Neutral Citation No. [2005] NIQB 67

Ref: **COGC5362**

Judgment: approved by the Court for handing down

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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF THE DIRECTOR OF THE ASSETS RECOVERY AGENCY

AND IN THE MATTER OF GERARD MALACHY KEENAN AND TERENCE FERGAL KEENAN AND CLAIRE MARTIN KEENAN, MICHELLE ANNE KEENAN, KILCLUNEY BEVERAGES LIMITED, CORRINA CONFECTIONARY LIMITED, MOLDOVA WINES LIMITED

AND IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

COGHLIN J

[1] This is an application on behalf of the first-named defendant Gerard Malachy Keenan ("this defendant") to discharge the Order appointing Louise Rivers of Mallard Associates, Suite 210, 34 Buckingham Palace Road, London as interim receiver ("the Receiver") over the property of the defendants on 10 December 2004.

[2] The interim receiving order ("the order") was made on the ex-parte application of the Director of the Assets Recovery Agency ("the Agency") in accordance with the provisions of Section 246 of the Proceeds of Crime Act 2002 ("POCA").

[3] For the purposes of this application this defendant was represented by Mr Treacy QC and Mr Doran while Mr Stevens QC and Mr McMillan represented the Agency. I am indebted to both sets of counsel for their carefully prepared and well presented written and oral submissions.

The Statutory Framework

[4] In so far as it is relevant to these proceedings Section 246 of POCA provides as follows:

> "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 satisfied that the conditions in sub-sections (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 other is not recoverable property, it is associated property."

[5] Section 240 of POCA enables the Agency to recover in civil proceedings property which is or represents property obtained through unlawful conduct and Section 241 defines "unlawful conduct" as conduct occurring in any part of the United Kingdom if it is unlawful under the criminal law of that part or which, if it occurs in a country outside the United Kingdom and is unlawful under the criminal law of that country, would also

be unlawful if it occurred in a part of the United Kingdom under the criminal law of that part.

Grounds of the Application

[6] This defendant relied upon the following grounds in support of his application:

> "*(1)* Failure to disclose material facts in support of an ex-parte application insofar as the applicant failed to disclose to the court;
>
> > *(a)* the existence and content of an agreement in writing reached between the legal representatives of this defendant and the DPP at the conclusion of the criminal proceedings brought against this defendant
> >
> > *(b)* that the court was informed that the said criminal proceedings brought against this defendant had to be compromised because of the non availability of a crucial witness whereas, in truth, the said witness had not only been available but had indicated a willingness to give evidence on behalf of this defendant.
>
> *(2)* That, in the circumstances, the material non-disclosure amounted to an abuse of process.
>
> *(3)* That, quite apart from any issue of material non-disclosure and/or abuse of process the applicant had placed insufficient evidence before the court to establish a good arguable case that the relevant property was or included recoverable property ie property obtained as the result of unlawful conduct."

It seems to me that it would be appropriate to deal with these issues in reverse order.

The Sufficiency of the Evidence

[7] In order to obtain an interim receiving order the Agency is required to satisfy the court, on the balance of probabilities, that there is a good arguable case that property to which the application for the order related is or includes recoverable property and, that, if any of it is not recoverable property, it is associated property in accordance with the provisions of Section 246(5) of

POCA. Recoverable property is defined by Section 304 of POCA as property obtained through unlawful conduct. The "good arguable case" test corresponds with the test generally applied by the court with regard to applications for Mareva Injunctions which may be sought by the parties to civil litigation.

[8] I have carefully reviewed the case made on behalf of the Agency and, subsequent to the issue of the summons to discharge the order issued on behalf of the defendant, I have been able to do so in the context of replying and supplementary affidavits served on behalf of both parties. I bear in mind that all of the factual evidence has been furnished by way of affidavit and I have not had the benefit of cross-examination of the relevant witnesses. However, having carried out my reconsideration, I remain satisfied that the Agency has passed the threshold required by Section 246 of POCA 2002.

[9] In reaching this view, I have given careful consideration to the agreement dated 11 April 2003 which was initialled by Mr Peter Sefton on behalf of the Director of Public Prosecutions and by Mr O'Donohue QC on behalf of this defendant at the conclusion of this defendant's criminal trial. I have also read the affidavits provided by this defendant, Mr Peter Sefton, Mr John Rea and Mr Frank O'Donohue QC relating to the circumstances in which this agreement was concluded. Having done so, I am satisfied on the basis of this evidence that the agreement related solely to confiscation proceedings under the provisions of the Proceeds of Crime (Northern Ireland) Order 1996 and, in particular, was intended to ensure that the extended benefit provisions of Article 9 of the 1996 Order were not triggered. In addition, I am satisfied that, in concluding the said agreement, those acting on behalf of the Director of Public Prosecutions would not have had any authority to bind the Agency in carrying out its public functions in accordance with the provisions of POCA 2002. I have no doubt that, in the normal course of events, the agreement should have been disclosed in the course of the ex-parte application for an interim receiving order but, in the event, having been given an opportunity to consider the terms of the agreement and the circumstances into which it was brought into existence I remain satisfied that the Agency has established a good arguable case.

[10] At paragraph 58 of the affidavit supporting the original ex-parte application Mr Davidson on behalf of the Agency stated that, at the criminal trial, the Director of Public Prosecutions had decided to add an eighth count to the indictment and not to proceed in respect of the original seven counts "due to the continued unavailability of a Customs Officer who had been subject to long-term illness." The officer in question was a Mr Derek Kearney who answered a series of questions addressed to him by this defendant's solicitor in March 2003 confirming, among other things, that, at the material time, his work had been suffering as a result of Post Traumatic Stress

Disorder, combined with heavy drinking and anti-depressant medication. In the course of these answers he said:

> "When dealing with Mr Keenan it is entirely possible that I said everything was alright meaning the paperwork in the case of MA 12/99 in my effort to avoid conflict. My memory of this time is a complete jumble and I would not have been able to tell dates or years involved only for the diaries I have."

Rather than being unavailable, Mr Owen accepted in evidence that he believed that Mr Kearney was expected to appear for the defence at the criminal trial and he also agreed that was the main reason why the Crown did not pursue the first seven counts. I have taken into account the further evidence relating to the role played by Mr Kearney in the criminal proceedings but, once again, after doing so, I remain satisfied that the Agency has established the appropriate grounds for an interim receiving order.

Non-Disclosure by the Agency

[11] I am satisfied that the existence and content of the agreement together with the true role played by Mr Kearney ought to have been disclosed in the course of making the ex-parte application. Mr Davidson, on behalf of the Agency, has maintained that he had no knowledge whatsoever of the agreement prior to the affidavit sworn by the defendant on 1 February 2005. Subsequent to receipt of the referral from HM Customs and Excise on 5 June 2003 Mr Davidson attended at the offices of the DPP on 25 June in order to consider the case papers relating to the criminal prosecution. These papers did not contain any copy of or reference to the agreement nor was there any document present which suggested that Mr Kearney might resile from the witness statement he had made to the Crown or that he had agreed to give evidence for the defence. While he would have been alerted to confiscation proceedings being one of the possible outcomes of a criminal prosecution, Mr Davidson would have seen the explanation recorded at paragraph 14 of the referral form which was:

"No criminal confiscation was sought as no alleged benefit could be made in relation to the one count to which he pleaded."

There would have been no reason for him to question that statement.

[12] On 30 June 2003 Mr Davidson met Mr Rodger Owen of Her Majesty's Customs and Excise at Carn House in Belfast. Mr Owen had been the senior investigating Officer on behalf of HM Customs and Excise for the purpose of the criminal proceedings. According to Mr Davidson's affidavit dated 31 May

2005 Mr Owen did not make any reference to the existence of the agreement during their conversation. Mr Davidson averred that he was told by Mr Owen that he believed that Mr Kearney did not intend to return to Northern Ireland because of his medical condition and, consequently, that it was highly unlikely that Mr Kearney would ever give evidence in the criminal proceedings. The same affidavit records that when Mr Davidson raised with Mr Owen the note recorded at Section 21 of the referral form, namely that Kearney had indicated an intention to appear for the defence, he was assured by Mr Owen that this was an unsubstantiated suggestion and that he, Mr Owen, was unaware of any evidence to support this claim.

[13] There is a clear obligation imposed upon those seeking to make ex-parte applications to ensure that a full and fair disclosure of all material facts is made to the court. This duty is not limited to facts known to the applicant but extends to facts that the applicant ought to have known after making proper inquiries. The material facts are those which it is material for the court to know for the purpose of dealing properly and fairly with the application, materiality being an issue to be decided by the court and not by the applicant. These principles apply to ex-parte applications made by the Agency under the provisions of POCA 2002. Both the principles and the relevant authorities have been set out in a clear and helpful summary form in paragraphs 42 and 43 of the judgment of McCombe J in Director of the Assets Recovery Agency v Singh [2004] EWHC 2335 and I gratefully adopt his observations as comprising an accurate statement of the law in relation to this application.

[14] I am satisfied that the agreement and the true position with regard to the availability of Mr Kearney as a witness did constitute material facts which should have been disclosed to the court at the time of making the ex-parte application. However, having had the benefit of all the affidavit and oral evidence that has now been submitted with an inter-parties hearing, I would still have made the interim receiving order had such disclosure taken place. I am further satisfied that the Agency was not aware of either material fact prior to making the ex-parte application despite the proper inquiries made by Mr Davidson of the Office of the Director of Public Prosecutions, the Police Service of Northern Ireland, the Northern Ireland Court Service and HM Customs and Excise. With the benefit of hindsight it is frequently possible to conceive of additional and/or more sophisticated lines of inquiry. However, hindsight is a form of knowledge that generally should be considered with caution and in context. It is necessary to bear in mind that the Director of the Agency acts, not as a private individual, but as a public body charged with statutory responsibility for the recovery of assets acquired as a consequence of unlawful conduct. By their very nature, such assets are likely to be at particular risk of dissipation. In the circumstances I am satisfied that the non-disclosure of material facts on the part of the Agency was attributable to an innocent lack of knowledge and when this is combined with the important

public functions and duties for which the Agency is responsible it seems to me that to discharge the interim receiving order would be an altogether disproportionate action in the circumstances. Alternatively, if I am wrong to exercise my discretion in such a manner and the original order ought to be discharged I would be prepared to grant a second order forthwith since I am quite satisfied that it would be proper to do so now that I have heard all the evidence – see the judgment of Glidewell LJ in Lloyds Bowmaker Limited v Britannia Arrow Holdings Plc [1988] 1 WLR at 1343H-1344A. Finally, it seems to me that such a conclusion is consistent with the recent decision of the Court of Appeal in England and Wales in Jennings v Crown Prosecution Service [2005] EWCA Civ 746.

Abuse of Process

[15] The investigation of the affairs of this defendant carried out by the Agency was initiated by a referral to that body by Mr Rodger Owen. The original referral material did not contain any copy of or reference to the agreement concluded between this defendant and the DPP at the conclusion of the criminal proceedings. When Mr Davidson met Mr Owen on 30 June 2005 for the purpose of discussing the investigation the latter made no mention of the existence of any such agreement.

[16] In an affidavit sworn on 10 May 2005 Mr Owen, after seeing a copy of the written agreement, stated that, to the best of his knowledge, Her Majesty's Customs and Excise did not have a copy of the document and confirmed that he had not previously seen the document or been aware of its specific contents. In the same affidavit he agreed that he had been aware "in general terms" that there had been a "verbal agreement of sorts made between the prosecution and defence counsel in the case, although I was never shown anything in writing." In his affidavit sworn for the purpose of these proceedings Mr Peter Sefton stated that the agreement was only drawn up after he had held discussions with and had received authority from Mr Owen. According to Mr Sefton the entire contents of the document were brought to the attention of Mr Owen. In the course of cross-examination by Mr Tracey QC Mr Owen asserted that he had never seen the written document and that he had not been aware of its contents. At another point he said he was not "fully conversant" with the contents of the agreement and that Mr Sefton's assertion to the contrary was "mistaken". He went on to say that he had not mentioned the agreement to Mr Davidson because he thought that it dealt only with criminal confiscation.

[17] I think that it may be possible to reconcile this apparently conflicting evidence at least to some extent. The agreement initialled by Mr O'Donohue QC and Mr Sefton and signed by this defendant was dated 11 April 2003. Mr Owen maintained a trial log which records telephone conversations between himself and Mr Sefton on 10 April 2003 at 8.50am and 10.45am. These

conversations clearly related to the topics ultimately contained in the agreement but they do not contain any reference to the agreement being reduced to writing nor is there any other evidence to indicate that the document was actually physically produced to Mr Owen although I am aware that Mr Owen conceded in cross- examination that he was present in court on the 11 April and spoke briefly to Mr Sefton. On the other hand I am quite satisfied that Mr Owen was fully conversant with the subject matter of the agreement, namely, that the applicant would plead guilty to a technical charge based on the final three counts being rolled into one, that there would be no criminal confiscation and that no criminal proceedings would be taken by the DPP in relation to the rubber stamp.

[18] Mr Owen was also cross-examined about the role of Mr Kearney in the collapse of the trial of the criminal proceedings. He accepted that the main reason why the Crown had not proceeded upon the first seven counts was the indication by Mr Kearney that he would appear as a witness for the defence. He said that he had relayed this fact to Mr Davidson when discussing the referral of the case to the Agency by HM Customs and Excise and noted that this was consistent with the entry at paragraph 21 on the referral form. However, Mr Owen had no recollection of the conversation with Mr Davidson recorded by Mr Davidson at paragraphs 20-28 of his affidavit of 31 May 2005. I am satisfied that Mr Davidson's affidavit reflects the activities of a careful and conscientious investigator and that the conversation as recorded by him did take place.

[19] I considered Mr Owen to be an unsatisfactory witness and I have reached the conclusion that, in the course of his discussions with Mr Davidson, he suppressed the existence of the agreement and that he deliberately misled Mr Davidson as to the role that Mr Kearney eventually played in the collapse of the criminal trial.

[20] In the course of giving judgment in Lough Neagh Exploration Limited v Morrice [1999] NI Reports 279 Carswell LCJ, as he then was, noted that the inherent jurisdiction of the court to stay proceedings which are frivolous or vexatious or an abuse of its process exists independently of the power contained in the rules of court and he confirmed that the boundaries of what may constitute an abuse of the process of the court are not fixed. At page 286 of his judgment the learned Lord Chief Justice set out a number of relevant examples of the exercise of the power which included an action that had been commenced, not with the genuine object of obtaining the relief specified, but for some collateral purpose. In the Lough Neagh Exploration Limited case both Girvan J, at first instance, and the Court of Appeal were satisfied that the proceedings had been instituted for the purpose of putting pressure on the respondents, the appellant having no prospect of satisfying an order for security for costs which had been made against it in the Republic of Ireland. At page 289 Carswell LCJ said:

> "In our view it (the appellant) commenced the present action knowing that it would be unable to comply with the order made in the proceedings in the Republic and equally unable to comply with an order for security if made in this action. In our opinion that is vexatious, oppressive and an abuse of the process of the court. We consider that it would be unfair to the respondents to allow the action to proceed when the inevitable conclusion will be that it will be stayed in due course, after expenditure of further costs and the consumption of more time, with the probable consequence of damage to their commercial interest."

[21] In Lonrho Plc v Fayed (No 5) [1994] 1 ALL ER 188 the judge at first instance, MacPherson J, struck out the action against the first six defendants as an abuse of the process of the court on the ground that the plaintiffs were misusing the court's process by using an action at law for the purpose of ventilating their allegations against the Fayeds and vilifying the Fayeds with maximum publicity. In giving judgment in the Court of Appeal Stuart-Smith LJ said, at page 202:

> "If an action is not brought bona fide for the purpose of obtaining relief but for some ulterior or collateral purpose, it may be struck out as an abuse of the process of the court. The time of the court should not be wasted on such matters and other litigants should not have to wait until they are disposed of. It may be that the trial judge will conclude that this is the case here; in which case he can dismiss the action then. But for the court to strike it out on this basis at this stage it must be clear that this is the case. I cannot agree with the judge that the point is so plain as to be unarguable."

At page 211 Evans LJ expressed sympathy for the criticism to which the trial judge had subjected the conduct of the parties in using the litigation to pursue their vendetta but went on to say:

> "The plaintiffs cannot be said to be bringing the proceedings with a collateral or improper motive, in my judgment, in so far as they allege facts which entitle them to damages for conspiracy, and there are no grounds for depriving the plaintiffs of

> that remedy if they are entitled to it. But the courts can and will keep the proceedings within proper limits which at this stage means restricting the plaintiffs to the course of action upon which they rely."

[22] These proceedings have been instituted by the Director of the Agency in the bona fide discharge of her public functions and, as I have indicated above, I am satisfied that sufficient evidence has been placed before the court to establish a good arguable case than an interim receiving order should be made. It may well be that Mr Owen was at least partially motivated in making the original referral by a feeling of frustration and resentment at the collapse of the criminal proceedings and the subsequent complaint apparently made against him by this defendant. Indeed, on the basis of his answers in cross-examination, it is difficult to come to any other realistic conclusion. However, I am satisfied that no such criticism can be made of Mr Davidson or any other officer acting on behalf of the Agency and, after being given an opportunity to consider all the materials placed before the court I am not persuaded that this is a case in which I should exercise my inherent jurisdiction to stay the proceedings. Accordingly, I propose to dismiss this application. I shall hear counsel as to costs.