

**Neutral Citation no. [2006] NIQB 72**

*Ref:* **MORF5678**

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

*Delivered:* **23/10/06**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**  
**QUEEN'S BENCH DIVISION**

**BETWEEN:**

**DIRECTOR OF THE ASSETS RECOVERY AGENCY**

**Plaintiff;**

**DAMIEN JOHN MCGLEENAN**

**-and-**

**FIONA MCGLEENAN**

**Defendants.**

**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. By an application made on 21 September 2006 the second named defendant now seeks a variation of the Order to provide for an exclusion pursuant to section 252 of the Proceeds of Crime Act 2002 to enable her to discharge the reasonable legal expenses of her solicitor and counsel.

[2] In its original form section 252(4) of the 2002 Act prohibited the making of an exclusion in respect of legal expenses. That subsection was amended by paragraph 14 of schedule 6 to the Serious and Organised Crime Act 2005:

"14. (1) Section 252 (interim receiving orders: prohibition on dealings) is amended as follows.

(2) For subsection (4) (restriction on exclusions for legal expenses) substitute-

'(4) Where the court exercises the power to make an exclusion for the purpose of enabling a person to meet legal expenses that he has incurred, or may incur, in respect of proceedings under this Part, it must ensure that the exclusion-

(a) is limited to reasonable legal expenses that the person has reasonably incurred or that he reasonably incurs,

(b) specifies the total amount that may be released for legal expenses in pursuance of the exclusion, and

(c) is made subject to the required conditions (see section 286A) in addition to any conditions imposed under subsection (3).

(4A) The court, in deciding whether to make an exclusion for the purpose of enabling a person to meet legal expenses of his in respect of proceedings under this Part-

(a) must have regard (in particular) to the desirability of the person being represented in any proceedings under this Part in which he is a participant, and

(b) must, where the person is the respondent, disregard the possibility that legal representation of the person in any such proceedings might, were an exclusion not made, be funded by the Legal Services Commission or the Northern Ireland Legal Services Commission'."

[3] Shortly after being served with the original Order the second named defendant sought advice from her solicitor. She and the first named defendant had been divorced in 1999 and each had been separately represented in any legal proceedings thereafter. As part of her divorce settlement she had

obtained a property, 12 Mellifont Drive Armagh, and an interest in a fund held by Hansard International outside the jurisdiction in the sum of £100,000 or thereabouts. Neither of those assets was made subject to the original Order and indeed the second named defendant did not possess any assets which were identified in that Order. In order to seek advice on her position generally and in particular to advise as to whether she should seek to vary the Order by way of excluding her from it junior counsel was retained. He advised on the investigative powers of the receiver including the power to interview and the power to seek amendment of the Order. On foot of his advice no application to vary the Order was made by the second named defendant.

[4] In May 2006 the second named defendant was interviewed by the receiver. As a result of that interview an application was made by the receiver to vary the Order to include the property at 12 Mellifont Drive Armagh. Notice of the application was served by the receiver under cover of a letter dated 31 May 2006. The letter respectfully suggested that the second named defendant's solicitors show attendance at the hearing which was fixed for 20 June 2006. The second named defendant appeared by junior counsel and solicitor and agreed to the variation.

[5] The interview also disclosed the existence of the interest in the Hansard International fund. An application to vary the order by adding the money contained in the fund was granted on 15 September 2006 with the consent of the second named defendant who again appeared by junior counsel and solicitor. Until that time the second named defendant had not applied for legal aid cover or for an exclusion because each application was bound to fail as a result of her interest in the fund. On 21 September 2006 she launched this application to enable her to discharge the costs which she had incurred as a private client. It was common case that she had no other assets out of which to discharge those costs.

[6] For the second named defendant Mr Green submitted that the exclusion order should cover the following legal expenses:

(a) The advice to the client from solicitor and junior counsel in respect of the making of the original Order.

(b) The advice to the client from solicitor and junior counsel in respect of the conduct of the interviews which occurred in May 2006.

(c) The advice to the client in respect of the two variation applications from solicitor and junior counsel.

(d) The representation of the client at the variation hearings by solicitor and junior counsel.

(e) The representation by solicitor and junior counsel in the making of this application for an exclusion order.

He submitted that the test in section 252(4)(A) was whether it was desirable for the second named defendant to have representation. He pointed out that the costs at issue were incurred by the second named defendant as a private client. He submitted that it was appropriate for the solicitor to seek the advice of Counsel having regard to the complexity of the legislation generally but further submitted that in this case it was appropriate in any event to seek the advice of Counsel in relation to whether there should be an application to set aside the Order since in its original form it did not refer to any property possessed by the second named defendant. In respect of the variation applications he relied upon the letter of 31 May 2006 received by his solicitor from the receiver.

[7] For the Agency Mr Stephens QC submitted that an exclusion order should only relate to practical and effective representation in respect of identified and particularised issues. In this case against the background set out above the Agency did not take issue with the proposition that the second named defendant should be separately advised. It was submitted, however, that such advice could and should have been provided by the second named defendant's solicitor. He relied upon the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 to support the proposition that the court should only exclude such legal expenses as were necessary in relation to particular issues.

[8] There is no issue between the parties that the second named defendant was entitled to obtain the advice of her solicitor in relation to her response to the original Order, advice in relation to the conduct of the interview in May 2006 and advice in respect of the variation applications. Although I do not accept that it is necessary in every case to retain Counsel to advise on the making of an Order I consider that in this case it was appropriate to obtain advice from junior counsel firstly as to whether an application to vary the Order by removing the second named defendant should be made and secondly to advise the second named defendant as to the position in respect of the other assets. That advice necessarily trespassed upon the issues surrounding the power of the receiver to conduct the interview and to seek a variation of the Order.

[9] Where a party is consenting to a variation to the original Order I do not consider that it is generally necessary for that party to attend the hearing of the application. I consider, however, that the letter of 31 May 2006 may reasonably have caused the applicant's solicitor to take the view that attendance was required in respect of the first variation application. I consider, however, that I should allow representation in respect of the

solicitor only on the hearing of the first variation application. There was in my view no requirement for attendance in relation to the second variation application.

[10] This application for an exclusion order is one of the earliest which has had to look at the exclusion provisions under the 2002 Act as amended. Because of that I consider it appropriate in this case to allow for representation by way of solicitor and junior counsel in respect of the making of this application. What has become apparent in the course of the hearing, however, is that much of the dispute between the parties could have been resolved by agreement if there had been a full exchange of views in correspondence beforehand. In respect of future applications I consider that the court may well refuse to allow the cost of any representation to make such applications where there has been a failure to set out in writing to the Agency in advance the entirety of the circumstances justifying the proposed exclusion order.

[11] For the avoidance of doubt I will make an exclusion order in respect of the following matters:

- (a) The advice of the solicitor to the client in respect of the original Order, the conduct of the interview in May 2006 and the variation applications.
- (b) The advice of junior counsel in respect of the application to set aside the Order including the advice on the power to interview and the power to vary.
- (c) Representation by solicitor only at the first variation application.
- (d) Representation by solicitor and junior counsel at the making of this application for an exclusion order.

I will give the parties seven days to see whether they can reach agreement on the amounts which should be excluded and if they have not reached agreement I will refer the matter to the taxing Master.