

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

PROCEEDS OF CRIME AGENCY

-v-

SEAN GERARD HUGHES AND OTHERS

TREACY J

[1] By this application Mallard Associates, joint interim receivers, appointed by the High Court in Northern Ireland have made an application for directions pursuant to Section 251 of the Proceeds of Crime Act 2002. Pursuant to that section an interim receiver or any party to the proceedings or person affected by any action taken by the interim receiver or who may be affected by any proposed action may seek the court's directions as to the exercise of the interim receiver's functions. Section 251 is in the following terms:

"251. Supervision of interim receiver and variation of order

(1) The interim receiver, any party to the proceedings and any person affected by any action taken by the interim receiver, or who may be affected by any action proposed to be taken by him, may at any time apply to the court for directions as to the exercise of the interim receiver's functions.

(2) Before giving any directions under subsection (1), the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to the interim receiver and to any person who may be interested in the application.

(3) The court may at any time vary or set aside an interim receiving order.

(4) Before exercising any power under this Chapter to vary or set aside an interim receiving order, the court must (as well as giving the parties to the proceedings an opportunity to be heard) give such an opportunity to the interim receiver and to any person who may be affected by the court's decision."

[2] In this summons the joint interim receiver seeks:

- (1) Directions as to the interim receivership order.
- (2) An order that AIB Group UK plc trading as First Trust Bank who we shall hereafter refer to as FTB holds sums received in respect of the sale of part Folio AR 21928, County Armagh, to the order of the receivers or on the alternative an order that FTB holds sums received in respect of the sale of part Folio AR 21928 to the order of the Serious Organised Crime Agency ("the Agency").

[3] The grounds upon which the application is made can be shortly stated. The interim receivership order at paragraph 3 requires that the defendants and all other persons having possession of schedule 2 property shall forthwith deliver up to the receiver possession of all such assets together with all deeds, books, documents and papers relating thereto to such other place as the receiver specifies within 7 days of such a request. Schedule 2 property includes all property detailed specifically therein and any *other* property which the receiver believes on reasonable grounds may be recoverable or associated property held by or on behalf of the defendants. Paragraph (f) of the order states that if the defendants or any person in possession or control of schedule 2 property disobeys the order or obstructs the interim receiver he or she may be guilty of contempt of court and may be sent to prison or fined.

[4] In this case the joint interim receivers have requested FTB to hold the proceeds of the sale of the lands comprised in the Folio and not to allocate those proceeds to third party liabilities with FTB until it can be determined whether the FTB is properly secured against the said Folio. The bank have refused to comply and the receivers have therefore sought directions and an order in the terms set out in para2 above.

[5] The **issue** for the court is whether the bank is obliged to hold such monies (which have been deemed recoverable property by the interim receiver) to the order of the interim receiver and/or the Agency pending the determination of the recovery proceedings or whether the bank is free to deal with the proceeds of sale of the lands.

[6] The background to this matter is helpfully summarised in the skeleton argument filed on behalf of the applicant. In short form the bank obtained the charge over the relevant land apparently executed by Sean Gerard Hughes on 18 October 2006 which was registered on 4 February 2009 in respect of liabilities to the bank arising from facilities granted to a company operated by the defendants and known as SCC Construction Limited. That facility was secured by a personal guarantee given by Sean Francis Hughes, also a defendant, to include a charge over this land notwithstanding that Sean Francis Hughes at no time has had ownership of this land. The interim receiver is required by the order to examine the property of the defendants in relation to this company. The interim receiver has examined the documents filed with the Land Registry and considers that the correct date on which the ownership of the lands was transferred was 22 September 2008 and not 2001 as first appeared. According to the interim receiver the charge to the bank was thus executed almost 2 years *prior* to the date on which Sean Gerard Hughes had title to grant any charge.

[7] The interim receiver has concluded that the lands are recoverable (and indeed according to him were recoverable at the date at which they were registered to Ciaran Hughes in 1999). The interim receiver believed that the granting of and the taking of a charge over the lands to be fraudulent given that Sean Gerard Hughes did not have title at the date of execution and that Sean Francis Hughes was never the owner. Accordingly the interim receiver considers the charge to be invalid and has asked the bank to hold the funds to his order pending the holding of a recovery trial. The Agency has confirmed to the bank's solicitors that it will be bringing a recovery claim in respect of these lands. The bank considers the lands to be properly charged and that it is free to deal with the proceeds of sale. It argues that the register is conclusive evidence of title in the absence of actual fraud in accordance with Section 11 of the Land Registration Act (Northern Ireland) 1970. In these circumstances the applicant therefore seeks the court's directions as to the exercise of his functions. In material part section 11 provides:

"11. Conclusiveness of registers

(1) Save as is otherwise provided by or under this Act, the register shall be conclusive evidence of the titles shown on that register and of any right, privilege, appurtenance or burden as shown thereon, and the title of any person shown thereon shall not, in the absence of actual fraud, be in any way affected in consequence of his having notice of any deed, document or matter relating to or affecting the title so shown.

[8] The applicant believes on reasonable grounds that the bank's charge was taken at a time when the party purporting to grant the charge did not

have title over the relevant lands and that the charge was fraudulent and legally ineffective. The correctness or otherwise of this position is a matter, the joint interim receiver submitted, to be determined substantively in the recovery trial. It was emphasised that his request to this court is merely to ensure that the bank holds the proceeds of sale of the lands pending this determination.

[9] I agree that this is a matter to be determined substantively in the recovery trial. The interim receiver is merely seeking to ensure that the proceeds of the relevant sale are held pending this determination. Section 252(6) of the Proceeds of Crime Act provides:

“The power to make exclusions must be exercised with view to ensuring, so far as practicable, that the satisfaction of any right of the enforcement authority to recover the property obtained through unlawful conduct is not unduly prejudiced.”

[10] The court was referred to the decision of the English Court of Appeal in the *Serious Fraud Office v Lexi Holdings* [2008] EWCA and an extract from *Millington*. Paragraph 13.191 states:

“... [Lexi] held that restraint orders made under POCA may not be varied to permit defendants to pay off unsecured third party creditors, and it is submitted that their Lordships’ reasoning therein may have persuasive application to any variations sought (outwith legal expenses) under the civil recovery scheme).”

[11] At paragraph 13.193 of the same text the authors’ state:

“In IRO and PFO matters it is appropriate for the court or the receiver to consider all approaches for the settlement of secured and unsecured debts which are bona fide on their merits. *It would not however be appropriate it is suggested to release property from civil restraint when that property was the probable proceeds of unlawful conduct because to do so would be to frustrate the purpose of the Act.*”

Conclusion

[12] In my view it would not be appropriate to release property deemed recoverable property by the interim receiver at this stage. To release property

from civil restraint when that property is believed to be the probable proceeds of unlawful conduct would not be compatible with and could serve, I agree, to frustrate the purpose of the Act.

[13] Accordingly I accede to the application and make the direction order sought in the summons.