

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

PROCEEDS OF CRIME AGENCY

-v-

SAYERS

TREACY J

[1] By this summons the defendants have requested the court to interpret the recovery order made in October 2009 and to clarify whether that order entitled the plaintiff agency to take (and sell) cattle that were supplied after 4 December 2008 (the date of the Consent Order) .

[2] Following the making of the Consent Order the Defendants assert that 269 more cattle were supplied by various suppliers to the defendants but not paid for and that amounts in excess of £117,000 and €105,000 are owed to the suppliers. There were other cattle supplied during the same period which were paid for and about which the Defendants make no complaint.

[3] Following the Recovery Order made in October 2009 the trustee on behalf of the plaintiff agency seized the Defendants two cattle herds as then constituted. It was common case that the composition of the herds as constituted in October 2009 was, in terms of *identity* of individual cattle, as a result of trading etc, wholly different from the herd as constituted in December 2008. But the two *herds*, the subject of this application, remained in existence as herds throughout the relevant period.

[4] The trustee has dealt with those animals which remain unpaid for and in which the defendants assert the suppliers have an equitable interest since they haven't yet been paid for them. They seek clarification of the order, *inter alia*, so as to avoid the risk of further litigation and to ensure that the Plaintiff

Agency will pay the suppliers in whom, the Defendant asserts, title to the unpaid for cattle still resides.

[5] The **relevant background** is that pursuant to Section 276 of the Proceeds of Crime Act 2002 a Consent Order was drawn up on 4 December 2008. In paragraph 2.1 thereof the defendants *expressly acknowledged* that the property identified in paragraph 2.1 is recoverable property including the two cattle herds (one in NI and the other in Scotland) at items (d) and (e).

[6] At paragraph 2.2 of the consent the parties *agreed* that the property referred to therein was *associated property*. Per paragraph 4.1 the interim receiving order which had been granted by this court in respect of the relevant property on 30 March 2006 was by agreement *discharged* forthwith.

[7] Paragraph 5.2 provides:

“Notwithstanding that the property is recoverable and that the plaintiff is entitled to pursue its application for a recovery order forthwith and thereafter to realise and/or sell the entirety of that recoverable property the defendants have requested that the plaintiff adjourns the application for a recovery order in relation to all recoverable properties. The purpose of the defendant’s request is to allow the defendants to raise and to pay to the plaintiffs a sum equivalent to the minimum approximate net value of the recoverable property being £800,000 in three tranches . . .”

[8] The plaintiff Agency for its part, at paragraph 5.3, agreed to the adjournment subject to a number of terms to which the defendants consented and those included at item (c) of paragraph 5.3 that pending payment in full the defendants consented to the court making a properly freezing order but significantly excluded from that property freezing order were the two cattle herds and a business account in respect of which as I understand it the trading in the cattle would have been conducted through.

[9] Paragraph 8.1 also provided that in default of payment of the sum of £800,000 by close of business on a specified date (30 September 2009) the plaintiff would be entitled to a Recovery Order in respect of the entire specified recoverable property as of 30 September 2009 and would be permitted to apply to the court with the *consent* of the defendants for an order to that effect.

[10] By the Consent Order the defendants acknowledged that the property sought was recoverable property, which included the two herds of cattle, as defined by Section 304 of the 2002 Act. The defendants also agreed that the

property identified in paragraph 2.2 was associated property. In short form the defendants sought and obtained, subject to the terms of the Consent Order, an adjournment of the plaintiff's application for the recovery order to allow the defendants to raise the sum of £800,000. Prior to entering into the consent order the property, the subject of the recovery order, had been held by an interim receiver appointed by the court. Part of that recoverable property related to the cattle herds. These were beef cattle which would have been fed for slaughter and during the course of the interim receivership the interim receiver permitted the defendants to continue to trade in these cattle. Necessarily therefore there was a turn over of cattle within each herd during the entirety of the interim receivership. As the plaintiff has pointed out the fact that there was a turn over of cattle within the herd didn't detract from the consideration that the *herd* was deemed to be recoverable property and indeed pursuant to the consent order those herds were *accepted as such* by the defendants.

[11] It was plain that the *composition* of the herd, but not its existence as recoverable property, would continually fluctuate from the time of the IRO until the consent order and thereafter until the time of the full recovery order. Thus the cattle in the herd at the time when the interim receiver was first appointed would never have been (or were likely to have been) the *actual* cattle that would have comprised the herd at the time of the consent order or at the time of the recovery order in October 2009 when the plaintiff was compelled to invoke paragraph 8.1 of the consent order because of the defendants wholesale default.

[12] Thus in my view the herd, as *composed at any given time*, reflected the proceeds of the unlawful conduct and as such remained recoverable property. The recoverable property is this *herd* as identified by the consent order and the recovery order. The fact that the composition of the herd necessarily changed did not (and was plainly not intended to) negate its existence as a herd liable to be seized as recoverable property. Any other construction in my view would be absurd and unworkable.

[13] As the plaintiffs pointed out part of the consent order provided for the discharge of the interim receiving order to permit the defendants to continue to trade the herd unsupervised. No property freezing order was made relating to the herd or the accounts of the business as it was contemplated by all of the parties that the defendants would trade the herd and that this would involve the purchase and slaughter of livestock.

[14] Thus in the event of default the permitted trading would almost inevitably mean that by the time it became necessary to invoke clause 8 and obtain a recovery order the *composition* of the herd would have changed completely or significantly altered. That that consideration should deprive the cattle herd as referred to in the consent and recovery orders of its status as

recoverable property would appear an anomalous result. If, as I hold them to be, the valuable assets of the herd remain, as contemplated, recoverable property any associated property interests (such as unpaid vendors) not included in the recovery order can the plaintiff concedes be catered for in the mechanisms identified by it during the course of its written and oral submissions. I shall return to this later in the judgment.

[15] The full recovery order was made on 4 October 2009 pursuant to the plaintiff's application praying in aid clause 8.1 of the consent order. At the hearing before the court in 2009 and thereafter when the defendants were represented by Senior and Junior Counsel there were various arguments which were presented to the court as to why the application to make a full recovery order should fail notwithstanding the fact that the defendants had failed to pay any money to the plaintiff Agency despite having agreed to pay £800,000. It is conspicuous that at *none* of the hearings was there was any attempt made to argue that the recovery order should be impugned in relation to the cattle herds on the grounds that the order was imprecise or unclear or indeed that the nature of the herd had changed to the extent that it was no longer recoverable property.

[16] I consider that this is because the parties were fully aware that the cattle *herds* at the time of the making of the order constituted the recoverable property and were so described within the order. In fact when the order was made on 5 October 2009 and served on the defendants there was no objection raised by the *defendants* to the terms of the order. Nor was there any application made to set aside the order on the grounds that it shouldn't extend to the cattle herds as then constituted or that there were unpaid vendors who should be added to the list of those identified as being the holders of associated property.

[17] In this case the defendants have presented a number of arguments to the court the primary argument being that the cattle herd as referred to in the order only refers to the herd as it was constituted *at the time of* the consent order in December 2008. An alternative argument is that the unpaid vendors have associated property rights which need to be recognised and "clarifying" the order will forestall further litigation.

[18] In relation to the defendants primary contention I reject that argument. At the time of making the consent order the parties were fully aware that the cattle within the herd would almost by definition change on a regular basis since they had been permitted to trade both under the terms of the interim receiving order and between the making of the consent order and the recovery order. It would have been obvious to all engaged in this process, by the very nature of the business, that the *composition* of the herd would change (but *not* the existence of the herds as recoverable property), barring some unforeseen calamity.

[19] The argument that has been presented to the court now was never raised at the time of the making of the order and indeed it appears that the first time it was raised was when the summons in this case was issued towards the end of June 2010.

[20] Somewhat inconsistently with the case being made the defendants complaint relates solely to the cattle that they say haven't been paid for. However if the defendants argument was well founded, which it is not, all of the cattle as of October 2009, paid for or not, would have ceased to be recoverable property since none of those cattle composed the herd as of December 2008.

[21] The reason for the delay in raising the argument was said to be because of an erroneous understanding that the defendants had to the effect that they had understood that the plaintiffs would foot the bill for the unpaid cattle. Even if the delay in raising this point was engendered by the defendants alleged erroneous belief I consider that does not alter the nature or effect of the order or what the parties must or ought to have understood by it.

[22] Turning to the question of whether the unpaid vendors have associated property rights the court has already noted that the consent order, by agreement, defined the associated property rights. The plaintiff Agency has however made some important submissions in relation to this topic at paragraph 15 of its skeleton argument:

“There was never any suggestion of any one having any associated property rights relating to the herd or any cattle therein. These people have only appeared since the making of the recovery order. In practical terms what appears to have happened is that the defendants now allege that they purchased cattle and introduced them into the herd but did not pay for them and that they owe the vendors. They now seek to assert that those unpaid vendors have associated property rights. *If that is so it is for those persons to make any necessary application to the court to have their associated property rights recognised.* No such application has ever been made and the plaintiff would regard as extremely suspicious and subject to full investigation any such application. In particular the plaintiff is aware that the defendant had a stock loan from the Northern Bank from 6 March 2006 to fund the purchase of stock. That loan was discharged in full by the trustee on 17 May 2010. The plaintiff thus believes as does the trustee that it has paid in full for the purchase of all cattle brought into the herd.”

They then continue:

“If those with associated property rights wish to bring an application to the court and establish through acceptable evidence that they hold legitimate associated property rights over any recovered property then the court can examine the issue and make any consequent order. At present unsurprisingly no such application is before the court. The plaintiff notes the contents of the affidavit sworn in support of the defendant’s claims. If there is any substance to any of their claims these individuals can make an application to the court. Unless and until they make an application that they are the holder of associated property and establish this to the satisfaction of the plaintiff or the court as the case may be they continue to hold no associated property rights.”

[23] Thus the plaintiff has expressly acknowledged that a mechanism exists for protecting the rights of any properly established associated property rights. On that basis I propose to say nothing further on this particular aspect of the case.

[24] For the reasons given I consider that there is in this case no need for any further order and the application contained in the summons is supported by the affidavits filed on behalf of the defendants is refused.