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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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Between:

THE DIRECTOR OF THE ASSETS RECOVERY AGENCY

Plaintiff/Respondent;

-and-

WILLIAM JOSEPH LOVELL

Defendant/Appellant.

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Before Kerr LCJ, Higgins LJ and Girvan LJ

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KERR LCJ

Introduction

[1] This is an appeal from a decision of Coghlin J making a recovery order in relation to certain of the appellant's property. In broad summary, three main grounds of appeal are advanced. First, it is suggested that the judge should have adjourned the hearing of the case against the appellant. Secondly, it is claimed that, having reached an adverse view about the appellant's credibility, the judge should have recused himself from the hearing. Finally, the appellant contends that there was insufficient evidence to prove that the property in question had been obtained through unlawful conduct.

Background

[2] The Police Service of Northern Ireland (PSNI) on 8 February 2004 asked the Assets Recovery Agency (ARA) to investigate whether assets held by William Lovell were the proceeds of crime. On 23 September 2004,

following a civil recovery investigation, ARA obtained an interim receiving order over property held by Mr Lovell and other members of his family. On 20 January 2005, Messrs Kevin R Winters & Co, solicitors, came on record for the appellant. They brought an application to have the interim receiving order varied. That application was subsequently withdrawn.

[3] On 22 July 2005 the interim receiver filed what is called a recoverable property report. This indicated that property held by the appellant represented the proceeds of crime and had been obtained by him through unlawful conduct. The report led in due course to an application under section 243 of the Proceeds of Crime Act 2002 (POCA) seeking the recovery of property held by William Lovell, his former wife and his parents. Winters & Co entered an appearance on the appellant's behalf. The case was listed for hearing on 29 May 2007. The appellant did not attend court on that date but his solicitors and counsel did. Counsel informed the judge, Morgan J, that the appellant would not be attending because he had lost confidence in his legal team. The judge told the appellant's legal representatives that Mr Lovell should be informed that, unless he appeared at 9.30 am the following day with a satisfactory explanation for his absence, the case would proceed at 10 am.

[4] Mr Lovell appeared on 30 May and the judge spoke directly to him, asking whether he was aware that the action had been listed for hearing the previous day. The appellant replied that he required more time to prepare his case. He considered that he had not seen his counsel sufficiently often during the two previous years. In answer to further questioning from the judge, Mr Lovell said that he needed new counsel. Morgan J then heard and acceded to an application by Winters & Co to come off record but directed that the matter should proceed on that day, with the trial judge being McLaughlin J.

[5] When the hearing reconvened before McLaughlin J, the appellant said that he had dismissed his legal team on 25 May. When asked what he had done about obtaining new legal representation since then, he replied that he had not been well and had done nothing. He said that he could not represent himself. When asked about the reasons for his indisposition, the appellant claimed that he had gall bladder problems and suffered from kidney stones. He also said that he had been involved in an accident on 10 June 2004. None of these matters had been mentioned to Morgan J. It was decided that the hearing would begin the next day.

[6] At the beginning of the hearing the following day (31 May 2007) the appellant informed McLaughlin J that he had made an appointment for the following day, 1 June 2007, with one David O'Shea, a solicitor in the firm of Sullivans of Dublin. (In fact, Mr O'Shea was a solicitor in the firm of O'Donovan of 73 Capel Street, Dublin). The judge warned Mr Lovell that he would need to make sure that his solicitor was entitled to practise in Northern

Ireland. He also informed the appellant that, when the case was next fixed for hearing, it would proceed on the date chosen. A review hearing was arranged for 7 June 2007.

[7] On 7 June the appellant was again unrepresented. He said that he had been in touch with Mr O'Shea by telephone and was waiting for him to arrive. McLaughlin J again raised the question of Mr O'Shea's entitlement to practise in Northern Ireland. Mr Lovell replied that he believed that Mr O'Shea might appoint a solicitor in Northern Ireland to act on his behalf. The judge delayed the start of the hearing to await the arrival of the solicitor. He did not appear. The judge took the somewhat unusual step of having Mr Lovell telephone the solicitor's office. The appellant claimed that he could not get a reply to his telephone call. He was ordered by the judge to leave the solicitor's contact details with the court registrar. The case was fixed for hearing on 19 September and Mr Lovell was told firmly that it would proceed on that date.

[8] The next stage in the story is described by Coghlin J in paragraph [5] of his judgment: -

> "[5] On 7 and 8 June 2007 the court office made a number of attempts to telephone the Dublin solicitor whose office address and telephone numbers had been provided to the court by the first-named defendant. On 8 June 2007 the court office made contact with a representative of the solicitors' firm who stated that he had just come "on record" on 7 June 2007 and that he would send in a letter explaining this as well as providing an address for service in Northern Ireland. The solicitor was made aware of the fact that the substantive hearing had been fixed for 19 September 2007. The court office received no further contact from the Dublin solicitor prior to 19 September 2007. On 12 September 2007 a representative of the Agency telephoned the office of the Dublin solicitors and was informed by the same representative that he was in the process of appointing an agent in Northern Ireland but he was unable to provide a name as the matter was being dealt with by his secretary. Upon that occasion he was reminded that the hearing had been fixed for 19 September."

[9] When the matter came on for hearing on 19 September, Coghlin J was the judge assigned to hear it. The appellant was present. He did not have legal representation. He told the judge that he had telephoned Mr O'Shea and was waiting for him to arrive. He then informed the court that he had

attended the office of the Dublin solicitors a number of times during the summer and that he had been informed by Mr O'Shea that there would be no difficulty in arranging for him to be represented by solicitor and counsel at the hearing on 19 September. On hearing this, Coghlin J deferred the start of the hearing until 12 noon to give the appellant time to contact his solicitor. He warned Mr Lovell that it would begin at that time. When the court sat again, the appellant told the judge that he had spoken to his solicitor. According to the appellant, during that telephone conversation, Mr O'Shea had informed him for the first time that he was not entitled to practise in Northern Ireland and would therefore not be appearing to represent him. Coghlin J stated that the appellant would have to represent himself. He said that the court would give Mr Lovell such assistance as it could on matters of concern to the appellant or which he did not understand. Mr Lovell's riposte was that he would not be representing himself and, following further exchanges with the judge, he left the courtroom.

[10] The trial proceeded. On 20 September 2007, settlement was reached between ARA and the other defendants (the appellants' parents and his former wife). Consent orders were made under section 276 of the 2002 Act. The action against the appellant continued in his absence. On 17 December 2007, Coghlin J delivered his judgment. On 14 January 2008 the appellant lodged a Notice of Appeal through Winters & Co who had been re-appointed to act for him. Grounds of appeal were not submitted until 10 September 2008 following an application to strike the case out by ARA.

[11] Coghlin J explained the reasons for ordering the trial to proceed in paragraph [7] of his judgment: -

> "[7] I gave careful consideration to all of the circumstances relating to the first-named defendant's [Mr Lovell's] account of the steps that he had taken to secure alternative legal representation and familiarised myself with the log notes relating to the previous explanations that he had tended (*sic*) to the court. In the circumstances I concluded that the explanations put forward by the first defendant were simply not credible and that the likelihood was that either he had not made any real attempt to secure representation or that he had deliberately left any such attempt to the last minute with a view to persuading the court that a further adjournment should be granted. September 19 was the second occasion upon which the Agency had attended together with its witnesses including the Interim Receiver, who had travelled from London. The case had been fixed peremptorily to proceed on 19

> September and, prior to that date, neither the Agency nor the court had been given any indication that the first-named defendant had failed to secure effective legal representation for the purpose of the hearing. I considered that the first-named defendant had been given an adequate opportunity to make arrangements for whatever legal representation he wished to secure and that, in fact, he was simply engaging in a course of conduct aimed at the continuing deferment of the hearing. In such circumstances, balancing the rights of both parties, I determined that the case should proceed. I offered the first-named defendant the opportunity to represent himself confirming that I would do all that was reasonably in my power to assist him during the course of the hearing. The first-named defendant rejected such an opportunity and left the court taking no further part in the hearing."

The appellant's account of the engagement of Mr O'Shea

[12] On the day before the hearing of the appeal (10 February 2009) the appellant swore an affidavit in which he purported to set out his contact with Mr O'Shea. Before dealing with the averments in this affidavit, we should say something about its timing. Counsel for the appellant, Mr O'Donoghue QC, suggested that the filing of the affidavit had been prompted by certain assertions in the respondent's skeleton argument. In that document the respondent had pointed out that, although the appellant had told Coghlin J that he had visited the offices of the Dublin solicitors a number of times, there was no evidence that he had done anything more than have some telephone conversations with the solicitor. This contention, Mr O'Donoghue suggested, was the catalyst for the production of the appellant's affidavit.

[13] We find this explanation wholly unacceptable. A major plank – if not indeed the centrepiece – of Mr Lovell's appeal has been that the learned trial judge was wrong to have concluded that he had not made any real effort to secure representation or that he had deliberately left this to the last minute expecting that he would thereby be able to get the matter adjourned. In order to make that case, a full explanation of what had transpired between him and Mr O'Shea was required of the appellant. The sudden production of the affidavit when the appeal was imminent, especially when the grounds of appeal were furnished only after an application to strike out the appeal had been made, does not provide the most convincing backdrop to Mr Lovell's claim that he had made genuine efforts to secure legal representation for the hearing on 19 September 2007.

[14] In his affidavit, Mr Lovell stated that a friend had recommended Mr O'Shea and they had met initially in the first week of June 2007. At that first meeting, Mr O'Shea said that he needed to read the papers but that he "could not go into any detail until the court case was put back until after 19 September 2007". Some significant observations can be made on foot of this averment. Firstly, the appellant had told the court on 31 May that he had an appointment with Mr O'Shea on 1 June. It is quite clear that no meeting took place on that date because the hearing was not fixed for 19 September until the court hearing on 7 June. Based on Mr Lovell's account in his affidavit, therefore, the first meeting with Mr O'Shea must have taken place some time after 7 June. The second matter that becomes clear from this account is that Mr Lovell did not, apparently, respond to the suggestion made by Mr O'Shea that he could not go into detail until the case was adjourned beyond 19 September. This is, to say the least, surprising if Mr Lovell was truly committed to obtaining representation. He had been left in no doubt by McLaughlin J that the matter would have to proceed on 19 September. One would have thought that his instant and urgent reaction to the solicitor's suggestion (that the case would have to be adjourned) would have been to point out that it was most unlikely that an adjournment would be allowed. Finally, in light of the solicitor's comments that the case would have to be adjourned before he could "go into any detail", it is strange that Mr Lovell should have told the judge on 19 September that he had been assured by Mr O'Shea that there would be no difficulty in arranging for him to be represented by solicitor and counsel at the hearing that day.

[15] It is clear from Mr Lovell's affidavit that he had not received any written communication from Mr O'Shea before 19 September nor was he ever told that a barrister had been engaged for his case. He did not have a consultation with counsel after Mr O'Shea became involved. The emphasis throughout all three meetings with this solicitor was on having the case adjourned but there is not a hint in Mr Lovell's affidavit that he gave Mr O'Shea any intimation that this might be difficult to secure. Instead, he has blandly averred, "It is my clear understanding that Mr O'Shea was going to get the case adjourned and then we would get a barrister sorted out". There was absolutely no basis for this belief and every reason to anticipate that it would not happen. Moreover, it contrasts sharply with what the appellant told the judge on the morning of 19 September when he said that he had been told that there would be no difficulty in arranging for him to be represented by solicitor *and counsel* at the hearing.

[16] It is not a matter for surprise that Mr O'Shea did not turn up when the case was due to begin on 19 September. Having examined all the available evidence, we have considerable reservations whether the appellant truly expected that he would. Whether he did or not, it is abundantly clear that Mr Lovell had not made a concerted effort to secure representation for the hearing on 19 September. The representation required for that date was a

solicitor (and, if necessary, counsel) who could present his case. The appellant knew very well that the judge would insist on the case proceeding on that date. Yet Mr Lovell did not demand to meet counsel. Indeed, he did not even insist that a barrister be engaged before the hearing. In this context, one must remember that the appellant had told the court on 30 May 2007 that he had not seen his counsel sufficiently often during the two previous years. The inescapable conclusion from these circumstances is that Mr Lovell believed that, by the stratagem of not having a barrister on 19 September, and possibly also in the knowledge that his solicitor would not be present, he would secure yet a further deferral of this action, despite the dire warnings that he had been given at the earlier hearings.

[17] We are therefore entirely satisfied that the judge was correct to decide that no real effort had been made by the appellant to obtain representation for the hearing on 19 September. Nothing in the material that he has latterly produced supports the view that he made an authentic attempt to be ready to proceed on the date that (as he had been firmly told) the case would begin. On the contrary, at best, he willingly fell in with a strategic approach to the case whose sole focus was to get the matter put off yet again.

Should the judge have recused himself?

[18] It was submitted that, as the judge had reached a conclusion on the appellant's truthfulness (or, more accurately, the lack of it), he ought to have recognised that he could no longer deal with issues in which the appellant's honesty was in issue. We can deal with this argument briefly.

[19] Trial judges must regularly make assessments of the integrity of witnesses' testimony while it unfolds in the course of the trial. This is not an exercise which can always be suspended until the trial is over. Judgments as to the veracity of evidence given by witnesses are made frequently during trials and often must be made before a particular stage can be passed. The present case is an example of that. Coghlin J had to reach a view on whether the appellant's claim to have done all that he could to secure the services of a solicitor was true. As it happens, we consider that the view that he formed (that it was not true) was fully justified. Material produced to this court has convinced us that the judge was entirely correct to find as he did. It would be ironical if Coghlin J should be regarded as having created an appearance of bias by reaching an unimpeachable decision on this matter. But, there are good reasons for rejecting this argument besides that.

[20] The leading authority on apparent bias remains *Porter v Magill* [2002] 2 AC 357. The principle stated by Lord Hope of Craighead in paragraph 103 of his opinion is still the *locus classicus* on this issue: -

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[21] Having referred to this statement, in *Re William Young* [2007] NICA 32, this court said at paragraph [6]: -

> "The notional observer must therefore be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker was biased. In this context, it is pertinent to recall Lord Steyn's observation in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, quoting with approval Kirby J's comment in *Johnson v Johnson* (2000) 201CLR 488 at 509 that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.'"

[22] In the present case, the observer would be obliged to acknowledge that the judge had to form a view as to the truthfulness of the appellant's claim that he had made concerted efforts to obtain legal representation for the hearing on 19 September. If the judge concluded that genuine but unavailing attempts had been made, this would clearly have influenced his decision whether to adjourn the matter yet again. If, on the other hand, he decided, as he did, that the appellant was deliberately exaggerating (if not indeed manufacturing) his account of how he had tried to obtain the services of a solicitor, this would have impelled a different conclusion – a conclusion such as the judge in fact reached.

[23] The notional observer would also have to reflect on the circumstance that this type of decision is the stuff of everyday *ad hoc* assessments that a judge is called on to make in the course of many forms of litigation. The observer would also be required to bear in mind that judges are well accustomed to reaching adverse views about a witness but, in the same proceeding, finding in their favour on other issues, where the evidence warrants it. On this basis, we do not consider that there is any reason to suppose that a dispassionate bystander would view the judge's conclusion that the appellant had not made a proper attempt to obtain legal representation as giving rise to the appearance of bias on his part in relation to the substantive issues in the case.

The substantive findings

[24] The judge found that the appellant had a propensity for dishonesty and acquisitive crime. It is not suggested that he erred in doing so. He based his finding on this aspect of the case partly on Mr Lovell's criminal record. This was certainly substantial. It spanned the period from 1981 until 2002 and covered a wide spectrum of offences of dishonesty ranging from theft and burglary to conspiracy to steal and handling stolen goods. Coghlin J heard evidence from a Detective Sergeant McComb, a member of the Economic Crime Bureau of the Police Service of Northern Ireland, about the appellant's conviction of the offence of burglary and theft that had occurred on 8 April 2002. On that occasion two men had forced their way into the home of a 76 year old man at Fintona and there stole a sum of cash whilst a third man waited in a car outside the premises. The appellant was subsequently found driving the vehicle that had been used in these offences. A blue baseball bat was found in the vehicle similar to one that had been seen by a witness at the scene of the offence. The appellant pleaded guilty (with two others) to these offences and was sentenced to three years' imprisonment suspended for three years.

[25] During interviews the appellant also conceded that he had never made a declaration of income to the Inland Revenue authorities. He had never paid income tax or national insurance. He claimed to have had a regular income from the purchase and sale of motor vehicles but investigation of his various bank accounts by the interim receiver disclosed no pattern of lodgments and withdrawals consistent with such a business being conducted on anything approaching a conventional basis.

[26] Mr O'Donoghue argued that the trial judge had failed to address two essential questions after finding that the appellant had a criminal propensity. It was necessary, counsel claimed, to consider whether proceeds of the crimes of which the appellant had been convicted had contributed to the property which was to be recovered. Secondly, it was suggested that the judge should have considered whether, as a matter of probability, the appellant had been engaged in other criminal activity that generated sufficient money to account for his acquisition of the property that the respondent sought to recover.

[27] We do not accept these arguments or the premise on which they are based. It is clear that the judge carefully considered the question whether the appellant might have generated income from legitimate business activity that could have accounted for his acquisition of the property which the respondent seeks to have recovered. He concluded that this was not a feasible proposition. We do not believe that a judge is required to seek to attribute the acquisition of particular assets to a specific crime or series of crimes. It would be virtually impossible to do so in the broad sweep of cases such as this. Secondly, it appears to us to be obviously implicit in the judge's

findings that he was convinced that the appellant had engaged in crime which produced money which he either spent or used to acquire other property.

[28] Mr O'Donoghue conducted an analysis of such records as the appellant had produced and he pointed out that a draft set of accounts prepared by a firm of accountants for the purpose of the original hearing indicated that an income stream was available to the appellant that would have negatived what the interim receiver identified as a "financial black hole" arising from the appellant's estimate of his actual income and the money necessary to acquire the property which was the subject of the recovery order. These accounts were not produced in evidence but Mr O'Donoghue suggested that, if the case had been adjourned, they would have formed the basis of cross examination of the respondent's witnesses.

[29] No application was made in advance of the hearing of the appeal to receive the draft set of accounts in evidence. They were referred to by the appellant initially without opposition from the respondent. It was pointed out by the court that there were two contexts in which the accounts might be admitted: first in relation to the argument that the application should be adjourned; secondly, in support of the claim that the judge was wrong to accept the case for the respondent that there was a financial black hole.

[30] When confronted by his failure to apply for the accounts to be received, Mr O'Donoghue at first suggested that they formed part of the court papers. When it was pointed out to him that, even if this were so, it did not make them admissible, he applied to have them received in evidence. He suggested that, if they were admissible on the first issue (whether the application ought to have been adjourned), it would be anomalous to refuse to admit them on the substantive application. We do not accept that argument. One can quite see how the existence of this material and its possible impact on the hearing might have made a difference to the case for an adjournment. But, once it is concluded that the judge was right to proceed with the hearing, the principles of *Ladd v Marshall* [1954] 3 All ER 745 must come into play in deciding whether it should be admitted in evidence on the substantive issues. This is material that could have been introduced before the trial judge if the appellant had taken part in the hearing before the judge. It is at least arguable that he should not benefit from his wrongful failure to participate in the hearing by being permitted to have it admitted now. Despite this, we decided to consider the draft accounts *de bene esse.* Since we have concluded that the judge was right not to have adjourned the appeal, however, we consider that the relevance of the draft accounts is extremely limited. The principal focus must be on the evidence that was given on the hearing before Coghlin J.

[31] That evidence established clearly that the appellant did not have a business that could remotely have supported his expenditure. On his own admission, he had never paid tax or national insurance. It was suggested that such moneys as he obtained from his failure to pay tax or such property as he purchased by use of those moneys should not form part of the recoverable property. We do not accept that submission. True it is that he may be subject to recovery action by the authorities in respect of tax and national insurance, but his failure to pay these legally due payments constituted criminal conduct and the money that he thereby obtained and such property as he bought with that money come clearly within the rubric of recoverable property.

[32] The general purpose of Part V of the Proceeds of Crime Act is stated in section 240 (1) (a) to be to enable the enforcement authority to recover, in civil proceedings, cash or property which is, or represents, property obtained through unlawful conduct. Money obtained by withholding tax and insurance payments due is cash or property obtained through criminal conduct. Likewise, premises purchased with that money are property obtained through unlawful conduct.

[33] Mr O'Donoghue submitted that it was incumbent on the court to make an estimate of the level of tax evasion that the appellant had been guilty of before it could conclude that this contributed materially to the acquisition of the assets that were the subject of recovery order. We do not accept that proposition. The money that has unquestionably been generated by income tax evasion and the failure to pay national insurance contributions need not be isolated from an overall consideration of the absence of legitimate income available to the appellant to acquire this property.

[34] An analysis of the appellant's bank account records was undertaken by Mr O'Donoghue in support of his argument that the claimed financial black hole could be explained away and that there was evidence to show that there was money available from legitimate sources to allow the appellant to purchase the properties that were the subject of the recovery application. He suggested that the payment into and withdrawal from the bank accounts of irregular sums of cash reflected the somewhat spasmodic nature of the appellant's business. Mr O'Donoghue claimed that, while this may be inconsistent with a normal car dealing business, it was entirely to be expected of the somewhat unorthodox business that the appellant conducted.

[35] We do not accept that the bank statements support the thesis advanced by Mr O'Donoghue. It is, one may suppose, conceivable that the conduct of a highly unusual business of car sales might result in the type of bank records that have been produced in this case. But those records must not be viewed in isolation. The appellant has been shown to be someone who had a propensity for acquisitive crime. He produced what he said was a P45 form relating to employment with R J W Motors. All the available evidence

established that he had never been employed by that firm. His accountant, Liam McAvoy, (on information supplied by the appellant) had prepared three sets of accounts purporting to show earnings from the car dealing business of £9,400 per annum, as opposed to the annual income suggested by the draft accounts that had been prepared for the purposes of the case. Documents purporting to record sales of motor vehicles were plainly false. The appellant engaged in what the judge found (and, for reasons that we will give below, we accept) was undoubted mortgage fraud. All these factors must be brought into account when considering if it has been shown that the appellant's assets were acquired by criminal activity. In our judgment there was ample evidence on which to conclude that the appellant had not been engaged on legitimate employment that produced any significant income. The deduction that his income came mainly from criminal activity was not only justified, it was inescapable.

[36] It was submitted that the trial judge failed to make an assessment of whether the offences of which the appellant was convicted had contributed to the acquisition of the property to be recovered. It was also suggested that the judge had failed to consider whether other criminal activity that the appellant had engaged in would have generated sufficient resources to acquire that property. We do not accept that the judge was required to approach the issue in that way. Section 240 of POCA provides that the court may make a recovery order in relation to property obtained through unlawful conduct. This is defined in section 242 as follows: -

> "(1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.
>
> (2) In deciding whether any property was obtained through unlawful conduct—
>
> (a) it is immaterial whether or not any money, goods or services were provided in order to put the person in question in a position to carry out the conduct,
>
> (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."

[37] In *Director of Assets Recovery Agency and others v Green and others* [2005] EWHC 3168 (Admin) Sullivan J was required to deal with the preliminary question whether a claim for civil recovery can be determined on the basis of

conduct in relation to property without the identification of any particular unlawful conduct. As a sub-set to that question, the issue was raised whether the claim for civil recovery can be sustained solely on the basis that a respondent has no identifiable lawful income to warrant his lifestyle and purchases. The learned judge indicated that he was minded to answer the preliminary question in the following way: -

> "… the Director need not allege the commission of any specific criminal offence, but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained. A claim for civil recovery cannot be sustained solely on the basis that a respondent has no identifiable lawful income to warrant his lifestyle."

[38] No objection to the formulation of the test in this way was made and it has been consistently followed in the cases that have addressed the question since, most recently in *Assets Recovery Agency v Kean* [2007] EWHC 112 (Admin) where at paragraph 38 of his judgment Stanley Burton J said: -

> "38. On the other hand, I reject the suggestion, made in correspondence by Mr Kean's solicitors, that it is necessary for the ARA to specify the offence or offences which it alleges resulted in the moneys invested in the Property. It is implicit in the provisions of section 242(2)(b) that it is sufficient for the ARA to identify kinds of conduct, such as drug trafficking, as Sullivan J held in *R (the Director of the ARA) v Green* [2005] EWHC 3168 (Admin) …"

[39] Two clear principles (with which we are in respectful agreement) emerge plainly from these authorities. The first is that it is not necessary to identify particular criminal activity as the source of funds which have been used to acquire the property. The second and related principle is that evidence of a lifestyle or acquisition of assets beyond that which a respondent's apparent lawful income might sustain is not enough. It must be shown that the respondent had engaged in types of criminal activity which provided the moneys used to acquire the property which is sought to be recovered. That is not to say, however, that evidence of a lifestyle and assets beyond that which a respondent might be considered able to sustain from legitimate income is irrelevant to the judge's consideration. This is obviously to be taken into account in deciding whether the property which he has been shown to have acquired was obtained through criminal activity.

[40] Mr O'Donoghue argued that, in the present case, Coghlin J did not refer to particular kinds of unlawful conduct by which property was obtained, but jumped from evidence of a lifestyle apparently beyond the appellant's means to an inference of property obtained from unlawful conduct. We do not accept these submissions. The judge found that the appellant had engaged in tax evasion – see paragraph [26] of the judgment. He found that the appellant's claim to have a regular income from a car dealing business was patently false. He also found that the properties that he had acquired were the result of mortgage fraud. It is quite clear, therefore, that the judge's conclusions were not based solely on evidence that the appellant was living beyond his legal means. Types of criminal conduct were therefore identified by the judge which, when taken with the unexceptionable conclusions that the appellant had a propensity for acquisitive criminal activity and that he was living well beyond his legitimate means, were more than ample to support the conclusion that the property sought to be recovered had been acquired through unlawful conduct.

[41] The appellant did not challenge the finding that he had been guilty of tax evasion. I have already referred in paragraph [31] above to Mr O'Donoghue's argument that the legislation was not designed to bring within the embrace of 'property obtained through unlawful conduct' property that had been funded by moneys that ought to have been paid in discharge of tax and national insurance liabilities. He suggested that if the tax and national insurance liability of the appellant could be dealt with by the imposition of penalties and recovery action by the Inland Revenue and national insurance authorities, it should not be the subject of a recovery order under POCA. We cannot accept that argument. In the first place, there is no evidence that such a recovery process is either in prospect or even feasible. Secondly, it cannot be correct that property acquired by plainly unlawful conduct should fall outside the ambit of POCA simply because some other means of recovering the money (as opposed to the property obtained through its use) existed. If Mr O'Donoghue's argument were correct, it would mean that property which had been obtained by money withheld from the tax and national insurance authorities and which had increased markedly in value before the crime was detected could remain immune from the recovery process under POCA by the payment of the outstanding liabilities and any penalties deemed appropriate. That would defeat the clear intention of the legislation, in my opinion.

[42] The appellant likewise did not dispute that the evidence established that he had been guilty of mortgage fraud, although it was argued on his behalf that in relation to one of the properties that were the subject of the recovery order, the necessary proofs that he had personally perpetrated the fraud had not been provided. This argument had not been raised before the trial judge. In any event, we do not consider that it signifies in an overall consideration of the case against the appellant. It is quite clear that he was

embarked on a series of transactions that were plainly fraudulent. He did not have the income that he claimed in order to obtain the mortgages. The irresistible inference is that this applied equally to the case where the precise documentary evidence had not been presented.

Conclusions

[43] None of the arguments presented on behalf of the appellant has succeeded, in my opinion. The appeal is dismissed.