

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

*Delivered:* **12/05/2006**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**BETWEEN:**

**DIRECTOR OF THE ASSETS RECOVERY AGENCY**

**Plaintiff;**

**DAMIEN JOHN MCGLEENAN**

**-AND-**

**FIONA MCGLEENAN**

**Defendants.**

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**MORGAN J**

[1] On 27 January 2006 Mr Justice Coghlin made an order on the ex parte application of the Director of the Assets Recovery Agency appointing an interim receiver over certain property of the defendants. The application was grounded on the affidavit of William Baxter which referred to the following matters:

- (a) Evidence suggesting the involvement of the first named defendant in fuel smuggling in April, August and September 2000.
- (b) Evidence contained in documents uplifted from Longfield Oil Company in the Republic of Ireland indicating extensive fuel transactions involving the first named defendant in the period from 1998 to 2000.
- (c) Evidence connecting the Longfield Oil records with the subsequent supply of fuel to customers in Northern Ireland.
- (d) Evidence suggesting the use of false invoices by the first named defendant in respect of the supply of fuel to customers in Northern Ireland.

(e) Evidence that the defendant at interview in December 2001 had stated that books in his house apparently relating to fuel smuggling transactions were connected to a third person whom he could not safely name.

(f) Evidence that in the year 2000 the Longfield Oil records suggested fuel transactions involving the first named defendant in excess of £4.5 million and payments made by third party sterling cheques.

(g) Evidence in relation to a number of bank accounts held by the defendants.

(h) Evidence of the acquisition by the defendants of various properties from 1999 onwards.

[2] On 31 March 2006 the defendants issued a summons seeking an order that the interim receiving order be discharged or alternatively that it be varied. That application was grounded on the affidavit of the first named defendant who indicated in paragraph 2 that he had been acquitted of charges relating to fuel smuggling. At paragraph 3 he indicated that he had reached a settlement in relation to his tax affairs for the period 1999 to 2000. At paragraph 4 he asserted that the grounding affidavit did not identify any money held by him or any properly held by him the provenance of which could not be explained. At paragraph 5 he pointed out that although he was charged with smuggling offences in December 2001 and acquitted on June 2005 no application had been made for a restraint order. He suggested that no evidence had been given of any likelihood that he may dispose of property.

[3] I heard submissions from Mr Michael Lavery QC who appeared with Mr Ronan Lavery B. L. for the defendant, Ms Simpson BL for the agency and Mr Moore of Russell & Co for the receiver. I am grateful to all parties for their helpful oral and written submissions.

[4] For the defendants Mr Lavery QC said that the two principal issues were those of the necessity for making the order and the question as to whether the property was recoverable property. He submitted that the approach for which the Agency contended meant that no attempt was made to identify whether the individual items of property were recoverable. He submitted that the primary duty of investigation lay with the Agency. If it was sufficient to identify an arguable case in relation to mixed property he submitted that this became a Draconian power without restriction or control in the hands of the receiver. Since the exercise of such a power was undoubtedly an interference with a property right such an interference offended the proportionality test.

[5] For the Agency Ms Simpson BL submitted that it was agreed that there was a good arguable case that the first named defendant have been engaged in smuggling. She submitted that one could not disentangle a mixed fund at this stage. She contended that the issue of dissipation is relevant to the exercise of the court's discretion. Smuggling by its nature is secretive and deceptive. In this case it arguably involves cross-border transactions with false invoices and covert systems of money conversion between jurisdictions. In those circumstances the risk of dissipation was evident from the good arguable case.

[6] For the receiver Mr Moore indicated the extent of the receiver's responsibilities. In particular he emphasised the receiver's investigative role and the responsibility of the receiver to report to the court and to be supervised by the court.

[7] By virtue of section 243 of the Proceeds of Crime Act 2002 (the 2002 Act) proceedings for a recovery order may be taken by the appropriate authority against any person whom it thinks holds recoverable property. The necessary conditions for the appointment of an interim receiver are set out in section 246 of the said Act:

*"Interim receiving orders (England and Wales and Northern Ireland)*

#### **246 Application for interim receiving order**

(1) Where the enforcement authority may take proceedings for a recovery order in the High Court, the authority may apply to the court for an interim receiving order (whether before or after starting the proceedings).

(2) An interim receiving order is an order for-

(a) the detention, custody or preservation of property, and

(b) the appointment of an interim receiver.

(3) An application for an interim receiving order may be made without notice if the circumstances are such that notice of the application would prejudice any right of the enforcement authority to obtain a recovery order in respect of any property.

(4) The court may make an interim receiving order on the application if it is satisfied that the conditions in subsections (5) and, where applicable, (6) are met.

(5) The first condition is that there is a good arguable case-

(a) that the property to which the application for the order relates is or includes recoverable property, and

(b) that, if any of it is not recoverable property, it is associated property.

(6) The second condition is that, if-

(a) the property to which the application for the order relates includes property alleged to be associated property, and

(b) the enforcement authority has not established the identity of the person who holds it, the authority has taken all reasonable steps to do so.

(7) In its application for an interim receiving order, the enforcement authority must nominate a suitably qualified person for appointment as interim receiver, but the nominee may not be a member of the staff of the Agency.

(8) The extent of the power to make an interim receiving order is not limited by sections 247 to 255."

[8] The functions of the receiver are set out in section 247 of the 2002 Act:

**"247 Functions of interim receiver**

(1) An interim receiving order may authorise or require the interim receiver -

(a) to exercise any of the powers mentioned in Schedule 6,

(b) to take any other steps the court thinks appropriate,

for the purpose of securing the detention, custody or preservation of the property to which the order applies or of taking any steps under subsection (2).

(2) An interim receiving order must require the interim receiver to take any steps which the court thinks necessary to establish -

(a) whether or not the property to which the order applies is recoverable property or associated property,

(b) whether or not any other property is recoverable property (in relation to the same unlawful conduct) and, if it is, who holds it."

[9] Schedule 6 of the 2002 Act sets out the extensive investigative and management powers of the receiver:

**"POWERS OF INTERIM RECEIVER OR ADMINISTRATOR**

*Seizure*

1. Power to seize property to which the order applies.

*Information*

2.(1) Power to obtain information or to require a person to answer any question.

(2) A requirement imposed in the exercise of the power has effect in spite of any restriction on the disclosure of information (however imposed).

(3) An answer given by a person in pursuance of such a requirement may not be used in evidence against him in criminal proceedings.

(4) Sub-paragraph (3) does not apply -

(a) on a prosecution for an offence under section 5 of the Perjury Act 1911, section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 or Article 10

of the Perjury (Northern Ireland) Order 1979 (false statements), or

(b) on a prosecution for some other offence where, in giving evidence, he makes a statement inconsistent with it.

(5) But an answer may not be used by virtue of sub-paragraph (4)(b) against a person unless -

(a) evidence relating to it is adduced, or

(b) a question relating to it is asked,

by him or on his behalf in the proceedings arising out of the prosecution.

*Entry, search, etc.*

3(1) Power to

(a) enter any premises in the United Kingdom to which the interim order applies, and

(b) take any of the following steps.

(2) Those steps are-

(a) to carry out a search for or inspection of anything described in the order,

(b) to make or obtain a copy, photograph or other record of anything so described,

(c) to remove anything which he is required to take possession of in pursuance of the order or which may be required as evidence in the proceedings under Chapter 2 of Part 5.

(3) The order may describe anything generally, whether by reference to a class or otherwise.

*Supplementary*

4(1) An order making any provision under paragraph 2 or 3 must make provision in respect of

legal professional privilege (in Scotland, legal privilege within the meaning of Chapter 3 of Part 8).

(2) An order making any provision under paragraph 3 may require any person-

(a) to give the interim receiver or administrator access to any premises which he may enter in pursuance of paragraph 3,

(b) to give the interim receiver or administrator any assistance he may require for taking the steps mentioned in that paragraph.

### *Management*

5(1) Power to manage any property to which the order applies.

(2) Managing property includes-

(a) selling or otherwise disposing of assets comprised in the property which are perishable or which ought to be disposed of before their value diminishes,

(b) where the property comprises assets of a trade or business, carrying on, or arranging for another to carry on, the trade or business,

(c) incurring capital expenditure in respect of the property."

[10] By virtue of section 251 of the 2002 Act the court exercises a supervisory role and by virtue of section 255 the receiver is required to report to the court where he concludes that property is not recoverable or associated.

[11] In my view it is clear that the statutory role for the receiver involves both the preservation of the property in respect of which there is an arguable case for recovery and the investigation as to whether that property is recoverable or associated property. That is apparent both from the functions of the receiver as set out in section 247 above and from the powers of the receiver as contained within schedule 6 to the 2002 Act. Mr Lavery QC criticises the allocation of the investigative function to the receiver as being a disproportionate interference with the defendants' property right. Property rights under the convention are qualified and in this statute the balance

between the public interest and the private interest has been set by Parliament. The court retains a supervisory jurisdiction and in my view that jurisdiction is to be exercised by means of the control which the court has in relation to the conduct of the receivership. The intensity of the exercise of this jurisdiction must depend upon the circumstances of the particular case but in my view there is no reason to conclude that the exercise of supervision by that means gives rise to a disproportionate interference with the property rights of the defendants.

[12] In this case it is accepted that there are good arguable grounds for believing that the first named defendant is involved in fuel smuggling and has been so involved since 1998. The nature of that activity is secretive and deceptive. By its very nature it involves the hiding of materials from the appropriate authorities. The defendant's interview in December 2001 suggests the involvement of other serious criminal elements. The evidence in this case suggests a participation in such activity for a period of years at a level involving millions of pounds worth of transactions. That in my view supports the argument that there is a good arguable case that each substantial property asset of the defendants acquired on or after 1998 is recoverable property or associated property. I further consider that the evidence supports the view that by the nature of the alleged transactions and the involvement of criminal third parties the risk of dissipation is evident.

[13] Having regard to the matters set out above I do not consider that there is any basis upon which I should discharge or vary the Order made by Mr Justice Coghlin on 27 January 2006.