

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 MALACHY JAMES MOLLOY AND
PATRICIA MOLLOY AND MFS FUEL SUPPLIES LIMITED AND TILE
SAFE LIMITED AND MFS BALLYBAY LIMITED AND MFS
DEVELOPMENTS LIMITED**

AND IN THE MATTER OF THE PROCEEDS OF CRIME ACT 2002

COGHLIN J

[1] This is an application by Malachy James Molloy and Patricia Molloy ("the respondents") to discharge an Interim Receiving Order made upon the application of the Director of the Assets Recovery Agency ("the applicant") on 13 March 2006. Mr Michael Lavery QC and Mr Ronan Lavery appeared on behalf of the respondents while Mr Humphries represented the applicant. I am grateful to both sets of counsel for their detailed and carefully prepared written and oral submissions.

[2] The case was originally referred to the applicant on 7 September 2005 by the Acting Chief Investigative Officer for Her Majesty's Revenue and Customs ("HMRC") Northern Ireland who expressed a belief that certain property held by the respondents was derived from criminal activity. The relevant property was identified by Dee Traynor, a Financial Investigator, acting for the applicant, in an affidavit in support of the application for the Interim Receiving Order ("IRO") sworn on 9 March 2006. In the course of the same affidavit Ms Traynor identified the alleged unlawful conduct as including fuel smuggling, evasion of excise duty and laundering of monetary proceeds derived from fuel smuggling.

[3] The IRO in this case was originally obtained by the applicant on foot of an ex-parte application in accordance with the provisions of Section 246 of the

Proceeds of Crime Act 2002 (“POCA”). The effect of the order was to appoint an interim receiver and secure detention, custody or preservation of property alleged by the applicant to be recoverable property. In order to obtain such an order the applicant must persuade the court that there is a good arguable case that property to which the application for the order relates is or includes recoverable property or associated property. Recoverable property is defined in Section 240 of POCA as property which is or which 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. In seeking to discharge the IRO Mr Lavery QC submitted that the applicant had not identified any relevant unlawful conduct on the part of the respondents nor had it identified any property alleged to have been obtained as a result of such unlawful conduct.

Unlawful Conduct

[4] In the course of the affidavit sworn in support of the application for the IRO on 9 March 2006 Ms Traynor, identified the relevant unlawful conduct as including fuel smuggling, evasion of excise duty and laundering of the money proceeds produced from fuel smuggling. “Money laundering” is dealt with in Part 7 of POCA and, by virtue of Section 327, includes concealing, disguising, converting, transferring or removing criminal property from England or Wales, Scotland or Northern Ireland. Section 328 provides:

“328 (1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.”

[5] In the course of her affidavit Ms Traynor asserted that she had been advised by HMRC that there was a substantial level of fuel smuggling between Northern Ireland and the Republic of Ireland as a result of the differential excise duty charged on fuel on each side of the border. Such a fiscal imbalance is a strong incentive to smugglers to source cheaper fuel in the Republic of Ireland and bring it by clandestine means into Northern Ireland where it is offered to customers at a substantially reduced cost per litre. The “excise drawback scheme” offers a refinement of this activity under which fuel may be purchased anywhere on the island of Ireland but will only be liable to excise duty in the jurisdiction in which the product is eventually sold. Thus fuel may be purchased from a wholesaler in Northern Ireland, legitimately imported into the Republic of Ireland and subsequently smuggled back into Northern Ireland under cover of false invoices giving the appearance of the fuel having been sold in the Republic of Ireland. It seems that HMRC further believe that fuel may be supplied to fuel smugglers in the Republic of Ireland upon credit terms by a supplier which is then smuggled across the border and paid for by uncrossed third party cheques which are

subsequently furnished by the smuggler to the original supplier in the Republic of Ireland. Another alternative is for the would-be smuggler to furnish the customer in Northern Ireland with an invoice made out in favour of the distributor in the Republic of Ireland indicating that the fuel was purchased in the latter jurisdiction. The supplier in the Republic then lodges the cheques to its account and subsequently pays the smuggler in whichever jurisdiction is agreed.

[6] A number of matters were debated during the course of the hearing:

(i) The Tile Safe Account. This is an account held with the Ulster Bank by a company known as Tile Safe Limited which was formed by the respondents for the purposes of selling a product for application to tiles. The account was opened in 1995 when the business was initially registered for VAT as a husband and wife partnership subsequently being converted to a limited company in June 1997. At an Extraordinary General Meeting of the two shareholders, the respondents, the company's objects were changed from that of marketing the non-slip tile preparation to a fuel distribution business on 17 September 2003. Malachy Molloy has deposed in an affidavit sworn on 20 April 2006 that the company's objects were changed on the advice of his accountant in order to deal with difficulties reclaiming VAT which were being experienced by MFS NI which was undergoing a VAT investigation at the material time. A Production Order obtained by HMRC in respect of the period from 28 December 2001 to 4 December 2003 revealed a large volume of transactions processed through the Tile Safe account. During this period a total of £3,236,622.45 was lodged and £3,239,647.47 was withdrawn from this account. The lodgements appear to have been predominantly in the form of third party sterling cheques. According to the affidavit sworn by Mr Malachy Molloy it is normal practice in the fuel business to accept payment in the form of third party cheques and he maintains that all sums lodged in the Tile Safe account represented payment for fuel supplied in the Republic of Ireland. He has explained that sterling third party cheques were lodged into this account to avoid the long delays which were experienced when such cheques were lodged into Republic of Ireland bank accounts. In addition such a practice avoided the prohibitive bank charges which occurred when sterling cheques were lodged to Euro accounts. Thus, according to Malachy Molloy's affidavit, the Tile Safe account was used to process payments made by third parties for fuel supplied by MFS Ballybay in the Republic of Ireland without incurring the difficulties associated with payments made in sterling. In support of the bona fides of this arrangement Malachy Molloy relied upon the negative results of an extensive investigation into his affairs carried out by the Revenue Commissioners and the Criminal Assets Bureau in the Republic of Ireland. Mr Malachy Molloy also referred to the letter, dated 8 June 2006, from the auditors of MFS Ballybay Limited in the course of which Mr David Staunton of Mullen Staunton, registered auditors and accountants, confirmed that he had examined the record of monies lodged to and withdrawn from the Tile

Safe account and subsequently recorded in the cashbook of MFS Ballybay Limited. Having done so, he concluded that the Tile Safe sums relating to the purchase and sale of fuel had been reflected in the annual accounts of MFS Ballybay Limited. A similar view has been expressed by GPB chartered accountants in their letter of 7 June 2006 to Mr Molloy's solicitors. Mr Lavery QC relied heavily upon the reports from the auditors and accountants as confirming that the respondents' affairs were in order and as failing to disclose the existence of any unaccounted for funds or payments. Mr Humphries submitted that, in a carefully organised unlawful scheme of this nature, it might not be at all surprising to be unable to identify any documentary evidence of illegitimate activity amongst the formal documents and records of an undertaking or undertakings especially where the relevant unlawful conduct embraced essentially clandestine activities such as smuggling and money laundering. It seems to me that there is substance in such a submission provided that, in considering it, due weight is always given to the possibility of an innocent operation.

(ii) Ms Traynor's affidavit records that many of the third party sterling cheques lodged to the Tile Safe account bear the initials "SD", "DMG" or "NV". HMRC believes these refer, respectively, to Sean Donaldson, Damien McGleenan and Neil Valleley. It appears that all three of these individuals were the subject of criminal charges brought by HMRC alleging fuel smuggling and evasion of excise duty and VAT. While these proceedings resulted in acquittals, McGleenan and Valleley remain the subject of IROs obtained by the applicant in Northern Ireland. During the course of a recent application before Morgan J. to discharge the IRO in his case McGleenan's representatives accepted that the Agency had established good arguable grounds for believing that he had been involved in fuel smuggling since 1998. During the course of interviews by HM Customs in August 2004 the only explanation put forward by Mr Malachy Molloy for the initials on the back of the relevant cheques was that it was for the purpose of identifying "... who owns them in the first place". According to Mr Malachy Molloy, the identities would be known to his employee Paul McArdle. No other explanation has been forthcoming as to what role these men played and, in particular, Mr Molloy has not provided any further explanation in either of the two affidavits subsequently sworn in support of his application.

(iii) During the course of interview Mr Malachy Molloy confirmed that he employed Mr Paul McArdle in "sales and marketing" and that he had done so for "10 years or more". Mr Molloy said that Mr McArdle worked part-time, some 25 hours weekly and that he also worked for the Republic of Ireland company. However, despite having been employed for such a period in such a capacity and having a close knowledge of the identities of customers, it appears that, when interviewed, Mr McArdle refused to answer any questions other than admitting that he was an employee of Mr Molloy.

(iv) On 5 November 2003 Malachy Molloy, on behalf of MFS Fuel Supplies, sent an email to Paul Barrington of Conoco Phillips Limited, a major Irish fuel distributor, identifying "Sean Donaldson, Corry Garry, County Monaghan" as one of his customers. During the course of a search of the respondent's premises at 32 Brootally Road, Armagh on 12 August 2004 customs officers seized, among other documents, three pages of A4 paper recording entries between 22 November 2002 and 5 November 2003. These records included references to "D McGleenan" and "SD" together with a number of references to "wages". The agency believes that the initials stand for Sean Donaldson. According to Ms Traynor's affidavit these pages appear to form part of a cash ledger showing credits of £400,753.50 and debits of £375,785.50 between those dates. A lever-arch file marked "AIB Sterling and Euro 2002 MFS Ballybay Limited" was seized during the course of the same search and found to contain correspondence annotated with references to SD and D McGleenan and references to unpaid cheques being put back on their "cards." A 2002 and 2003 diary found at the same time records the correct telephone numbers of Donaldson and McGleenan and contains figures that Ms Traynor believes relates to amounts of money and fuel. Despite the contents of these various documents no formal records have been obtained by the agency to indicate that either Donaldson or McGleenan was legitimately employed by the respondents or that either was a customer of the respondents other than the e - mail. No detailed explanation for these documents or the roles played by Mr Donaldson and/or Mr McGleenan has been forthcoming from the respondents despite the concession made during the course of the submissions that the respondents must have known they were customers. At paragraph 4 of his affidavit sworn on 12 June 2006 Mr Molloy alleged that the documents had been misinterpreted by Ms Traynor but, apart from this assertion, he simply relied upon the investigation carried out by the Irish Revenue authorities, the auditor's report and the report of GPB Chartered Accountants.

(v) During the course of an investigation of the respondents' customers Customs spoke to a Mr Liam Walsh, the company accountant for A and N Shilliday of Armagh ("Shilliday"). Mr Walsh confirmed that Shilliday did not obtain any fuel from the Republic of Ireland or directly from MFS Ballybay. He stated that for some time fuel had been delivered to Shilliday premises by, initially, Sean Conlon (Armagh Oil) and, laterally, Eamon Boylan (Corbett Fuels). These deliveries appear to have commenced in April 2000. The fuel was paid for by Shilliday with company cheques drawn on the company Bank of Ireland account in Monaghan made payable to MFS Ballybay. Mr Walsh admitted that he was aware of the different fuel duty rates in the Republic of Ireland and Northern Ireland and that transportation of fuel into Northern Ireland would be illegal and he also conceded that he had claimed back VAT on the fuel supplied in the Republic. He stated that he had never queried with Sean Conlon or Eamon Boylan why the invoices were

made out in the name of MFS Ballybay Limited and purported to show that Shillidays had collected the fuel at the MFS depot. At paragraph 2 of his affidavit sworn on 12 June 2006 Malachy Molloy maintains that the MFS Ballybay invoices were entirely accurate in all their details. On the basis of the Customs interview with Mr Walsh it would appear that this assertion could only be true if the respondents believed Mr Conlon and, subsequently, Mr Boylan were acting as employees or agents of Shilliday when collecting the fuel from MFS Ballybay Limited in the Republic of Ireland. Indeed, such a possibility was suggested by Mr Lavery QC in the course of his submissions. However, there do not appear to be any documents to support such a proposition and no such case has been advanced by the respondents on affidavit.

(vi) During the course of the Customs search at 32 Brootally Road Mr Malachy Molloy was asked whether he had any cash or valuables on the premises and, specifically, whether he had any amounts in excess of £5,000. Mr Molloy replied in the negative. During the course of the search some €97,050 in cash was discovered in a light blue suitcase in a little storage room off the dressing room in the main master bedroom. During an interview with Customs Officers Mr Malachy Molloy explained that this sum had been accumulated over some 25-30 years by way of savings, observing that:

“Well a couple of hundred euros here and there and come home from holidays and maybe threw out if you have money on holidays €2000 and 500 in your pocket you’d leave it out and so on and that’s why we always kept something in the house for in case of an emergency and bad debt or something because I had nothing in the earlier part of our life.”

Mr Molloy said he had forgotten about these savings when asked about cash or valuables in the house at the start of the search. He confirmed that the cash was kept for emergency use such as the need to pay off a mortgage or a loan or a cheque bouncing in the business and that it was not intended for use in the business other than for such an emergency. Mr Molloy confirmed that cash and valuables stored in connection with the business were kept in a safe. At paragraph 14 of an affidavit sworn on 20 April 2006 Mr Malachy Molloy said:

“At the time of the Customs search I did not realise that as much as €97,000 was in the house as I had expected my wife to make a lodgement which she had not at that stage.”

At paragraph 1 of the subsequent affidavit sworn on 12 June 2006 Mr Molloy stated unequivocally that this money related to the business of MFS Ballybay representing "cash payments for fuel". He supported this assertion by explaining how, after its return by Customs, this money was used to pay Kelly Fuels for fuel obtained by MFS Ballybay Limited. In my view, these explanations and, in particular, that given to the Customs during interview and that contained in the affidavit of 12 June 2006 simply cannot be reconciled.

(vii) At paragraph 537-540 of her affidavit Ms Traynor referred to an investigation by the Garda Bureau of Financial Investigation in relation to a number of Republic of Ireland customers identified among the MFS Ballybay invoices. As a consequence of these investigations the Irish Customs Service formed the opinion that a number of the identified individuals were not known to have been involved in the purchase or use of commercial quantities of oil. No affidavit has been forthcoming from the respondents to explain this apparent anomaly.

[7] I have carefully considered each of the matters debated before me with the assistance of the well-marshalled and helpful submissions of counsel. No property has been specifically identified by Ms Traynor as representing the product of unlawful conduct but I accept Mr Humphries' submission that such an identification may well be unlikely at this stage in a case that concerns extensive and complex property arrangements. I also bear in mind the possibility that this case may involve the mixing of property produced by both legitimate and illegitimate activity and in this context I note the concept of "associated property" contained in section 245 of POCA. The property concerned of the respondents is extensive and complex and it is the specific task of the Interim Receiver to investigate that property for the purposes of establishing whether or not it is recoverable property. To that end, with the cooperation of the defendants' legal advisers, a good deal of progress has already been made and it has become necessary to amend Schedule 2 of the original Interim Receiving Order so as to exclude a substantial amount of property which is no longer regarded as recoverable. However, at this stage, I remain of the view that there is a good arguable case that property to which this Interim Receiving Order relates is or includes recoverable property insofar as it represents property obtained through unlawful conduct and, accordingly, I dismiss this application.