are not applicable to confiscation of property belonging to a person suspected of being

> a member of a Mafia-type organisation, decided in the context of proceedings for the application of preventive measures under various Italian Acts, as the measure does not involve a finding of guilt subsequent to a criminal charge and does not constitute a penalty."

At paragraph 56 Collins J referred to page 98 of the European Commission's report in M v Italy (at l17 DR 59):-

> "The Commission considers that this legal background confirms the preventive character of confiscation and shows that it is designed to prevent the unlawful use of the property which is the subject of the order. It follows that the confiscation of the applicant's property does not imply a finding that he was guilty of a specific offence, any more than the compulsory residence order against him does.
>
> The Commission further considers that the severity of the measure is not so great in this case as to warrant its classification as a criminal penalty for the purposes of the Convention. Confiscation is a measure not confined to the sphere of criminal law; it is encountered widely in the sphere of administrative law. Items liable to confiscation include illegally imported goods (see the issue examined by the Court and the Commission in the Agosi case, Eur. Court of HR judgment of 24th October 1986, Series A no 108), the proceeds from unlawful activities not classified as criminal offences (such as buildings constructed without planning permission), certain items considered dangerous in themselves (such as weapons, explosives or infected cattle) and property connected, though only indirectly, with a criminal activity (cf the confiscation under Italian law of the funds of secret societies pursuant to Law No 17 of 15th January 1982.)
>
> Thus it can be seen from the legislation of the Council of Europe member States that measures of great severity, but necessary and appropriate for protection of the public interest, are ordered even outside the criminal sphere.

> The Commission notes that the impugned confiscation measure concerns property considered to be of unlawful origin. Its aim is to strike a blow against mafia-type organisations and the very considerable resources they have at their disposal to finance unlawful activities. The Commission therefore takes the view that the measure in question can be likened to those mentioned above.
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> That being the case, and in the light of the Court's case-law, the Commission concludes that the confiscation complained of does not involve a finding of guilt subsequent to a criminal charge, and does not constitute a penalty. Consequently, the complaints of a violation of Article 6 para 2 and Article 7 of the Convention are incompatible ratione materiae with those provisions and must be rejected pursuant to Article 27-para 2."

At paragraph 57 he said of the decision of Coghlin J in Walsh's case:-

> "I have no doubt that Coghlin J was correct in deciding as he did that these were civil proceedings. I do not need, I think, to say more than that I entirely agree with the reasons that he gives to reach that conclusion. His conclusion is entirely consistent with, and supported by, both domestic and Strasbourg jurisprudence."

He referred to argument about Article 7 at paragraph 68 and 69:-

> "The authorities to which I have already referred make it plain that there is no question of any penalty involved in these proceedings. Furthermore, there has been no conviction of a criminal offence leading to a penalty. Of course, property cannot be recoverable unless, at the time it was acquired, it was obtained through unlawful conduct. The conduct must have been criminal at that time. To that extent, the prohibition against retrospectivity will apply, but only because the Act says that the property must be property which was obtained by criminal conduct. In those

> circumstances, it is quite clear that Article 7 has no application."

[9] Coghlin J in the course of his judgment in the present case considered the decision in Welch to which we will return, and concluded that the confiscation proceedings in the cases on which the appellant relied did not provide a very helpful analogy. Recovery proceedings were in rem, aimed at the identification and recovery of property obtained as a result of unlawful conduct and, consequently, to which [the appellant] could have no legitimate claim. Unlike confiscation orders, there were no indications of a punishment regime.

[10] Section 12 of the Civil Evidence Act (Northern Ireland) 1971, abrogates except in relation to criminal proceedings the rule whereby in any legal proceedings a person cannot be compelled to answer any question … if to do so would tend to expose him to a forfeiture. Section 10(1) enacts that the right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question … if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty (a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law…

In Valentine's Civil Proceedings, The Supreme Court, 13-44 and 13-45 the note to this sub-section reads:-

> "Any person is privileged from answering a question … which would tend, ie materially increase the risk, to expose him or his spouse … to proceedings for a criminal offence or for recovery of a penalty under the law of any part of the United Kingdom: Civil Evidence Act (NI) 1971, section 10(1). In any case a court on ordering discovery can bar a claim of privilege by accepting the prosecuting authority's assurance that the information will not be used for criminal prosecution. Istel Ltd v Tully [1993] AC 45. The person must claim the privilege and state his bona fide belief of incrimination on oath: Kelly v Colhoun [1899] 33 1LTR 33 … The privilege is to be upheld if the answer might provide any evidence which would help the proof of his guilt or might encourage a prosecution. A mere claim of belief that the answer will incriminate is not enough … "

[11] The most relevant decision of the European Courts on the meaning of "penalty" is Welch v United Kingdom (1995) 20 EHRR 247, which was concerned with a retrospective confiscation order under the Drug Trafficking Offences Act 1986. The headnote reads in part:-

> "The concept of a penalty in Article 7(1) is, like the notions of `civil rights and obligations' and `criminal charge' in Article 6(1), an autonomous Convention concept. To render the protection offered by Article 7 [of the Convention] effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a penalty within the meaning of this provision."

This is stated at paragraph [27] of the judgment of the Court. It is unnecessary to set out Article 7 but at paragraph [28] of the judgment the Court said:-

> "The wording of Article 7(1), second sentence, indicates that the starting point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a `criminal offence'. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity".

At paragraph [30]:

> "The preventive purpose of confiscating property that might be available for use in future drug trafficking operations as well as the purpose of ensuring that crime does not pay are evident from the ministerial statements that were made to Parliament at the time of the introduction of the legislation. However, it cannot be excluded that legislation which confers such broad powers of confiscation on the court also pursues the aim of punishing the offender. Indeed, the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment."

At paragraph 33:

> "… The sweeping statutory assumptions in Section 2(3) of the 1986 Act that all property passing through the offender's hands over a six year period is the fruit of drug trafficking unless he can prove otherwise; the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit; the discretion of the trial judge, in fixing the amount of the order, to take into account the degree of culpability of the accused; and the possibility of imprisonment in default of payment by the offender – are all elements which when considered together, provide a strong indication of, inter alia, a regime of punishment."

At paragraph 34:

> "Finally, looking behind appearances at the realities of the situation, whatever the characterisation of the measure of confiscation, the fact remains that the applicant faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted."

[12] But, of course, the decision in Engel v The Netherlands (No 1) [1976] 1 EHRR 647, which was the subject of analysis by Coghlin J and this court in Walsh, and by Collins J in Jia Jan He and Another, and the decisions in Ozturk v Germany [1984] 6 EHRR 409, Schmaatzer v Austria [1995] 21 EHRR 511 and Lauro v Slovakia [1998] ECHR 26138/95 which were taken into account in Engel are relevant. The principles in Engel were applied in Welch. (In R v H [2203] 1 All ER 497 the approach in Engel was held to be applicable domestically). In Phillips v UK (Application No 41087/98) the court also treated confiscation proceedings as part of the sentencing process following a conviction. On the other hand in M v Italy, Application No 12386/86, the European Commission held that forfeiture of property obtained by unlawful conduct was not a penalty and that Articles 6 and 7 of the Convention did not apply in the context of proceedings for the application of preventive measures under various Italian Acts, as the measures did not involve a finding of guilt subsequent to a criminal charge, and, therefore, did not constitute a penalty: see M v Italy 17 DR 59.

[13] Under domestic law a confiscation order under the 2002 Act is regarded as a penalty: see McIntosh v Lord Advocate and Another [2001] UK PC D1, a decision of the Privy Council. See also R v Rezvi [2002] UKHL1, a decision of the House of Lords. We were referred to R v Montila and Others [2004] UKHL50 on behalf of the appellant. The House of Lords was not concerned with confiscation proceedings nor with the recovery of assets. This case is, therefore, not relevant.

[14] Part V of the 2002 Act sets out the provisions in relation to recovery of assets. Section 240 states that the general purpose of this Part is to recover in civil proceedings property which is, or represents, property obtained through unlawful conduct and cash which is, or represents, property obtained through unlawful conduct or which is intended to be used in unlawful conduct. The court must, of course, remain free to assess for itself whether the nature of the proceedings amounts in substance to a penalty.

The unlawful conduct must be criminal in that part of the UK where it occurs and the court must decide the issue on the balance of probabilities. It does not matter whether the unlawful conduct is the respondent's own conduct or another's, provided that he obtains the property by or in return for the conduct. It is not necessary to show that the conduct was of a particular kind, provided that it is shown that the conduct was one of a number of kinds, each of which would have been unlawful: see sections 241 and 242.

Under section 266 if the court is satisfied that property is recoverable, it must make a recovery order vesting the property in the trustee for civil recovery unless the conditions in subsection (4) are applicable and it would not be just and equitable to do so or it would be incompatible with any of the Convention rights. The conditions in subsection (4) include a condition that the person against whom the recovery order is sought obtained the property in good faith but there are other conditions to be met. The section is also subject to sections 270 to 278. The trustee for civil recovery is appointed by the court under section 267 and acts on behalf of the enforcement authority (the Director of the Agency).

Where a person enters into a transaction by which he disposes of recoverable property and obtains other property in place of it the other property represents the original property. Where a person who has recoverable property obtains further property consisting of profits accruing in respect of the recoverable property, it is to be treated as representing the property obtained through unlawful conduct: see section 307. But there are general exceptions and other exemptions.

Nothing which the Director of the Agency is authorised or required to do may be done by a member of a police force.

[15] There is no section contained in this Part of the Act which provides for the prosecution of any person for an offence or empowers the Director of the Agency to institute criminal proceedings. It follows that no one can be convicted or sentenced to imprisonment or fined under this Part. The Court, if satisfied that property has been obtained by criminal conduct to the civil standard of proof, must, subject to the protection set out above, make a recovery order and vest the property in a trustee who acts under the direction of the Director of the Agency which is a public authority. The aim is to recover property, not to pursue an individual. As the property has been obtained by criminal conduct, it appears to us that it must be in the public interest to recover the property for the benefit of the public. The appellant has not drawn our attention to any unfairness in the provisions of this part of the Act and we have been unable to find any unfairness. None of the other Parts of the Act affect this Part.

[16] Confiscation orders made in Northern Ireland are governed by Part 4 of the 2002 Act. Section 156 provides that a court must proceed under the section if two conditions are satisfied; (1) the defendant is convicted of an offence in proceedings before the Crown Court or is committed to the Crown Court in respect of an offence or offences of which he has been convicted by a magistrates' court and the prosecutor asks the court to commit the defendant to the Crown Court with a view to a confiscation order being considered; (2) the prosecutor or Director of the Agency asks the court to proceed and the court believes it is appropriate for it to do so. The court must decide whether the defendant has a criminal lifestyle and, if it so decides, it must decide whether he has benefited from his general criminal conduct; or if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

If the court decides that he has benefited, it must decide the recoverable amount and make a confiscation order requiring him to pay that amount. Provisions are made in respect of cases where the defendant absconds: see sections 177 and 178.

The recoverable amount is an amount equal to the defendant's benefit from the conduct concerned, provided that only the "available amount" is recoverable. If the court decides that the defendant has a criminal lifestyle it must make four assumptions. But the court must not make an assumption if the defendant can show that it is incorrect. The assumptions are (1) that any property transferred to the defendant at any time after the relevant day was obtained by him as a result of his general criminal conduct. (The relevant day is the first day of the period of six years ending with the day when proceedings for the offence concerned were started against the defendant); (2) that any property held by the defendant at any time after the date of conviction was obtained by him as a result of his general criminal conduct

and at the earliest time he appears to have held it; (3) that any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct; (4) that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it: see section 160. Legitimately acquired property may be subject to confiscation to meet the amount assessed as the defendant's benefit from the unlawful conduct. The court has power to commit the defendant to prison for default in payment of the amount to be paid under the confiscation order or for any shortfall in payment of that amount.

In view of these provisions it is scarcely surprising that the courts have held that confiscation orders under the Act are part of the sentencing process and a penalty. None of these provisions is to be found in Part 5 of the 2002 Act.

[17] None of the provisions in Part 5 of the 2002 Act imposes a penalty criminal or civil. For the reasons given at paragraph [15] of this judgment which are in similar terms to the reasons given by Coghlin J for dismissing the application, set out at paragraph [9] of this judgment, the appeal is dismissed. Even had I been satisfied only on the matters contained in sub-paragraph 1-4 I would still have been satisfied that the threshold criteria was crossed. Needless to say with the additional material which I have found, I am further convinced that this is the case.